

IP PERSPECTIVES

INTELLECTUAL PROPERTY & TECHNOLOGY LAW NEWSLETTER

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Reverse Confusion Actionable in Canada

The first pronouncement by a court in Canada on reverse confusion was made on March 23, 2005 by the Federal Court, Trial Division in *A&W Food Services of Canada Inc. v. McDonald's Restaurants of Canada Limited* (2005 FC 406). At issue was the trade-mark CHICKEN McGRILL, which McDonald's has used in association with a grilled chicken sandwich since 2001. A&W alleged that McDonald's was infringing its registered CHICKEN GRILL trade-mark.

In a typical trade-mark confusion case, the Plaintiff claims that the Defendant's trade-mark causes customers to believe that the Defendant's goods originate with the Plaintiff. This is known as "forward" or "direct" confusion. However, in this case, A&W claimed that McDonald's use of the trade-mark CHICKEN McGRILL caused A&W customers to believe that A&W's CHICKEN GRILL

sandwich was a McDonald's product. This kind of confusion is termed "reverse confusion".

The concept of reverse confusion is well established in the United States. The Court reviewed the pertinent U.S. case law, then turned to the Canadian *Trade-marks Act*, but failed to identify anything in the Canadian *Trade-marks Act* that would restrict Plaintiffs to a claim of forward or direct confusion. The Court therefore held that the *Act* is broad enough to cover both forward and reverse confusion, and that each is actionable under the *Act*.

Although A&W's claim ultimately failed, this decision nevertheless establishes that reverse confusion is indeed actionable under Canadian trade-mark law.

Geneviève M. Prévost, Toronto

Canadian Trade-mark Examination Practice Burned in *Effigi* – A Fundamental Change After 50 Years

As a result of a landmark decision rendered by the Federal Court of Appeal on May 10, 2005, the claimed date of first use or making known of a trade-mark in Canada is no longer a factor to be considered by Examiners in deciding the priority of co-pending applications (during prosecution, as opposed to opposition).

In *Attorney General of Canada v. Effigi* (2005 FCA 172), the Federal Court of Appeal overturned the longstanding Canadian practice of determining the priority of applications based on the earliest of: the date of first use or making known in Canada, the date of filing in Canada, or the date of filing of the *Paris Convention* priority applica-

tion. Now, regardless of any prior use or making known in Canada, the application with the earliest Canadian or priority filing date will proceed.

Consequently, the filing of any applications in Canada should not be delayed, even if there is prior use in Canada. Additionally, Applicants should claim priority pursuant to the Paris Convention, even if there is earlier use in Canada.

It is important to understand that this change in practice – which has already been adopted by the Trade-marks Office as a result of this decision – does not alter substantive trade-mark law in Canada in any manner. Canadian trade-mark law

(unlike examination procedure) has not adopted a first-to-file system. Thus, if a party has a date of first use or making known in Canada that predates the filing date of another confusing application, the ability to oppose an application or to expunge a registration based upon such rights has not been changed. Indeed, this will undoubtedly lead to an increased number of oppositions being filed in Canada, as well as a greater need to monitor co-pending applications.

This change has resulted in Canadian Trade-marks Office practice being similar to that of the United States. In particular, the date of first use or making known will now need to be proven by evidence in opposition proceedings, rather than being merely accepted without proof as accurate by an Examiner.

Mark K. Evans, Toronto

Possible Modernization of Canadian Trade-marks Act

The Canadian Trade-marks Office (TMO) has solicited comments and suggestions from the Canadian trade-mark profession, as well as other interested parties, for revising and modernizing the Canadian *Trade-marks Act*.

By way of background, the TMO and the Canadian Government are considering whether Canada should adhere to the Trademark Law Treaty (TLT) and the Madrid Protocol. As part of this process, the TMO has proposed certain amendments to the Canadian *Trade-marks Act* that would be required, and other amendments that may be desirable, should Canada adhere to those agreements. The TMO is soliciting comments to its proposals, which may be found here: http://strategis.ic.gc.ca/sc_mrksv/cipo/tm/tma_mod-e.html

Canada has not confirmed that it will adopt TLT and Madrid. However, given the adoption of these agreements by Canada's major trading partners, it seems inevitable that Canada will adopt these agreements at some point in the future. In recognition of this possibility, the TMO has proactively considered what consequential amendments to the Canadian *Trade-marks Act* would be necessary or desirable.

