

IP PERSPECTIVES

INTELLECTUAL PROPERTY & TECHNOLOGY LAW NEWSLETTER

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LEGO Supreme Court Case Gets More Complicated

In the [October 2003](#) issue of *IP Perspectives*, we reported on the July 14, 2003 decision of the Federal Court of Appeal in *Kirkbi AG v. Ritvik Holdings Inc.* [[2003 FCA 297](#)]. In that case, in a 2:1 decision, the Court held that the shape of the basic LEGO brick could not be protected as a trade-mark because it was primarily functional. As reported in the [June 2004](#) issue of *IP Perspectives*, the Supreme Court of Canada has agreed to hear an appeal of the Federal Court of Appeal's decision. Furthermore, the Supreme Court has recently permitted the respondent to raise an additional issue which was not raised in the lower courts. This issue relates to the Constitutional validity of the provision of the Federal *Trade-marks Act* on which the plaintiff's action was based. The provision at issue is paragraph 7(b) of the *Trade-marks Act*, which is considered to be the statutory

equivalent of the common law cause of action called passing off. This provision gives jurisdiction to the Federal Court of Canada to hear cases of this kind and to dispose of them using its full national powers. A ruling that this provision is unconstitutional could deprive the Federal Court of an important area of its jurisdiction in trade-mark matters, and could even adversely affect, by implication, the constitutionality of other provisions of the *Trade-marks Act*. The addition of this issue to the appeal has raised the stakes considerably for the parties to the LEGO action, for the entire Canadian trade-mark community, and indeed for anyone using trade-marks in Canada. We will report on this decision in a future issue of *IP Perspectives*.

A. David Morrow, Ottawa

Proposed Regulations Pursuant to Bill C-9 Published for Comment

As reported in the [June 2004](#) issue of *IP Perspectives*, Parliament approved Bill C-9, *An Act to amend the Patent Act and the Food and Drugs Act (The Jean Chrétien Pledge to Africa)* on May 14, 2004. This Bill is intended to implement an August 30, 2003 decision of the General Council of the World Trade Organization (WTO). The amendments in the Bill will allow Canadian pharmaceutical manufacturers (typically generic manufacturers) to obtain compulsory licences authorizing the manufacture of eligible patented pharmaceutical products for export to eligible importing countries.

On October 2, 2004, proposed regulations under the amendments to the *Patent Act (Use of Patented Products for International Humanitarian Purposes Regulations)*, and the *Food and Drugs Act (Regulations Amending the Food and Drug Regulations and Regulations Amending the Medical Devices Regulations (Developing Countries))* were published. Bill C-9 will come into effect once the regulations have been passed.

Interested persons may make representations within 75 days after the date of publication of the notice (December 17, 2004).

Supreme Court to Take Second Look at *Patented Medicines (Notice of Compliance) Regulations*

Under the Canadian *Patent Act* and the *Patented Medicines (Notice of Compliance) Regulations* ("*Regulations*"), the owner of a listed Canadian patent covering a medicine can obtain a Court Order prohibiting the sale of the patented medicine by a generic manufacturer if the generic manufacturer bases its application for marketing permission (Notice of Compliance Application) on the patentee's clinical test data. The case of *Biolyse v. Bristol-Myers Squibb* (paclitaxel for injection), now before the Supreme Court of Canada, is an appeal from such an Order. This will only be the second occasion on which the Supreme Court of Canada has considered the *Regulations*. Biolyse's appeal is quite technical, and relates to the interpretation of certain provisions in the *Regulations* which Biolyse says were construed too broadly against its interests, and which, as so construed, resulted in the quashing of a Notice of Compliance that had

been granted to Biolyse to market its paclitaxel product. However, positions taken by an intervener in the appeal, the Canadian Generic Pharmaceutical Association, seek to call into question some more fundamental aspects of the *Regulations*, including the alleged ability of patentees to "evergreen" their protection by adding new patents to their list. The case will be argued on November 5, 2004, and the decision will likely be reserved and rendered some months later. It will be interesting to see whether the Supreme Court is prepared to examine the *Regulations* in any fundamental way or will satisfy itself with dealing with the limited technical issues addressed by the lower courts. We will report on the Supreme Court decision in a future issue of *IP Perspectives*.

