

Speech to GELS Meeting – April 28, 2011

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Good morning.

The purpose of my remarks this morning is to provide a context within which we can discuss genomics research and intellectual property. I come at this task as a relatively independent practitioner in the field of intellectual property. Although I have worked with and for various stakeholders in this and other fields, neither my practice nor my client base is dependent on any specific type or group of clients.

Those who know me will hopefully attest to my relatively blunt nature and views that seek to obtain the best results from Canada's innovation system. I do not need to soft-pedal issues to placate any specific client or interest group.

My views are my own and I thank the organizers for the opportunity to provide those views to you.

There are three points that I want to raise in setting the context of this discussion for you. These points are:

1. The inherent bias related to intellectual property lobbying and large owners of IP rights;
2. The tendency in many research organizations to see commercial value in everything and, as an indirect result, the corresponding tendency – somewhat paradoxically – to hinder the progress of innovation; and
3. The current lack of a clear point in Canada's federal government structure to focus innovation and intellectual property policy discussions

The first issue that I touch on is the obvious but usually unspoken relationship between intellectual property policy lobbying and those who own intellectual property rights. If I work for a company that owns intellectual property – especially if it conveys near-monopoly rights – it is clearly in my best interests to seek an expansion of those rights at any cost.

On the other hand, there is usually little funding available for those who seek to resist the expansion of such rights. Except in the case of companies working in the information technology area, there are few that are willing to speak against an expansion of IP rights at any given time.

In such an imbalanced environment, abuses are likely to happen.

For example, in the current copyright debate in Canada, the lobbying activities of large copyright owners led to an embarrassing situation for one normally highly-regarded source of public policy research here in Ottawa. That group had to withdraw three reports in May, 2009 when it was found that much of the reports were copied from lobbying briefs prepared by copyright owners.

In genomics and related research, large IP owners usually support their case for strong and broad IP rights by pointing to a relationship between such IP rights and innovation. One cannot exist, the lobbying goes, without the other.

But, is this correct? Are patents a necessary condition for innovation to happen?

Our own Canadian experience as illustrated by three examples is instructive:

Insulin was isolated in 1921. Although patented by the University of Toronto the next year, the difficulty the University subsequently had in determining how the patent was to be managed gave proof that actual commercial use was the farthest thing from the researchers' minds in creating the innovation in the first place.

The Blackberry that so many of us today rely on was created without thought to the patent landscape. Although Research-in-Motion subsequently learned the lessons of intellectual property when entering and working in the American market, patent protection was not a necessary condition for the Blackberry to be created in Canada.

Finally, the identification of the Cystic Fibrosis trans-membrane conductance regulator (CFTR) gene at Sick Kids occurred as a result of a concerted 30 year effort begun by a group of parents with children who had CF. Although the patent system has been used to protect that and subsequent discoveries, the discovery

was made because of a need; not because there was or was not strong patent protection in Canada.

Even though we can find thousands of Canadian examples of innovations occurring as a result of curiosity or needs, patents are only a reward after the fact, it is not what drives innovations and innovators in the first place. There can be little question about this.

As a side note, it is, of course, true that investments in a specific research field may be driven by the relative strength or weakness of a country's intellectual property system. However, that does not create any correlation with the ability of that country to innovate.

I turn now to the second topic being the tendency in many research organizations to see commercial value in everything. The growth of technology transfer professionals in academic research institutions is a direct result of a number of well-publicized stories of successful inventions arising from publicly-funded research.

Such successes in Canada have included the MP3 licensing revenues arising at the Univ of Sherbrooke, Visudyne from UBC and the CF Gene in Toronto mentioned above to name but three.

The last highlights the corresponding challenge of how the chase for commercialization opportunities can actually hinder innovation.

As I mentioned earlier, the discovery of the CF Gene occurred as a result of 30 years of research devoted to plumbing the depths of this pernicious disease. The research was funded in part through donations channelled through a disease-specific foundation. No doubt those donations were motivated by a desire to provide alleviation of the suffering caused; not because of any commercial opportunities to be created.

