

IP PERSPECTIVES

INTELLECTUAL PROPERTY & TECHNOLOGY LAW NEWSLETTER

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Missed or Incorrect Payments for Patent Fees – Continued

This updates previous notes on the subject, most recently in the [June 2004](#) issue of *IP Perspectives*.

The Canadian Courts continue to take a draconian approach to missed or incorrect patent fee payments. In *Johnson & Johnson et al v. Boston Scientific*, November 30, 2004 ([2004 FC 1672](#)), the Federal Court held a patent invalid where the patentee had incorrectly paid the filing fee applicable to a small entity, but was allowed by the Commissioner to "top up" the filing fee to that of a large entity outside the reinstatement period. The Court found that the Applicant was not entitled to claim small entity status on the payment date, and that the failure to pay the prescribed fee within the time limit — and the failure to reinstate within the one year reinstatement period — resulted in the irrevocable abandonment of the application. The acceptance of a "top up" fee by the Commissioner was without a legal basis and had no legal effect. This is the latest in a series of Court decisions that has applied strictly the Canadian requirements for the timely and correct payment of patent fees of all kinds.

In the [February 2004](#) issue of *IP Perspectives* we reported on proposed legislation to remedy some of the effect of the strict application of patent fee payment laws. Legislation to this effect has now been introduced. Bill C-29, introduced into Parliament on December 3, 2004, proposes to provide a one year window in which to correct an incorrectly paid small entity fee, irrespective of when the incorrect fee was paid and of any pending actions or other proceedings in relation to the patent or patent application affected. However, the legislation will not provide any continuing relief for incorrectly paid fees of any kind. Therefore, it will only be a one-time solution to correct past errors in relation to small entity fees, and will do nothing to resolve or ameliorate the continued strict effect of Canadian patent fee payment laws.

If and when Bill C-29 becomes law, we will advise our clients accordingly.

A. David Morrow, Ottawa

Recent Federal Court of Appeal Decisions

Smart & Biggar represented the successful parties in two Federal Court of Appeal decisions that issued within one week late in 2004.

Oakley v. Shoppers Drug Mart, November 30, 2004 ([2004 FCA 404](#)): Led by Steven Garland of our Ottawa office, we represented the successful Respondent in resisting a motion for summary judgment in a case alleging copyright infringement of a design trade-mark.

Genpharm v. Astrazeneca et al., December 2, 2004 ([2004 FCA 413](#)): Led by Gunars Gaikis of our Toro-

nto office, we were successful in sustaining a judgment in favour of the patentee in a pharmaceutical case which restrained a generic manufacturer from selling a generic product until the expiry of the original patent. The reasons contain useful pronouncements on the doctrine of obviousness in Canada, and on the circumstances in which a patent for a new use of a known product may be infringed when a product monograph refers to the new patented use.

A. David Morrow, Ottawa

Government of Canada Proposes Sweeping Amendments to Linkage Regulations and to Data Protection Provisions

On December 11, 2004, the Government of Canada published proposed amendments to the *Patented Medicines (Notice of Compliance) Regulations* ("Regulations") and data protection provisions of the *Food and Drug Regulations*. These amendments are described by the Government as:

"...a package of regulatory amendments designed to reaffirm the balanced policy intent behind the [Regulations] and to reinforce data protection under the Food and Drug Regulations. If passed, the proposed amendments would bring a greater degree of stability and predictability to the intellectual property environment in the pharmaceutical industry by establishing a firmer upper and lower boundary to the period during which brand-name drugs enjoy market exclusivity."

The proposed "firmer lower boundary" would result from amendments to the *Food and Drug*

Regulations that are intended to provide a guaranteed period of market exclusivity of eight years after issuance of the innovator's first notice of compliance for a drug, based on data protection.

The proposed "firmer upper boundary" would result from amendments that would severely restrict the ability of innovators to add patents to the Patent Register ("Register") maintained by the Minister of Health pursuant to the *Regulations*, and would limit the patents that must be addressed by generic manufacturers.

The proposed amendments provide for a 75-day consultation period, expiring on February 25, 2005. For further details, see the [December 2004 Special Edition](#) of *Rx IP Update*, our firms' pharmaceutical newsletter, which is available online at www.smart-biggar.ca.