A. David Morrow, Ottawa



A. David Morrow

Protection for Colour Trade-Marks in Canada

Canada, unlike many of its major trading partners, does not permit registration for colour *per se* as a trade-mark. In a leading case in 1987, the applicant filed an application for registration of the colour green applied to a tablet as shown in a drawing accompanying the application. The Registrar of Trade-marks held that the trade-mark was not registrable given that colour alone could not function as a trade-mark. The Federal Court agreed that colour *per se* was not registrable, but noted that the application was restricted to a particular shape and therefore allowed the registration. (*Smith, Kline & French Canada Ltd. v. Registrar of Trade Marks (No. 2.)*, [1987] 2 F.C. 633 (T.D.))

Prior to 2000, some marks registered on the Canadian Trade-marks Database were accompanied by a colour claim noting that the object shown does not form part of the trade-mark,

essentially granting a trade-mark for colour *per se* (see Registration number TMA519025 for example).

A Practice Notice issued by the Trade-Marks Office in December of 2000 put an end to this unintended loophole by requiring a description "indicating that the trade-mark consists of the particular colour or colours only insofar as they are applied to the particular object shown in the drawing". Applications claiming a colour that is not restricted to a particular size or shape will now therefore be rejected by the Office.

Although colour *per se* is not registrable in Canada, colour may be claimed as a feature of the mark. Section 28 of the Canadian *Trade-mark Regulations* provides that where the applicant claims colour as a feature of the mark, the colour must be described. This normally entails a written



Keltie R. Sim



Heather E. Tonner

description below the drawing of the mark. Alternatively, the drawing can also be lined for specific colours.

Unless restricted to a particular colour, registration confers on the owner the exclusive right to use the mark in any colour. It is therefore desirable to claim colour only when colour is an important feature of the mark.

Colour is arguably protectable under the common law by way of the tort of passing off, but this has not been determined to date. What is evident is that colour will not be protected by common law or registration if the colour is merely ornamental or functional in nature.

In the U.S., Australia, and European Communities, colour *per se* is registrable and colour monopolies are controlled through an analysis of functionality, restraints in trade, and ornamental and economic aspects of colour.

In Australia and Europe, the Courts have also held that inherent distinctiveness would be difficult to prove, usually requiring evidence of acquired distinctiveness, while the U.S. has excluded outright the possibility of relying only on inherent distinctiveness for colour *per se* marks. In Canada, distinctiveness will likely always be an important hurdle in obtaining registration of a mark that relies heavily on colour.

Unfortunately, the state of the law today dictates that a registration for colour *per se* in Canada is not permissible. This question has yet to be considered at an appellate level, and we see no reason in principle why Canadian legal interpretation should differ from that of its major trading partners in this area. Colour continues to receive some protection when claimed as a feature of the mark limited to the size or shape of the product.

Keltie R. Sim and Heather E. Tonner, Toronto



Scott A. Beeser

Interlocutory Injunctions: Springboarding to Irreparable Harm?

An “interlocutory injunction” (“temporary restraining order” in U.S. terms) is a Court Order that restrains a defendant from continuing its alleged infringing acts while an action proceeds to trial.

Interlocutory injunctions, in theory, represent a powerful mechanism to protect intellectual property. In practice, however, it is often very difficult to obtain an interlocutory injunction in Canada, particularly in the Federal Court, in intellectual property matters. To obtain an interlocutory injunction, a plaintiff must demonstrate that: (1) there is a serious issue to be tried, (2) it would suffer irreparable harm not compensable by monetary damages should the injunction not be issued, and (3) the balance of convenience favours the granting of the injunction. Since the Federal Court to date has found in almost all cases that damages are an adequate remedy for any infringement, owners of intellectual property rights, such as patents, face a substantial obstacle in demonstrating irreparable harm.

