

# focus

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## KEEPING YOUR COMPETITIVE EDGE

By Taran Atwal, FMC Vancouver

What distinguishes you from your competitors? Every good business looks for ways in which to gain a competitive edge. In today's world, information is disseminated instantaneously and technology advances at break-neck speeds making it difficult to obtain and maintain an advantage in your industry. Understanding and strategically protecting and exploiting your intellectual property can be very important to obtaining and maintaining a competitive edge. Every business should have a strategy for assessing and protecting its intellectual property. The following are some general guidelines for creating a strategic plan that suits your business.



### Conduct an intellectual property audit

The first step is assessing what intellectual property or technology you have at your disposal. The term "intellectual property" is used to describe creations of the mind that, though intangible, may nonetheless have great value. Examples of intellectual property are many and varied:

- brand names such as the "GAP", "NIKE" and "SONY";
- the formula used by Coca Cola to produce its cola;
- software produced by Microsoft;
- the Harry Potter books written by J.K. Rowling; and
- computer hardware technology of Hewlett Packard.

A common misconception is that only technology companies need to be concerned about intellectual property protection. As you can see from the list above, valuable intellectual property comes in many forms and is not limited to technology. Other types of intellectual property are customer lists, business plans, methods of doing business, processes for obtaining a product or end result and designs.

### Evaluate methods of protection

The next step is to evaluate methods of protecting the intellectual property and to choose those that are best suited to the intellectual property asset and the business. Organizations put a lot of time and resources into marketing, branding, research and development activities. The dedication of time and resources would not be very fruitful if any individual were able to take advantage of the gains made through such activities.

For this reason, determining how to prevent others from using and benefiting from the intellectual property can be key to capitalizing

on intellectual property. A common method of maintaining one's competitive edge is secrecy. However, secrecy may not be conducive to trying to benefit from the intellectual property. In some cases, disclosure to a certain party or class of persons may be necessary, but a certain level of protection may be achieved by contractually binding such party or persons to not disclose the information and to not use it other than for certain limited purposes.

For certain types of intellectual property, the law provides rights and forms of protection to the "creator" even if the intellectual property is public or widely known. Some examples of intellectual property rights created by law are copyrights (for works of authorship such as books), trade-marks (for business names, brands and logos) and patents (for inventions having utility). Certain types of intellectual property rights arise simply upon the creation or use of the intellectual property. Other forms of rights are obtained through application to and registration with governmental organizations. The duration of protection and the costs of obtaining the protection vary depending on the form of intellectual property and the form of protection sought.

### Contract to clarify rights and obligations

The law will often dictate which party is considered the creator of intellectual property and/or entitled to rights to use and exploit the intellectual property. However, parties may, in certain cases, define the rights and obligations differently than set out by law by entering into an agreement that dictates the rights and obligations of the parties.

Examples of the types of parties and relationships that would benefit from such an agreement include an employer and its employees, a contractor or consultant and its client, a licensor and its licensee, the purchaser and seller of intellectual property or a business, parties partnering to do business and parties jointly contributing to research or development.

It is essential that any such agreement be reviewed carefully as the structure and terms of the agreement can have significant repercussions in respect of each party's ability to exploit the intellectual property, to obtain protection for the intellectual property as against third parties and even to carry on its business.

### Employ a strategy that meets long-term goals

There are various strategies, including legal and contractual strategies, that may be used to develop, protect and exploit intellectual property. Determining the appropriate strategy for protecting the information may be key to gaining and/or retaining a competitive advantage. The appropriateness of a strategy must be evaluated in light of factors such as:

- the form of intellectual property;

- the ways in which you intend to use and exploit the intellectual property;
- the form in which it must be disclosed to third parties;
- the cost associated with various intellectual property protection strategies; and
- the type and duration of protection afforded by each intellectual property protection strategy.

The best strategy for your business may be one that evolves and changes depending on the stage of development and operation of your business. Your goals will also help determine the most appropriate strategy. For example, it may depend on whether you intend to manufacture, licence or sell your product or intellectual property.

#### Consider the legal and strategic issues

It is important to get advice on strategies to protect your rights to intellectual property. The following are some issues that arise and should be considered by you to better protect and increase the value of both your business and your intellectual property:

- How can you make your business and intellectual property more valuable and attractive for investors, purchasers or clients?
- Have you, as an acquirer of or investor in a business or technology, reviewed the strength and validity of the intellectual property rights of the business or related to the technology?
- What are some of the key assets or ideas proprietary to your business?
- What type or form of intellectual property do the assets or ideas take or incorporate?
- How can such intellectual property be protected?
- What are the advantages and disadvantages of such types of protection?
- Have you taken the steps necessary to protect the intellectual property developed or created by your employees in the course of their employment?
- When you employ contractors or consultants, who owns the intellectual property produced during the course of the contractual relationship?
- How can you prevent others from exploiting the information, images and materials used in a presentation or advertising piece?

- Do your contractual relationships with third parties prevent you from using the intellectual property arising from those relationships or otherwise prevent you from doing the same type of work for third parties?
- Have you taken the appropriate steps to protect your name and goodwill?

In conclusion, your intellectual property can be critical to distinguishing you from your competitors. The above guidelines indicate issues on which legal and strategic advice should be sought to help formulate the most effective strategy for assessing and protecting your intellectual property.

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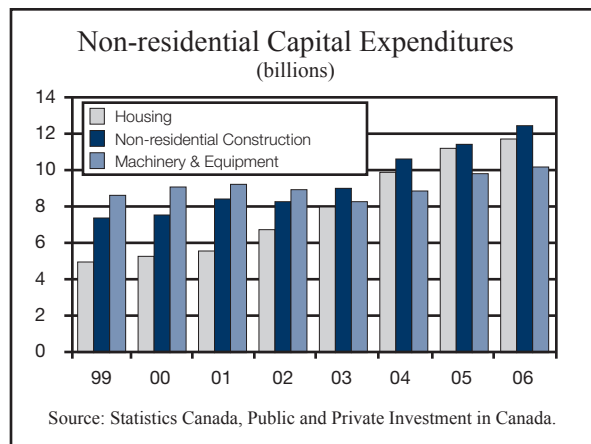
## BC ECONOMIC SNAPSHOT

*By Jock A. Finlayson and Ken Peacock,  
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The annual release of Statistics Canada's Public and Private Investment Intentions survey provides some welcome insight into investment trends and conditions in the province. It is especially helpful in trying to assess the near-term outlook because, unlike any other information source, the survey asks businesses across the province (and country) how much they plan to spend on capital investment in the coming year.

While intentions and what businesses actually invest can (and do) differ, it is interesting to note that last year's survey turned out to be remarkably accurate. Preliminary estimates show that total capital spending (investment in residential buildings, non-residential structures and machinery and equipment) in BC grew by 8.7% in 2005 to reach \$32.3 billion. Last year's survey "predicted" that investment would increase by 8.2%.



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