Nancy P. Pei, Toronto



Nancy P. Pei

Trade-mark Owners Required to Trim Down — No "Carb" Marks Permitted

The low-carb craze has led to a feeding frenzy of carb-related claims and trade-marks on packaging and advertising for food products. As a result, the Canadian Food Inspection Agency ("CFIA") has published an Information Letter to remind the food industry that the restricted nutrient content claims and nutritional labelling provisions under the *Food and Drugs Act and Regulations* apply to all food packaging and advertising in Canada.

Under the amended *Regulations*, which will require compliance by most companies by December 12, 2005, virtually all carbohydrate claims on food packaging and advertising, such as "carb-reduced", "source of carbohydrates" and "low carbohy-

drate", are prohibited. This includes food, beverages, and alcoholic beverages, such as beer.

A limited exception permits quantitative statements to be made about the amount of a nutrient within a food, such as "8g of carbohydrates per 30g serving".

So what's the skinny for brands and trade-marks? The CFIA has stated that all aspects of food labels and advertising are required to comply with the provisions of the *Food and Drugs Act and Regulations*, including all wording used within trade-marks and brand names. Thus, after December 12 — except in extremely limited circumstances — the words CARB or CARBOHY-



Mark K. Evans

DRATE will not be permitted for use by the food industry in Canada, no matter whether the mark is registered or is part of a pending application, or

whether it is used as part of a trade-mark or otherwise on product packaging and advertising.

Mark K. Evans, Toronto



Marc Gagnon

Written Descriptions in Applications to Register a Design in Canada

A design is defined in the Canadian *Industrial Design Act* as being "features of shape, configuration, pattern or ornament and any combination of those features that, in a finished article, appeal to and are judged solely by the eye."

Contrary to other countries, a written description of the applied design is required in Canada. Section 4(1)(a) of the *Industrial Design Act* provides that the application must comprise a drawing or photograph and a description of the design, and section 9(2)(c) of the *Industrial Design Regulations* provides that this description must identify the features that constitute the design.

At the examination stage, the Examiner must consider the description of the design in conjunction with the drawings or photographs in order to determine whether the applied design is registrable over the prior art references.

Moreover, Canadian Courts use the description of the design in conjunction with the drawings to determine whether the registered design is valid and whether it has been infringed. When comparing the registered design with a potentially infringing product, the Court must consider both the description of the design and the drawings to determine the nature of the design. While the registered design must be judged solely by the eye, the description of the design guides the eye of the Court to pay particular attention to the described features.

A general description of the design such as "The design is the shape of the product as shown in the Figures" may unduly restrict the ambit of protection of the eventual registration. In this example, the Court would not have any assistance in deciding which features of the design are important and which are trivial, and may therefore require that almost all features shown in the drawings

appear in the rival product before holding that the product infringes the registered design. If there is no reference to the important features of the design, the Court will have no choice but to compare the product and the drawings in their entirety. The Court may conclude that there is no infringement despite the presence of some features of the design in the rival product, because changes in the overall look of the product will suffice to avoid infringement. Similarly, a description that refers to all the features of the design and contains numerous limitations may also unduly restrict the ambit of protection of the registration.

In order to obtain broad protection, the description of the design should refer only to those features of the design that are both novel and important, without reference to any of the other features shown in the drawings. In the drawing, the use of full and broken lines to distinguish novel and important features of the design from unimportant features may be quite useful in meeting this objective. The description should also specify that the broken lines are to depict the full article only and form no part of the design to be registered.

If the Applicant cannot provide the agent with a suitable description of the design at the time of filing, a general description can be used to file the application. The Applicant can later inform the agent which features of the design are both novel and important, perhaps with a marked-up copy of some of the drawings, and a suitable description may then be prepared by the agent. The description of the design should be amended by filing a voluntary amendment or when filing a response to an eventual Office Action.

Marc Gagnon, Montreal

Court of Appeal Finds Copyright Not Applicable to Collective Works

In *Robertson v. The Thomson Corporation et al.*, the Ontario Court of Appeal considered the interplay between the copyright of a freelance author in an individual work published with authorization in a newspaper and the separate and distinct copyright in the newspaper as a collective work or compilation.

In this action, the Plaintiff alleged that the Defendants infringed the copyright in her literary works by reproducing the works in electronic databases. The Plaintiff had authorized the one-time publication of her works in the Defendants' newspaper, but the agreements were silent on the issue of electronic rights. The electronic databases in issue only included the articles from the newspaper and not its other elements such as advertisements.