On July 28, 2004, the Federal Court granted an interlocutory injunction in *Carbo Ceramics v. China Ceramics Proppant Ltd.* [2004 FC 1046]. The underlying action related to the defendant's sale and marketing of allegedly infringing ceramic proppant, material used in the oil and gas industry to increase subterranean flow. The defendant, a small corporation with a sole shareholder and no employees, began selling proppant manufactured for it by a Chinese manufacturer near the February 2005 expiration date of the plaintiff's patent. The evidence established that the defendant undercut the price of the plaintiff's product and that one of the plaintiff's clients had switched to purchasing proppant virtually exclusively from the defendant.

On the issue of irreparable harm, the Court accepted that the defendant had failed to establish that it had sufficient assets to satisfy any damage award that may be made against it. This deficiency was not remedied by an undertaking of the Chinese manufacturer, as the latter had no assets in Canada.

More interestingly, the Court also accepted that the defendant was obtaining an unfair advantage by "springboarding" – ramping up its allegedly infringing activities in anticipation of the impending expiration of the patent. The Court held, contrary to at least one recent case (*Bristol-Myers Squibb Co. v. Apotex Inc.* [2001 FCT 1086]), that the plaintiff's loss of market share caused by the defendant's springboarding could not be sufficiently addressed by an award of damages.

On September 2, 2004, the Court of Appeal upheld the injunction ([2004 FCA 283]), holding that while the trial judge had used "loose and unfortunate language", there was sufficient

evidence to support the allegation that the defendant was springboarding. Curiously, the Court of Appeal did not explicitly address the issue of irreparable harm, and the Court's references to springboarding were made in its analysis of the balance of convenience. As a result, it remains to be seen whether springboarding can, in itself, provide a basis for a finding of irreparable harm or whether it is but one of the factors to consider in determining the balance of convenience. If the defendant wishes to appeal this decision, leave to appeal will have to be granted by the Supreme Court of Canada.

Scott A. Beeser, Toronto

Company Officials Can Breathe Easier – Federal Court Rejects the Speculative Naming of Corporate Officers/Directors as Defendants in IP Infringement Actions

In a recent Federal Court decision, *Sunsolar Energy Technologies (S.E.T.) Inc. v. Flexible Solutions International, Inc. et al.* [2004 FC 1205], Mr. Justice Rouleau struck out an action against an officer/director claiming personal responsibility for the allegedly infringing actions of two corporate defendants. As alleged, the action against the officer/director was for "authorizing and directing" a course of deliberate and willful trade-mark infringement by the corporate defendants. However, the Statement of Claim failed to include any specific material facts to support the allegations against the individual officer/director.

At first instance, the Prothonotary refused to strike the action against the individual officer/director on the ground that "the Statement of Claim point[ed] to circumstances on which it *could be reasonable to conclude* that [the officer/director], as president of both corporate defendants, *could have been involved* in a deliberate, willful and knowing pursuit of a course of conduct likely to constitute infringement, or a course of conduct reflected in an indifference to the risk of

it...". However, on appeal, Mr. Justice Rouleau agreed with appellants' submissions that this was too speculative a test, and instead ruled that an officer/director must be more than "involved" in actions of a corporate defendant to be liable. Mr. Justice Rouleau held that to be properly made a party to an action, a corporate officer/director must instead actually know of likely infringement or be indifferent to the risk thereof, and this knowledge of likely infringement must be alleged with particularity for a claim against an officer/director to stand.

Sunsolar confirms that the Federal Court will not hesitate to strike out unparticularized claims against corporate officers/directors at the pleadings stage. Plaintiffs will not be permitted to embark on speculative actions against officers or directors without first pleading with particularity the factual basis upon which either: (1) the officer/director made the infringing actions "his own" or (2) the basis for actual knowledge or indifference to infringement by the officer/director.