The proposed amendments are too extensive to list here in their entirety. However, some of the proposed changes may be summarized as follows:

- There is currently no requirement for owners of Canadian trade-mark registrations to prove use of their registered trade-marks, except if the registrations are challenged in expunge-

ment proceedings. The TMO has proposed that owners of registrations be required to demonstrate use of their registrations periodically in order to maintain them.

- Canada is one of the few countries in the world that does not use the Nice classification system for goods and services. The TMO has proposed adopting this system.
- Currently, the TMO will not register marks consisting of sound, motion, animation, scent, taste, or color *per se*. In the proposal, the TMO has requested comments concerning whether the TMO should allow such non-traditional marks to be registered.
- Currently, trade-marks applications cannot be divided. The TMO has proposed allowing a parent application to be divided into two or more divisional applications, where the goods/services in the parent application could be divided among the two or more divisional applications, with the divisional applications maintaining the original filing or priority date.

Smart & Biggar has forwarded a response to the TMO. Our response addresses the specific proposals raised by the TMO, and suggests various amendments to the *Trade-marks Act* which were not specifically proposed by the TMO. A copy of the full text of the Smart & Biggar response is available at the following link:

<http://www.smart-biggar.ca/assets/CIPOResponse.pdf>

Philip D. Lapin, Ottawa



Philip D. Lapin



Mark K. Evans

Supreme Court Barbie

Barbie, the anatomically impossible plastic doll, is going to have her day in Canada's highest court.

On May 26, 2005, the Supreme Court of Canada granted Mattel leave to appeal the rejection of its opposition against an application to register the trade-mark BARBIE'S & Design (right).

The Applicant, a Montreal area restaurant owner, had filed the application based upon use in Canada since 1992, in connection with restaurant services, take-out restaurant services, catering and banquet services.

The Supreme Court of Canada granted leave to hear the appeal, even though Mattel had failed to succeed in all of its previous attempts in the Trademarks Office, the Federal Court and the Federal Court of Appeal to block the application.

In all previous decisions, it was held that the Applicant had established that there was no



reasonable likelihood of confusion. The Federal Court of Appeal also noted that it is not sufficient that there be a mere possibility of confusion.

In granting leave to hear the appeal, the Supreme Court indicated that the appeal will be heard with the appeal in the *Veuve Clicquot* case (as reported in the February 2005 issue of *IP Perspectives*). Also, the International Trademark Association (INTA) has recently been granted leave to intervene in the *Veuve Clicquot* appeal.

These appeals are anticipated to be heard in October 2005, and will provide the Supreme Court with an opportunity to discuss – and perhaps clarify – the scope of protection for famous marks in Canada.

We shall keep you fully advised of these cases in future issues of *IP Perspectives*.

Mark K. Evans, Toronto



L. Catherine Eckenswiller

Telecommunications Policy Review Panel

On April 11, 2005, The Ministry of Industry established the Telecommunications Policy Review Panel in order to conduct a review of Canada's telecommunications policy and regulatory framework. The panel has been asked to make recommendations regarding moving Canada towards a modern telecommunications framework that benefits Canadian industry and consumers. In particular, the panel has been asked to study and report on three specific areas:

1. *Regulation*. The panel has been asked to make recommendations on implementing a regulatory framework that can adapt to a changing technological landscape.
2. *Access*. The panel has been asked to recommend mechanisms that will ensure that

all Canadians have access to new and ever-changing technological services.

3. *Information and Communications Technologies Adoption*. The panel has been asked to make recommendations on measures to promote development, adoption and expanded use of advanced telecommunication services, and to report on the appropriateness of Canada's current levels of investment in information and communications technologies.

The panel has been asked to deliver a final report by the end of 2005. In preparing its report, the panel will rely on submissions from interested parties as its primary means of gathering information, although it also expects to conduct research and organize workshops.