In their defence, the Defendants asserted that they owned copyright in the newspaper as a collective work or compilation, and thus they had the exclusive right to copy the work, or a substantial part thereof, in any material form, including in the electronic databases.

The Plaintiff was successful on the motion for summary judgment on the issue of copyright infringement.

In a 2:1 split decision, the Ontario Court of Appeal upheld the motions judge's finding that the Defendants had infringed the Plaintiff's copyright as the electronic databases did not constitute a reproduction of the Defendants' collective work. The Court was of the view that the original aspects of the newspaper as a collective work were not preserved in the electronic database.

Accordingly, in Canada, when a collective work or compilation includes other copyrighted works, care must be exercised if an electronic copy of the collective work or compilation is made. It may be advisable to ensure that the original aspects of the collective work or compilation are maintained in the electronic copy, or that appropriate licenses are obtained from the owners of any copyright in the underlying works.

Leave to appeal this decision to the Supreme Court of Canada has been sought, but a decision has not yet been released.

Kevin K. Graham, Ottawa



Kevin K. Graham

Supreme Court of Canada to Consider Issue of Famous Marks

The Supreme Court of Canada has granted leave to hear an appeal of the decision of the Federal Court of Appeal in *Veuve Clicquot Ponsardin v. Les Boutiques Cliquot Ltee.* (2004 FCA 164). In so doing, the Supreme Court of Canada will have an opportunity to discuss — and perhaps clarify — the scope of protection for famous marks in Canada.

In *Veuve Clicquot*, the well-known manufacturer of champagne is suing the owner of six women's retail clothing stores that operate under the names CLIQUOT and LES BOUTIQUES CLIQUOT for trade-

mark infringement, passing off and depreciation of goodwill. The Federal Court of Appeal upheld the Trial Division's dismissal of *Veuve Clicquot Ponsardin's* claims, essentially on the basis that there was no likelihood of confusion due to the difference between the parties' wares and services, even though:

- the Plaintiff had used its VEUVE CLICQUOT trade-mark for many years in connection with champagne as well as a vast array of promotional items, including scarves and other fashion articles;

- the Plaintiff had advertised its VEUVE CLICQUOT champagne in fashion magazines and had sponsored fashion events;
- the Courts found that the Plaintiff's VEUVE CLICQUOT trade-mark was inherently strong, had been used for a lengthy period of time, and was deserving of a broad scope of protection;
- the Courts found that there was a great degree of resemblance between the respective marks; and
- expert evidence was provided to support the argument that as a well-known luxury brand VEUVE CLICQUOT was "elastic" in nature and could expand into the fashion field in the future.

In support of the finding that there was no confusion, the Courts referred to the Federal Court of Appeal's 1998 decision in *Pink Panther Beauty*

Corp. v. United Artists Corp. ([1998] 3 F.C. 534). In that case it was held that there was no reasonable likelihood of confusion between the famous THE PINK PANTHER movies and PINK PANTHER hair and beauty care supplies and services. Although the Supreme Court of Canada similarly granted leave to hear an appeal in *Pink Panther*, the parties settled the matter before it could be heard by the Supreme Court. As *Pink Panther* has created challenges for the protection of well-known trade-marks in Canada, owners of famous trade-marks will eagerly be awaiting the Supreme Court of Canada's decision concerning this important issue. We will report further in future issues of *IP Perspectives* once this matter has been heard, which will likely occur later this year.

Mark K. Evans, Toronto

Smart & Biggar Listed as Sole Firm in Top Tier of *Managing Intellectual Property's* IP Survey

Managing Intellectual Property recently released the results of its 2005 IP Survey, which lists the leading patent firms in 57 jurisdictions. In this year's survey, Smart & Biggar/Fetherstonhaugh

was the only firm listed in the first tier of patent firms in Canada. We are proud of this recognition, and thank our clients for their vote of confidence.

Firm Prominent in LEXPERT Survey Once Again

LEXPERT/American Lawyer Media has published *The 2005 Guide to the Leading 500 Lawyers in Canada* and once again has acknowledged the breadth of our expertise:

"The Toronto, Ottawa, Montreal, Vancouver and Edmonton offices of the IP boutique Smart & Biggar warrant special comment, however, in that it is the law firm in this practice area with multiple offices and leading lawyers in major centers across Canada."

