



Government Response to the Ninth Report of the Standing Committee on Public Accounts

Chapter 2, “Intellectual Property,”
of the Spring 2009 Report of the Auditor General of Canada

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The Honourable Shawn Murphy, P.C., M.P.
Chair
Standing Committee on Public Accounts
Room 331, Confederation Building
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Mr. Murphy:

Pursuant to Standing Order 109 of the House of Commons, we are pleased to respond on behalf of the Government of Canada to the recommendations made by the House of Commons Standing Committee on Public Accounts in the Ninth Report entitled *Chapter 2, "Intellectual Property," of the Spring 2009 Report of the Auditor General of Canada*, tabled in the House of Commons on April 19, 2010.

The Government of Canada commends and thanks the Committee for their analysis of the importance of the management of intellectual property within the federal government.

The Government has taken steps to improve the management of intellectual property, and has responded to the issues raised in both the Auditor General's Spring 2009 Chapter and the April 2010 Report of the Standing Committee on Public Accounts.

Sincerely,

Tony Clement, P.C., M.P.
Minister of Industry

Stephen Day, P.C., M.P.
President of the Treasury Board

Enclosure

The Government of Canada is pleased to table its response to the Ninth Report of the Standing Committee on Public Accounts (PACP), *Chapter 2, "Intellectual Property," of the Spring 2009 Report of the Auditor General of Canada*, which was tabled in the House of Commons on April 19, 2010.

On May 12, 2009, the Auditor General (AG) tabled a chapter examining intellectual property (IP) management in the federal government. Overall, the Report reviewed several aspects of how the government managed its IP and was monitoring IP policies.

The PACP undertook a study of the chapter and invited senior officials from the departments and agencies identified in the chapter, including the Treasury Board of Canada Secretariat, Industry Canada, the National Research Council Canada, Fisheries and Oceans Canada, and Health Canada, to appear before the PACP to address recommendations in the chapter and to table action plans on November 16, 2009.

After Canadian Patents and Development Limited closed in the early 1990s, the federal government moved to a decentralized IP management approach. The current framework for the management of federal IP is provided through both Acts (e.g. *Public Servants Inventions Act*) and policies (e.g. *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts*). Within the parameters established by these Acts and policies, each department has the flexibility to tailor its IP management to meet both its needs and the needs of clients.

Accordingly, under the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts*, departments are responsible for the implementation of the policy, while Industry Canada and the Treasury Board of Canada Secretariat are jointly responsible for monitoring and evaluation. Departments are also responsible for the overall management of both externally and internally generated IP. Both practitioners and senior executives from the main science-based departments and agencies have developed extensive networks to share best practices and common approaches to the effective management of IP. Thus, the Federal Partners in Technology Transfer (FPTT) and the Assistant Deputy Minister Committee on Science and Technology (ADMCST) are appropriate forums to achieve the objectives that underlie some of the PACP recommendations.

The government has reviewed all the recommendations in the Report and offers the following responses to the recommendations in support of enhanced IP management.

Recommendation 1

That Health Canada and Fisheries and Oceans Canada provide, by 31 December 2010, a progress report to the Public Accounts Committee on the status of actions taken to address the recommendations contained in Chapter 2 of the Auditor General's Spring 2009 Report.

Health Canada and Fisheries and Oceans Canada have taken actions to address recommendations from the AG's chapter, as per the action plans tabled before the PACP in November 2009, and are reporting on progress below.

Health Canada (HC)

To address the recommendations of the AG, Health Canada has implemented an integrated strategy to strengthen its IP management system for both externally generated IP (through procurement and collaboration) and internally generated IP (created by departmental employees).

In response to the AG's chapter on IP, to improve its management of externally generated IP, Health Canada:

- enhanced its contracting process as of June 2010 to include a check by procurement specialists for compliance with the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts* at the contract planning and initiation stage;
- ensured the compliance of IP identification, disclosure and reporting through the implementation of an annual verification exercise. The verification exercise in 2010 includes a specific check for compliance with the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts*; and
- enhanced the performance of contracting operations by strengthening the awareness, knowledge and capacity of procurement specialists and managers. In particular:
 - in 2009, HC established a procedures package for procurement specialists, which includes a detailed explanation of the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts* and reporting requirements; and

- in 2010, HC enhanced the mandatory training for cost centre managers to include detailed information on the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts* and reporting requirements.

In response to the AG's chapter on IP, to improve its management of internally generated IP, Health Canada:

- enhanced the IP identification and disclosure of inventions and Crown-owned copyright through the implementation of a department-wide *Health Canada IP Policy* (approval expected fall 2010; Policy will be posted on the Health Canada intranet);
- strengthened the Health Canada IP management system through the development of drafted operational guidelines, with the intent to clarify roles, responsibilities and procedures related to IP management; the guidelines are expected to be approved by December 31, 2010;
- held a workshop in March 2010 with research scientists and managers to raise awareness of IP management and to consult on the policy;
- established an interdisciplinary steering committee in April 2010 to vet material and inform directorates;
- developed training modules in both official languages in June 2010 on IP, government science, the patent application process, IP agreements, and policies and procedures; and
- updated the architecture for a Virtual Centre of Expertise in the spring of 2010, which will be ready for implementation by fall 2010.