The panel has a website at www.telecomreview.ca to assist in collecting submissions and to provide further information on the panel's work. Anyone interested in making a submission or obtaining

further information can register for updates on the panel's website.

L. Catherine Eckenswiller, Ottawa

Supreme Court of Canada Finds Biolyse Not Caught by Linkage Regulations

On May 19, 2005, the Supreme Court of Canada announced its decision in *Biolyse Pharma Corporation v. Bristol-Myers Squibb Company et al* (2005 SCC 26). Biolyse's appeal was allowed in a 6:3 decision of the Court.

The issue addressed was whether Biolyse's submission to Health Canada for approval to sell its prescription drug (paclitaxel) was within the scope of the *Patented Medicines (Notice of Compliance) Regulations* ("Regulations"). If so, Biolyse was required to comply with the *Regulations* and address certain patents on the Patent Register. If not, Biolyse could obtain its notice of compliance ("NOC") as soon as its submission met the safety and efficacy requirements of the *Food and Drug Regulations*.

Bristol Myers Squibb ("BMS") has three patents listed on the Patent Register for TAXOL, BMS's paclitaxel product, which cover formulations and methods of administration of paclitaxel. Paclitaxel is not a patented product.

Health Canada decided that Biolyse's product was not caught by the *Regulations*. Both the Federal Court (2002 FCT 1205) and the Federal Court of Appeal (2003 FCA 180) disagreed and quashed Biolyse's NOC. Satisfying the *Regulations* would require Biolyse to await patent expiry or make an allegation. Upon BMS's application, the latter would result in an automatic 24-month statutory stay prohibiting Health Canada from issuing a NOC for Biolyse's paclitaxel.

Biolyse appealed to the Supreme Court of Canada, which reversed the decision of the Federal Court of Appeal and freed Biolyse from

the requirements of the *Regulations*. The Court was strongly influenced by the fact that paclitaxel was not a patented product.

The case turned on whether Biolyse was caught by section 5(1.1) of the *Regulations*. In considering the "general context" of section 5(1.1), and referring solely to Canada's submissions to the WTO in the context of a complaint made by the European Communities, the majority held that "[i]t seems clear that the NOC Regulations were introduced to help generic drug companies and at the same time curb potential patent abuse by them".

The majority held that section 5(1.1) should receive a purposive interpretation. It held that the stated purpose of the provision is to prevent generic manufacturers from hiding their reliance on innovator drugs by putting forward another generic manufacturer's product as their reference drug in circumstances where both generic drugs are simply copies of the innovator drug.

The question decided by the Supreme Court was a narrow one. As the Government has proposed to repeal section 5(1.1), the significance of the specific finding of the majority may be minimal. However, the principles of interpretation applied by the majority are potentially wide-ranging.

The extent to which the Supreme Court's decision will affect the Federal Court's interpretation of the *Regulations* (apart from section 5(1.1)) remains to be seen. We will report on any future developments.

Nancy P. Pei, Toronto



Nancy P. Pei



Brian P. Isaac

Copyright Reform

On March 24, 2005, the Government of Canada announced proposed amendments to the *Copyright Act*. The amendments form part of the ongoing reform of the *Copyright Act*, with the present round primarily directed at addressing issues arising from the Internet. The stated intent was to present the proposed amendments to Parliament in late spring. However, it is possible that the recent difficulties being faced by Canada's governing party will delay the introduction of the amendments.

Highlights of the government's current proposal for reform include:

1. The reform is intended to implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, both of which deal with issues arising from the dissemination of copyright works over the Internet. The amendments would, *inter alia*:
 - a. provide an enhanced right to prevent unauthorized persons from making copyrighted works available on the Internet;
 - b. provide anti-circumvention rights making it an infringement of copyright to remove technological protection measures;
 - c. make it an infringement of copyright to remove rights management information embedded in copyright materials; and
 - d. provide performers with moral rights in their fixed and live performances.
2. The amendments would clarify Internet service provider (ISP) liability for infringement. Specifically, they would:
 - a. explicitly exempt ISPs from liability so long as they are only acting as intermediaries; and
 - b. provide for a "notice and notice" regime pursuant to which ISPs would be required to, *inter alia*, forward notices of infringement to their subscribers.
3. The amendments are intended to facilitate appropriate access to research and educational materials on the Internet. In essence, existing exceptions would be modified to provide for Internet access to educational and research works by and through educational institutions, subject to the adoption of appropriate safeguards.