We are proud of this recognition and congratulate all of our partners who are listed in this year's Guide:

A. David Morrow *Intellectual Property Law and Intellectual Property Litigation*

John R. Morrissey *Intellectual Property Law*

François Guay *Intellectual Property Law and Intellectual Property Litigation*

Joy D. Morrow *Biotechnology*

Firms Welcome New Partner

The partners of Smart & Biggar / Fetherstonhaugh are pleased to announce that effective January 1, 2005, **Nancy P. Pei** has become a partner of the Firms.

Ms. Pei works in our Toronto office, where her practice primarily involves patent and trade-mark litigation, with a particular focus in the area of

pharmaceuticals. Ms. Pei has represented clients before the Federal Court of Canada, the Ontario Superior Court of Justice, and in opposition proceedings before the Canadian Intellectual Property Office. Ms. Pei is a registered patent and trade-mark agent. She is also the editor of Smart & Biggar / Fetherstonhaugh's monthly newsletter on pharmaceutical regulations, *Rx IP Update*.

Notes

Announcements

Steven B. Garland was elected treasurer of the Canadian Executive Council for the International Association for the Protection of Intellectual Property in December 2004.

Owen W. Cramer has joined our Vancouver office as a patent agent. Mr. Cramer received a B.Sc. in Electrical Engineering from the University of the Witwatersrand. His practice focuses on the drafting and prosecution of patent applications relating to electrical, optical and mechanical inventions. He is a registered patent agent in both Canada and the United States.

Tilaye Terrefe has joined our Toronto office as a technical consultant. Mr. Terrefe holds an Honours B.A.Sc. and an M.Sc., both in the area of Electrical Engineering and from the University of Toronto. His practice focuses on the drafting and prosecution of patent applications relating to telecommunications and electrical/software engineering.

In November 2004, several of our professionals became Registered Patent Agents in Canada:

Christian Bérubé and *Sheema Khan* in Ottawa;

Nancy P. Pei in Toronto;

Martin Tremblay in Montreal; and

David Gileff, *Andris Macins*, *Graham McKinnon*, *Euan Taylor* and *Susan Tees* in Vancouver.

Seminars and Presentations

Steven B. Garland was a judge at the American Bar Association Law Student Division's 2004 Re-

gional Negotiation Competition at the University of Ottawa Law School on November 6, 2004.

Steven B. Garland co-presented a paper with Patrick Reimer entitled "The Death of Summary Judgment in the Federal Court?" at The Law Society of Upper Canada's Six-Minute Intellectual Property Law Lawyer Program in Toronto on November 10, 2004. At the same meeting, *Brian P. Isaac* presented a paper called "Anti-counterfeiting: Criminal Enforcement of Trade-marks in Canada".

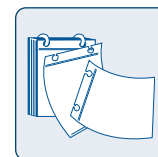
Marc-André Huot spoke on the topic of "The Liability of Shareholders, Directors and Officers when the Corporation Infringes Intellectual Property Rights" at the Recent Developments in Intellectual Property Law conference organized by the Quebec Bar in Montreal on November 12, 2004.

Timothy H. Briggs spoke on the topic of "Copyright Tips & Traps" at a British Columbia Real Estate Association Instructor Development Workshop held in Vancouver on December 7, 2004.

Michael D. Manson co-hosted the Learned Professors Trademark Symposium entitled "Pushing the Envelope in the Global Protection of Trademarks: Frontiers in North American, European and Asian Trademark Law" held by the International Trademark Association in San Francisco on January 7, 2005.

Andris D. Macins spoke on the topic of "Intellectual Property Careers" to the IP Law Club at the University of Victoria Law School on January 11, 2005.

A. David Morrow co-wrote, with Donald MacOdrum, an update on developments in patent law



in Canada during 2004. This paper was delivered by *John Bochnovic* at the Law Society of Upper Canada's 9th Annual Intellectual Property Law – The Year in Review held in Ottawa on January 14, 2005.

Ronald D. Faggetter and *Matthew Zischka* spoke on the topic of "The Importance of IP" at the Toronto Venture Group's seminar entitled "Funding: Facts and Fictions – An Entrepreneurs' Seminar" on January 20, 2005.

Theodore W. Sum spoke on the topic of "Traditional and Internet Software Licensing" at a Licensing Executives Society Vancouver Chapter workshop entitled "Intellectual Property Licensing", held in Vancouver on January 28, 2005.