Franc Boltezar and Emily Stock, Vancouver



Franc Boltezar



Emily Stock



Mark K. Evans

Top 10 Tips for Registering Trade-marks in Canada

Canada has led the G-7 in economic growth and is the largest trading partner of the United States. Thus, the economic importance of trade-mark protection in Canada is self-evident.

The Canadian *Trade-marks Act* and the policies and practices of the Canadian Trade-marks Office make Canada a relatively simple and cost-effective jurisdiction for registering trade-marks. Here is a list of some of the most important practical tips for registering trade-marks in Canada:

1. *International Classes*: Canada is one of very few countries in the world that does not use the International Classification system. As a result, a single application can cover an unlimited breadth of wares and/or services, all for the single government fee.
2. *Electronic Filing*: Smart & Biggar/Fetherstonhaugh's practice is to file all applications electronically, subject to exceptional circumstances. By filing electronically, we are provided with the filing receipt information almost instantaneously, and the government fee is reduced by \$50.
3. *Madrid Protocol*: Canada is not a member of the Madrid Protocol. Consequently, a separate Canadian application must be filed.
4. *Signing of Applications*: We can sign for the applicant in our capacity as Trade-mark Agents. Moreover, a Power of Attorney is generally not required.
5. *Priority Documents*: In order to claim the convention filing date under the Paris Convention, it is not necessary to file a copy, certified or otherwise, of the foreign priority application.
6. *Proposed Use Applications*: Applications can be filed on the basis of proposed use in Canada. However, unlike in some jurisdictions, it is important that the trade-mark not yet be in use in Canada if filed on this basis. The filing of a proposed use application for a mark already in use in Canada can constitute at least a basis to oppose the application. Thus, if the mark is in use in Canada, we require the date of first Canadian use.
7. *Relying on a Foreign Application or Registration*: Registration can be obtained in Canada without commencing use in Canada by relying upon a corresponding foreign application or registration so long as:
 1. The claim is made before the application is published for opposition purposes in the Canadian Trade-marks Journal;
 2. There is use of the trade-mark abroad; and
 3. A photocopy of a certified copy of the registration (not the application) is ultimately filed.
8. *Specimens of Use*: With rare exceptions, the Canadian Trade-Marks Office will not require specimens to be filed.
9. *Extensions of Time*: For applications filed on the basis of proposed use in Canada, the Canadian Trade-marks Office is generally quite liberal in providing a lengthy period of time to commence use in Canada. There is no definite limit to the number of extensions of time that may be granted, although substantive reasons for the delay may be required after several years.
10. *Speed*: The Canadian Trade-marks Office has dramatically improved the speed of examination. Currently, most applications are being examined within six to nine months of filing. Furthermore, officials have stated that their goal is to reduce this delay to two months within the next few years.

Mark K. Evans, Toronto

Nicholas H. Fyfe, Q.C., Honoured at CBA Judges' Dinner

Nicholas H. Fyfe, Q.C., was honoured at the annual judges' dinner held on May 20, 2004 by the Intellectual Property Section of the Canadian Bar Association, with the joint participation of the Judges of the Federal Court of Canada. Mr. Fyfe,

a former managing partner and current counsel to our firms, was honoured for his contributions to the practice of advocacy in intellectual property matters over a long career.

Notes

Announcements

Steven B. Garland was named President of the Intellectual Property Institute of Canada in October 2004.

T. Nessim Abu-Zahra, Frank Dudas, and Patrick D. Reimer of our Ottawa office, as well as *Y. Lynn Ing* and *Heather E. Tonner* of our Toronto office, have been called to the Ontario Bar.

Paul den Boef has joined our Ottawa office as a technical consultant. Mr. den Boef has a B.Sc. in Electrical Engineering from the University of Alberta. He is currently attending the University of Alberta, where he plans to receive an M.Sc. in Electrical Engineering.