Ongoing activities by Health Canada will include the development of new training modules and material, and continued support to, and dialogue with, Health Canada employees.

Fisheries and Oceans Canada (DFO)

DFO has also strengthened its IP management practices, in response to the AG's recommendations, with the aim of ensuring compliance with the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts*, and strengthened appropriate mechanisms for identifying and disclosing IP in DFO.

At the November 2009 PACP hearing, DFO informed PACP members that its new *Intellectual Property Management Policy* had been implemented, addressing the AG's concerns and enhancing DFO's capacity to identify and manage internally and externally generated IP.

In addition, during the winter of 2010, as per DFO's Action Plan tabled at the November 2009 PACP, DFO:

- created an Intellectual Property Office to act as the centre of expertise for managing DFO's IP; and
- implemented procedures to address IP Crown ownership issues throughout the procurement process.

Both actions will ensure that Crown ownership of IP resulting from contracts is properly justified, IP ownership decisions will be well-documented throughout the procurement process, and Crown ownership and/or licensing rights related to such IP will be protected.

To enhance its management of internally generated IP, DFO:

- established guidelines in spring 2010 for licensing IP to be commercialized by the private sector, including specific tools to enable DFO managers and personnel to comply effectively with the requirements of the *Intellectual Property Management Policy*;

- included within these guidelines specific procedures for licensing IP and proposed mechanisms for managers and personnel to identify and report IP, with a particular emphasis on IP that might be embedded in copyright material prepared by DFO employees; and
- initiated a department-wide awareness campaign in February 2010, ensuring that managers and personnel are well informed of the tools available to them to facilitate compliance with the IP Policy requirements.

Through increased department-wide awareness of IP issues in general, of the IP management centre of expertise in DFO, and of the procedures and tools provided in the guidelines, DFO will achieve enhanced performance on three levels:

- management of IP throughout the procurement process, in full compliance with the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts*;
- identification and interception of inventions before they are publicly disclosed; and
- licensing of IP to be commercialized by the private sector.

Through the Intellectual Property Office, DFO intends to maintain awareness of IP issues across the department, as the best assurance to sustain compliance with the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts* and steady IP management performance.

Recommendation 2

That Industry Canada and the Treasury Board of Canada Secretariat either report to the Public Accounts Committee by 31 December 2010 on the status of actions taken to address recommendation 2.25 of Chapter 2 of the Auditor General's Spring 2009 Report, or that the Secretariat provide the Committee with a copy of the completed evaluation of the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts*.

The Treasury Board of Canada Secretariat and Industry Canada have taken action to address recommendation 2.25 of the AG, which states:

Industry Canada and the Treasury Board of Canada Secretariat should work with federal entities to improve the monitoring of the application of the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts*, with a focus on cases where exceptions were invoked. They should work with federal entities to ensure that intellectual property data is accurately interpreted and that reporting systems correctly report ownership to support a future evaluation of the Policy.

The Treasury Board of Canada Secretariat and Industry Canada report that this collaboration is actively underway. In November 2009, a joint Action Plan was tabled with the PACP in response to recommendation 2.25 of the AG's chapter on IP, committing to various activities to raise awareness across government departments and agencies of the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts* and improve the quality of the data.

All activities that the Treasury Board of Canada Secretariat and Industry Canada committed to undertake in their joint Action Plan are completed or in progress. In particular:

- On January 15, 2010, the Treasury Board of Canada Secretariat, through the inter-departmental Treasury Board Advisory Committee on Contracts (TBACC) meeting, reminded departments of the administrative requirements of the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts* and of the 2007 improvements to reporting requirements on IP in Crown procurement contracts.
- On November 20, 2009, Industry Canada shared the data from the 2008 annual reporting of IP in Crown procurement contracts with members of the Assistant Deputy Minister Committee on Science and Technology (ADM CST). Members discussed ways to improve compliance with the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts* and were encouraged to conduct their own internal review of contracts claiming a Crown IP Ownership Exception. The ADM CST, comprised of assistant deputy ministers from departments and agencies involved in science and technology along with central agencies, provides a forum to enhance policy coordination and management of federal science and technology.
- Industry Canada completed an internal review of procurement contracts in 2008 that claimed the Crown IP Ownership Exception under the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts* and reported the findings to the Deputy Minister in March 2010. These findings were also shared with the ADM CST on May 18, 2010. The exercise brought to light some administrative errors, with little or no risk to the Crown. Industry Canada has taken steps to follow up, including providing additional information to contracting officers about the application of the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts* and implementing new tools for monitoring policy compliance.
- The evaluation of the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts*, for which the Treasury Board of Canada Secretariat and Industry Canada are jointly responsible, has been accelerated from 2011 to 2010 and is currently underway. Industry Canada will release the evaluation to the PACP as soon as possible.