A number of other issues will also be dealt with in this round of reform, and further issues raised through the reform and consultation process will be covered in subsequent rounds in the near future. Discussion of the current round of copyright reform, and of the copyright reform process generally, may be found at: http://strategis.ic.gc.ca/sc_mrksv/cipo/cp/cp_main-e.html by following the Copyright Reform Process links.

Brian P. Isaac, Toronto

Jean Chrétien Pledge to Africa Act Now in Force

Bill C-9, *An Act to Amend the Patent Act and the Food and Drugs Act* (the *Jean Chrétien Pledge to Africa Act*) and its accompanying regulations came into force on May 13, 2005. Bill C-9 implements the Decision of the World Trade Organization (WTO) General Council of August 30, 2003 ("Decision"). The Decision implements paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, and allows any

member country to export patented pharmaceutical products to developing countries which have been made under compulsory licences within the terms set out in the Decision. A detailed overview of Bill C-9 was reported in our [June 2004](#) issue of *IP Perspectives*.

Nancy P. Pei, Toronto

Congratulations to the Winners of the 2nd Annual Smart & Biggar Scholarship Award

Smart & Biggar is pleased to announce the winners of the 2nd Annual Smart & Biggar Scholarship Award at the University of Ottawa. Each year a cash prize is awarded to deserving engineering and common law students at the university who have demonstrated outstanding academic merit as chosen by the university's Faculty Selection Committee and Faculty of Law.

The scholarship winners are:

- Kathryn Garson, a fourth year computer science student (\$2,000)
- Nicolas Horne, a fourth year software engineering student (\$2,000)
- Vijay Narasimhan, a fourth year computer engineering student (\$2,000)
- Ms. Sarah Volpentesta, a first year common law student (\$4,400)

In celebration of this occasion, Smart & Biggar hosted three of the winners as well as Dr. Timothy Lethbridge, Associate Dean of Academics and Carol

Mothersill, Manager of Faculty Development, at a luncheon in the firm's Ottawa office on April 13th, 2005.

We take great pleasure in recognizing and supporting these outstanding students and the University of Ottawa. The scholarship is funded



Back row, left to right: Dr. Tim Lethbridge, Mr. Elliott Simcoe, Mr. David Schwartz, Mr. Colin Ingram
Front row, left to right: Mr. Philip Lapin, Ms. Kathryn Garson, Mr. Vijay Narasimhan, Mr. Nicolas Horne, Ms. Carol Mothersill
Absent: Ms. Sarah Volpentesta
Photograph taken by: Mélanie Provencher

by the firms' donation of teaching income generated by three partners of the Ottawa office who teach courses at the University of Ottawa. Elliott Simcoe and Philip Lapin co-teach the course "Intellectual Property and Technology Law for Engineers" which introduces students to legal mechanisms for protecting their inventions and other forms of intellectual property. Steven Garland teaches a Patent Law course at the university, focusing on the procurement, licensing and enforcement of patents in Canada.

Smart & Biggar Leads All Canadian IP Firms in Two Independent Surveys

The results of two recent surveys were released earlier this year, and Smart & Biggar is honoured to have achieved the highest ranking in both. We are proud of these achievements, and extend our deepest appreciation to our colleagues and clients who have expressed such confidence in our services.

Canadian Legal LEXPERT Directory

The Directory is the product of extensive research among Canadian in-house counsel and private practitioners. The 2005 edition of the Directory has identified Smart & Biggar as having 15 leading lawyers in the areas of intellectual property law and/or IP litigation – more than any other firm.