Dr. Lee Morrisroe has joined our Ottawa office as a patent agent trainee and technical consultant in the biotechnology practice group. Dr. Morrisroe has a B.Sc. Hons. in Biochemistry and Molecular Biology from the University of Leeds, as well as a Ph.D. in Biochemistry & Cell Biology from the University of Manchester.

Dr. Rebecca M. Eagen has joined our Vancouver office as a patent agent. Dr. Eagen has a B.Sc. Hons. in Genetics from the University of Western Ontario, an M.Sc. in Molecular Biology and Biochemistry from Simon Fraser University, and a Ph.D. in Molecular Biology and Biochemistry from the University of British Columbia.

Franc Boltezar has rejoined our Vancouver office as an associate. Mr. Boltezar has a B.S.E. in Civil and Environmental Engineering from Duke University, an LL.B. from the University of British Columbia, and an LL.M. in Intellectual Property Law from the Franklin Pierce Law Center. He was

called to the British Columbia Bar in 1999 and the New York State Bar in 2001.

Seminars and Presentations

Sanjay D. Goorachurn spoke on the topic of "Minimizing Risks and Maximizing Opportunities on the U.S. Market" at the Montreal Chamber of Commerce in Montreal on June 2, 2004.

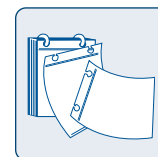
Sanjay D. Goorachurn spoke on the topic of "Effectively Managing and Leveraging IP Assets for Commercial Success" at the Canadian Institute Conference titled "La protection, le transfert et la gestion de la propriété intellectuelle", held in Montreal on June 16 - 17, 2004. At the same conference, *François Guay* gave the Co-Chair's Opening Address.

Gunars A. Gaikis led a course and presented a paper entitled "Strategic Partnerships From a Regulatory Perspective" at a course entitled "Advanced Licensing for Pharmaceuticals and Biotechnology" hosted by the Federated Press in Toronto from June 21 - 22, 2004.

Sanjay D. Goorachurn spoke at the Réseau Interval Inc. seminar entitled "IP Worship on University R&D Collaboration Agreements" at the University of Montreal on June 29, 2004.

Sanjay D. Goorachurn conducted a seminar entitled "Workshop on IP Issues Relevant to Companies Seeking VP Financing" as a prelude to the Emerging Technologies Venture Capital Conference on August 18, 2004 in Montreal.

Stephan P. Georgiev spoke on the topic of "Perspectives of Key Players in the Nano-technology Value Chain" at the Emerging



Technologies Venture Capital Conference in Montreal from September 14 - 15, 2004.

Michael D. Manson spoke on the topic of "Trademark and Copyright Strategies" for the Government of the Northwest Territories on September 18 - 30, 2004 in Yellowknife.

Mark G. Biernacki spoke on the topic of "Introduction to Intellectual Property for Entrepreneurs" at the Toronto Small Business Forum on September 22, 2004.

Geneviève M. Prévost was a panelist in a discussion on "Boutique/Specialty Practices", held at Osgoode Hall Law School on September 22, 2004.

Christian Bolduc gave two discussions on the topic of "Introduction to Trade-mark Strategies and Management", the first in Montreal on October 6, 2004, and the second in Quebec City on October 14, 2004.

Christian Bolduc spoke about the patent agent profession to a group of microbiology students at Laval University in Quebec City on October 15, 2004.

At the 78th IPIC Annual Meeting in Banff on October 14 - 16, 2004: *A. David Morrow* spoke on the topic of "Innovations and International Developments in Survey Evidence"; *Michael D. Manson* discussed "Interesting Developments in the *Monsanto v. Schmeiser* Decision: Patentable Subject Matter and Damages"; *Steven B. Garland* spoke on "Comparative Approaches to 'Shake Down' Letters and Contingency Fee Patent Litigation: Canada and U.S."; and *François Guay* spoke on the topic of "Quick Remedies in IP Litigation: Canada and Elsewhere".

Terry N. Kuharchuk was a panelist at two full-day seminars entitled "Intellectual Property for Business Lawyers" for the Legal Education Society of Alberta. These seminars took place in Edmonton on October 12, 2004 and Calgary on October 19, 2004.