Recommendation 3

That the Treasury Board of Canada Secretariat, in conjunction with Industry Canada, provide clear guidelines to federal government organizations with respect to managing intellectual property.

Canadian Patents and Development Limited, which had been the Government of Canada's central patenting, licensing and commercialization agency, was closed in the early 1990s. This closure resulted in a more decentralized approach to managing federal IP, providing greater flexibility for federal departments and agencies to tailor their management of IP in response to their individual circumstances. Given the current decentralized government approach to IP, creating guidance materials is a task that is best implemented as a collective effort by the federal science and technology community. The Federal Partners in Technology Transfer (FPTT) is a network of federal technology transfer professionals as a "community of practice" committed to working together to enhance their professional capacity and to ensure the expeditious and effective transfer of the value created in federal laboratories. The FPTT has been a key forum to share information and adopt common technology transfer practices across government. It has also been instrumental in introducing tools and practices to help departments better manage their technology transfer activities. The FPTT Assistant Deputy Minister (ADM) Committee reports to the ADMCST on critical issues and strategic activities related to federal technology transfer.

The government will work through the FPTT, using its network of 17 federal science-based departments and agencies, to collect information on departmental IP management policies and practices. The FPTT Secretariat will host a workshop to examine if these materials can be used as a basis to develop IP management guidelines. Recommendations would be made to the FPTT ADM Committee and, if appropriate, to the ADMCST for discussion. The ADMCST can disseminate these materials within the broader science and technology community, including science-based departments and agencies that perform research, and policy departments and agencies that fund research.

With respect to IP generated through Crown procurement, the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts* establishes the rules for departments to determine the appropriate ownership (contractor versus the Crown) of IP generated as a result of a contract.

Thus far, government efforts to provide guidance in the management of the application of the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts* have included an *Implementation Guide for the Policy* to assist departmental officials in understanding the policy requirements. Thereafter, a set of Frequently Asked Questions was developed and published. In 2007, Public Works and Government Services Canada improved its system for reporting procurement contract data related to IP. On September 4, 2007, the Treasury Board of Canada Secretariat issued a Contracting Policy Notice to departments to explain the changes and guide the departments in mirroring these changes in their own systems. On November 20, 2009, findings from the 2008 annual reporting of IP in Crown procurement contracts were shared with the ADMCST members. On January 15, 2010, the Treasury Board of Canada Secretariat, through the TBACC, reminded departments of the administrative policy requirements of the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts*.

In addition, an electronic learning course is currently being developed by the Canada School of Public Service (CSPS), under the guidance of the Treasury Board of Canada Secretariat and with the input of Industry Canada. This course will provide general background on the topic of IP and specific guidance in interpreting the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts*. The Treasury Board of Canada Secretariat will continue to work with Industry Canada, CSPS and other government departments and agencies to deliver this tool.

Recommendation 4

That the Treasury Board of Canada Secretariat use best practices and expertise within the public service, notably at the National Research Council Canada, to develop tools and resources to assist federal organizations in developing policies and practices to better manage internally generated intellectual property.

As noted in the response to Recommendation 3, given the current decentralized approach to IP adopted by the government, creating guidance materials is a task that is best implemented as a collective effort by the federal science and technology community.

This recommendation speaks specifically to IP generated by public servants, also called internally generated IP. As noted in the response to Recommendation 3, efforts are currently underway in conjunction with other departments and bodies (notably, the FPTT) to establish and share guidelines and best practices on the management of all aspects of IP.

The National Research Council Canada (NRC) has developed a number of policies, practices and tools, as well as a comprehensive training and orientation program, around IP and business issues. These are all currently focused on NRC staff and therefore strongly support the NRC's mission and programs. The NRC will examine the feasibility of offering the training and orientation programs to other government departments and will examine the option of tailoring some of its existing offerings for other departmental mandates.

The government will work through the FPTT and the ADMCST to maintain linkages with the science-based departments and agencies and the academic community in order to continuously identify best practices, including training materials on managing IP. These best practices will be shared and disseminated to government organizations through the ADMCST and through the FPTT network via its various communication platforms (e.g. regional meetings, newsletter and website).

Recommendation 5

That the Treasury Board of Canada Secretariat, in conjunction with Industry Canada, examine under what circumstances the federal government should retain full or part ownership of intellectual property arising from Crown procurement contracts, and report their conclusions to the Public Accounts Committee by 31 December 2010.

The current approach of the government pertaining to the ownership of IP arising from Crown procurement is prescribed by the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts*, which awards IP rights to contractors under Crown procurement contracts unless an exception is claimed by the Crown. Conditions under which these exceptions may be claimed are outlined in the policy. The purpose of this policy is to strengthen Canada's economic position and improve the economic well-being of Canadians.

An evaluation of the *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts* is currently underway. This evaluation will examine issues surrounding the circumstances under which it is appropriate for the government to claim ownership of IP by invoking the exception clauses, including whether or not the current conditions for claiming an exception meet government needs. Industry Canada will release this evaluation, originally scheduled for 2011, to the PACP as soon as possible.