Sanjay D. Goorachurn spoke on the topic of "Negotiating Alliances" at a conference entitled "Ateliers de sensibilisation en transfert technologique" in Quebec City on February 3, 2005.

Michael D. Manson spoke on the topic of "Intellectual Property Issues" at the Business Basics 2005 course held by the Continuing Legal Education Society of British Columbia on February 10, 2005 in Vancouver.

Steven B. Garland gave a lecture on the topic of "Intellectual Property and Information Technology Law" to the University of Ottawa Engineering School on February 28, 2005.

A. David Morrow will give a lecture on patentable subject matter to students at Osgoode Hall Law School at York University in Toronto on March 8, 2005.

A. David Morrow will present a paper entitled "Patenting Living Matter After the Supreme Court of Canada Decisions in *Harvard* and *Monsanto*" at the 4th Annual Drug Patents conference given by Insight Information in Toronto on March 31, 2005.

Nancy P. Pei will lead a workshop on the topic of "Complying with Price Control Regulations to Manage Legal Vulnerabilities" at The Canadian Institute conference entitled "Understanding the National Pharma Strategy – Balancing Canadian Price Controls with a Global Free Trade Environment" on April 5, 2005 in Toronto.

L. Catherine Eckenswiller will be giving a presentation called "Negotiating Key Terms" at a conference

entitled "Advanced Licensing for Pharmaceuticals and Biotechnology" sponsored by the Federated Press in Toronto on April 11-12, 2005.

L. Catherine Eckenswiller will be a speaker for the workshop entitled "International Outsourcing Agreements: Reaping the Benefits While Avoiding the Pitfalls" to be held at the Canadian Corporate Counsel Association Spring Meeting in Toronto on April 19, 2005.

Steven B. Garland will be speaking on the topic of "Summary Judgment Motions" at a conference entitled "Advocacy Before the Federal Court in Intellectual Property Matters – Pre-Trial Issues", held by the National Intellectual Property Section and the Continuing Legal Education Committee of the Canadian Bar Association in Ottawa on April 21, 2005 in Ottawa. At the same conference, *Michael D. Manson* will discuss "Cross-Examinations on Affidavits".

J. Christopher Robinson will speak on the topic of "The Year in Review – Patent Update" at the Intellectual Property Institute of Canada's Spring Meeting in Ottawa on April 25-26, 2005.

Christian Bolduc will present two EDILEX courses, the first entitled "Technologies I - R & D Contracts" on May 4, 2005, and the second entitled "Technologies II - The Contractual Bases of Research & Development and Technology Transfer" on May 5, 2005, both in Montreal.

A. David Morrow will present a paper on infringement of patents by equivalents at the International IP Summer Law Program, a joint symposium being held by the University of Victoria, the University of Illinois and Oxford University in Oxford on June 23-24, 2005.

Colin B. Ingram, *Philip Lapin* and *David E. Schwartz* are teaching a course entitled "Intellectual Property & Technology Law for Engineers" at the University of Ottawa from January to April 2005. This course was developed by *Elliott S. Simcoe* for the school's Department of Engineering.

Timothy P. Lo, *J. Christopher Robinson* and *Theodore W. Sum* are teaching a senior IP law course at the University of British Columbia's Faculty of Law from January to April 2005.

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Publications

Kevin K. Graham, "Case Summary: *Robertson v. The Thomson Corporation et al* (Ont. C.A.)", *IPIC Bulletin*, November/December 2004.

A. David Morrow and Dr. Ruth Corbin, "Pulling Confusion Surveys from an Illusory Brink: Reply to an Article of Dr. John Liefeld", *The Trademark Reporter*, Vol. 94, Nov-Dec 2004.

L. Catherine Eckenswiller, "Franchising in a Global Economy", *Inside Counsel*, Annual Meeting Issue 2005.

May Ming Lee, Joy D. Morrow and Daphne C. Ripley, "Biopharma Innovators Stand To Benefit From Proposed Data Protection Regulations", *2005 Canadian Biotechnology Guide*.

A. David Morrow and Colin B. Ingram, "Of Transgenic Mice and Roundup Ready Canola: The Decisions of the Supreme Court of Canada in *Harvard v. Canada* and *Monsanto v. Schmeiser*", *University of British Columbia Law Review*, Volume 38, Issue 1, 2005.

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