Terry N. Kuharchuk spoke at the "Annual Information Technology IP Update" at The 8th Annual Canadian IT Law Association Conference in Calgary on October 21, 2004.

Michael D. Manson spoke on the topic of "Patent Rights and Disputes" at the Intellectual Property

Litigation 2004 course held by the Continuing Legal Education Society of British Columbia on October 28, 2004.

L. Catherine Eckenswiller will be a panelist in a discussion on "The Investor's View of Commercialization" at the Research Money Conference being held in Ottawa on November 9, 2004.

Gunars A. Gaikis will speak on the topic of "Patented Medicine Notice of Compliance (NOC) Regulations: Key Legal and Strategic Development Impacting Brand Names and Generics" at the Canadian Institute's 3rd Annual Forum on Pharma Patents in Toronto on November 9 - 10, 2004.

A. David Morrow will discuss genetically modified living matter in Canada at The Advocates' Society Fall Convention being held in Scottsdale, Arizona on November 18 - 21, 2004.

Nancy P. Pei will lead a post-conference workshop entitled "Garnering Legal Intelligence to Make Informed Business Decisions" after the Canadian Institute's 12th Annual Pharmac Conference in Toronto on November 24, 2004.

Christian Bolduc will present at two EDILEX courses in Montreal, the first entitled "Technologies I - R & D Contracts" being held on November 25, 2004, and the second entitled "Technologies II - The Contractual Bases of Research & Development and Technology Transfer" being held on November 26, 2004.

Mark K. Evans will speak on the topic of "The Responsibility to Obtain and Maintain Intellectual Property" at The Canadian Institute's seminar on Intellectual Property License Agreements being held in Toronto on December 8 - 9, 2004.

Joy D. Morrow will give the Co-Chair's Opening Address at Insight Information Co.'s 2nd Annual Technology Transfer and Commercializing IP in the Life Sciences, being held on December 13 - 14, 2004 in Toronto. At the same conference: *David E. Schwartz* will speak on "Obtaining Patents From Inventions Developed in an Academic Environment"; and *L. Catherine Eckenswiller* and *Theodore W. Sum* will lead a workshop on "Successful Collaborations in the Life Sciences From Negotiation to Contract Drafting".

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Publications

Arnold T. Ceballos, "European Court of Justice Clarifies When a Refusal to Licence Copyright Violates European Competition Laws", *IPIC Bulletin*, May/June 2004.

Arnold T. Ceballos, "Reforms to Canada's Copyright Regime Urged", *The Lawyers Weekly*, July 2, 2004.

Arnold T. Ceballos, "Validity Cannot Be Challenged During Opposition Proceedings", *World Trademark Law Report*, July 14, 2004.

Daphne C. Ripley, "Regulating Beauty", Vol. 56, no. 7 of *Canadian Chemical News*, July/August 2004.

Arnold T. Ceballos, "Registrar Can Issue a Second Trademark Expungement Notice", *World Trademark Law Report*, September 1, 2004.

Daphne C. Ripley, "Balancing Act", Vol. 56, no. 9 of *Canadian Chemical News*, October 2004.

Franc Boltezar and *Kathy Rzeszutek*, a summer student, "Software Piracy Problem Continues to Plague Canada", *World Copyright Law Report*, September 21, 2004.

Steven B. Garland and *Jeremy E. Want*, "End of the Road: Supreme Court Rules in Favour of Monsanto", *Patent World*, September 2004.

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The preceding is intended as a timely update on Canadian intellectual property law. In order to request a copy of any decision, paper or legislative document, or for more detailed information or suggestions, kindly contact an author of the relevant article, or the Editor, *A. David Morrow*. The contents of our Newsletter are informational only, and do not constitute legal or professional advice. To obtain such advice, please communicate with our offices directly. To be put on the *IP Perspectives* mailing list, or to amend address information, please call (416) 593-5514 (ext. 402).