The lawyers listed in this year's Directory are:

- John Bochnovic (IP)
- Christian Bolduc (IP)
- Mark K. Evans (IP)
- Gunars A. Gaikis (Biotech, IP and IP Litigation)
- Steven B. Garland (IP and IP Litigation)
- Robert D. Gould (IP)
- François Guay (IP and IP Litigation)
- James D. Kokonis, Q.C. (IP Litigation)
- Terrence N. Kuharchuk (IP)
- Michael D. Manson (IP and IP Litigation)
- John R. Morrissey (IP and IP Litigation)
- A. David Morrow (IP and IP Litigation)
- Joy D. Morrow (Biotech and IP)
- J. Christopher Robinson (Biotech and IP)
- Matthew Zischka (IP)

International Who's Who of Business Lawyers

The publishers at Law Business Research Limited recently released the 2005 edition of *The Inter-*

national Who's Who of Business Lawyers. Only professionals who are highly nominated and meet strict independent research criteria are recommended and listed.

Smart & Biggar / Fetherstonhaugh leads the competition as the only Canadian firm with four lawyers featured in the book's Patent Law section. James Kokonis of our Toronto office, David Morrow and John Bochnovic of our Ottawa office and Michael Manson of our Vancouver office were all recognized in the survey results. In particular, the publishers noted that Michael Manson is "the only lawyer who received sufficient votes to merit inclusion in all of British Columbia."

In the book's Trademarks chapter, we were also recognized as "the leading trademarks practice in Canada." Robert Gould and David Morrow of our Ottawa office, James Kokonis of our Toronto office and Michael Manson of our Vancouver office were all commended in the survey results.



Notes

Announcements

Richard D. Okimaw has been called to the British Columbia Bar and is now practising as an associate in our Vancouver office. His practice extends to all areas of intellectual property law with a focus on the drafting and prosecution of patents.

Seminars and Presentations

Steven B. Garland moderated a panel discussion by the members from the Canadian Patent Office at IPIC's Spring Meeting on April 25, 2005.

A. David Morrow, Gunars Gaikis, Brian P. Isaac and *Steven B. Garland* presented a seminar on intellectual property litigation in Canada at the Waldorf=Astoria in New York City on May 5, 2005.

A. David Morrow and *Mark K. Evans* spoke on trade-marks and their applications in the wine industry at a seminar hosted by the firms in Toronto on June 2, 2005.

François Guay and *Sanjay Goorachurn* participated in a panel discussion titled "Reconnaître et ne plus occulter l'importance de la propriété intellectuelle" at the annual Barreau du Québec Congress held in Gatineau, Quebec from June 2-4, 2005.

Joy D. Morrow participated in a panel discussion on "Patenting Stem Cell Technology" at the annual BIO 2005 meeting held in Philadelphia on June 21, 2005. Yang Koon participated in a panel discussion on "A Global Perspective of Patent Procurement and Litigation Issues for Biotechnology Inventions" at the same conference.

Jean-Sebastien Brière will participate in a panel discussion on "Commercial Agreements Under Quebec Civil Law vs. Common Law – A Bilingual Overview and Discussion" at the CCA annual conference to be held in Vancouver on August 15, 2005.

Mark K. Evans is a project team member for the INTA/WIPO "Worldwide Forum on Marks & Designs" being held in Vancouver on September

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8-9, 2005. Mr. Evans will also be moderating a session entitled "National and Regional Systems for the Registration of Designs." *John R. Morrissey* will participate in a panel discussion on "Indications of Goods and Services in Marks: Is Broader Better?" at the same conference.

Michael D. Manson will speak on the topic of "The Internet: A Counterfeiter's Paradise?" at INTA's 5th Trademarks in Cyberspace Forum titled "Trademarks in Cyberspace 2005: Trademarks on the Internet 10 Years On", held in Vancouver on September 12-13, 2005. *Timothy P. Lo* will participate on the project team and will be a

moderator in a panel discussion on "International Domain Names" at the same conference.

Publications

Marc-André Huot, "La responsabilité des actionnaires, administrateurs et dirigeants lorsque la compagnie viole des droits de propriété intellectuelle", *Les cahiers de propriété intellectuelle*, Vol. 17, No. 1, January 2005.

Marc A. Gagnon, "La protection par dessin au Canada et aux États-Unis", *Les cahiers de la propriété intellectuelle*, Vol. 17, No. 2, pp. 235-261, May 2005.

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