However, that foundation adopted an intellectual property policy that seeks a return on any commercialization arising from research funded in part by the

foundation. Many other disease-specific foundations have similar requirements as do the research institutions themselves.

In an area such as genomics research, there could easily be funding obtained from a dozen different Canadian and international sources. If each of these funding sources anticipates that the research results will have commercial value and then want to share in that value, it becomes obvious how difficult the negotiations in funding a single project might be.

Some academic research institutions understand this and are actively involved in simplifying the processes and negotiations burden. Many however do not and in the name of ensuring there is a 'return on investment' from research have created bureaucratic structures that are a nightmare.

It is important to understand that the issue is not ownership of intellectual property but rather who might claim a share of any downstream commercialization revenues. Why is it reasonable to expect that a foundation that enjoys tax-free status because of its charitable purpose should act in a manner that expects a return from its research expenditures? Should this not lead to the loss of its tax-free status?

In research institutions, the solution to the tendency of bureaucracy is training and mentoring of researchers and administrators. In this way, we avoid the tendency of dealing with everything as if it will 'pay off' and we focus more on facilitating the projects. When something does arise that can have value, people know how to respond to assist in bringing such innovations to the market quickly.

Internal training needs to be coupled with regular discussions among appropriate external stakeholders as to best practices. However, in Canada, there is no group where academic research institutions and companies come together to discuss such issues on a generalized basis. Although among technology transfer personnel, there is an acknowledged association for such best practices discussions (ACCT Canada), on the business side, there is no specific forum where such discussions regularly take place to my knowledge.

This brings me to my third and final point about the lack of a well-defined constant point within the federal government system on which to focus innovation policy discussions.

Although there is a well-enunciated S&T Policy for the federal government, the reality is that innovation policy discussions and those related to intellectual property are very diffuse across the range of ministries.

Changing almost more frequently than the government itself, when I have to explain where one goes to make suggestions about innovation policy in Canada I am confronted with a long list which includes Industry Canada, the Science Technology and Innovation Council, Health Canada, the research councils, the Canadian Intellectual Property Office and the expert panels that are convened from time to time without any consistent program or mandate.

If I include federal-government supported groups such as this event and others, I can easily end up with a long list of organizations willing to discuss innovation and intellectual property policy without any understanding as to whose responsibility it will be to translate any recommendations into action within the federal government.

It is difficult to understand the value of policy discussions without a clear path to how government can consider and implement any recommendations.

In order not to end on a negative point, let me conclude with a few observations about the advantages of Canada's current IP system as it relates to genomics research.

There are generally fewer patents filed and issued in Canada than in the United States and Europe. The advantage of this is that there is less likelihood that research here in Canada will be impeded by any claims that the work infringes on a patent. In addition to this, Canada's courts are likely to imply a very broad patent research exemption for what is truly research than in many other countries. As a result, lawsuits for patent infringement against research institutions are almost unheard of.

Speaking of lawsuits, Canadian courts continue to follow the British system of losers of lawsuits paying some indemnity to the winner's legal costs. As a result of this and the almost total lack of Canadian IP litigators who are willing to take infringement cases on a contingent basis, lawsuits for patent matters are very rare. Other than lawsuits between generic and brand-name drug companies, there are usually only one or two matters which get to trial in Canada annually.

With the Patent Prosecution Highway system which allows fast-tracking of patent applications based on the handling of those applications in the United States, when required, patents can be more quickly issued in Canada than in the past. Although there is still some subject matter in biotechnology that is likely not to be allowed by the Canadian patent office, for research purposes, the differences are negligible.

Finally, after partly criticizing some technology transfer offices for their tendency to be bureaucratic, one of the better services that I have seen such offices engage researchers with is assisting in the creation of patent landscapes and state of the art patent searches. Researchers armed with patent information as they approach a particular field of research are likely to have a much greater level of awareness of a specific area.

Of course, in this latter case, if the insulin researchers at the University of Toronto had searched the patents of Romania in 1922 prior to their own patenting (which of course is just a few clicks of the computer mouse to us today) and discovered Nicolae Paulescu's patent, one wonders how Canadian history in biotechnology would be different today?

Many thanks.