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## Life Form Patents – The Schmeiser Case – An Update

In *IP Perspectives* for [October 2002](#), we reported on the decision of the Federal Court of Appeal in the *Schmeiser v. Monsanto* case. The trial judge and the Federal Court of Appeal found that Mr. Schmeiser and his company had infringed Monsanto's patent on glyphosate-resistant canola genes and cells by planting a crop of glyphosate-resistant canola containing the patented genes and cells, and granted Monsanto an injunction and damages. On January 20, 2004, the Supreme Court of Canada heard Mr. Schmeiser's appeal of the Federal Court of Appeal decision. The Supreme Court reserved its decision. Reserved decisions normally issue within about six to eight months of the date of hearing. The decision could have an important effect on the

availability and scope of patents for genetically modified genes and cells. At the hearing, in addition to arguments by the parties to the appeal, the Supreme Court heard arguments by a number of intervenors. One of them, the Canadian Seed Trade Association ("CSTA"), argued in favour of the patentability of genetically modified genes, cells, seeds and plants, and in favour of protecting patents to genes and cells in the same way as any other patented subject matter. The CSTA was represented at the hearing by A. David Morrow and Colin B. Ingram of our Firm.

A. David Morrow, Ottawa

## Patent Fees Updated

*This will update previous notes on this subject, published in the [June](#) and [October 2003](#) issues of *IP Perspectives*.*

In *Barton No-Till v. Dutch Industries*, the Federal Court of Appeal held that, if a small entity maintenance fee is incorrectly paid where a large entity maintenance fee was required, and the time for reinstatement has passed, the patent has irrevocably lapsed, and the payment of a "make-up" fee is not possible. On December 11, 2003, the Supreme Court of Canada denied Dutch Industries' leave to appeal this decision.

In a separate decision released on November 25, 2003, *F. Hoffman-La Roche AG v. The Commissioner of Patents, 2003 FC 1381*, the Federal Court, Trial Division, confirmed that the provisions of the *Patent Act* governing the payment of maintenance fees require strict compliance. In that case, a maintenance fee due on a reissued patent was not paid, and no action was taken during the reinstatement year to correct the non-payment. Notwithstanding evidence

of the patentee's intention to pay the fee, and evidence of incorrect notices by the Patent Office, the Court found that the *Patent Act* provides no legal basis on which a patentee might avoid the consequence of non-payment of fees, namely, the irrevocable lapse of the patent. The Court stated that "patent holders . . . must shoulder certain burdens and obligations. Among them is the duty to pay maintenance fees to keep a patent in good standing."

The *Roche* and *Dutch Industries* decisions highlight the importance of strictly adhering to the maintenance fee provisions of the *Patent Act and Rules*. We are continuing our practice of paying large entity fees in all cases to avoid even the risk of improper payment.

The Canadian government may take action to alleviate at least some of the concerns arising from the rigidity of Canada's laws in this regard. We reported in *IP Perspectives* for [October 2003](#), that the



A. David Morrow

government of Canada had announced its intention to amend the *Patent Act and Regulations* in order to address the issue raised by the *Dutch Industries* decisions. On December 22, 2003, the government published its proposed legislation, and invited comment from the public. The proposed legislation would specifically address the small entity fee issue by providing a six month period wherein any improperly paid small entity fee may be "topped up" with retroactive effect. This would be a one time opportunity to revive otherwise invalid patents. The legislation also contains a provision that would empower the government to pass regulations dealing more generally with the problem of

incorrectly paid or unpaid fees. The form that the regulations might take has not been announced. They could, for example, permit the payment of make-up fees in situations where the patentee can show a *bona fide* intention to pay the correct fee at the appropriate time. However, this is speculative at present. The public has until the end of March, 2004, in which to submit comments, and it is not known how soon the legislation might become law. The introduction of this legislation could be affected by a Canadian general election, which might be called in the spring of 2004.

A. David Morrow, Ottawa



Nancy P. Pei

## Canada Introduces Legislation to Amend Patent Act to Permit Exports of Patented Medicines to Developing Countries

On November 6, 2003, the Government of Canada introduced proposed changes to the *Patent Act* and the *Food and Drugs Act*. The stated purpose of the amendments is "to facilitate access to pharmaceutical products to address public health problems afflicting many developing countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics." These proposed changes were introduced to implement the World Trade Organization's recent Declaration on the Trade-Related Aspects of Intellectual Property Rights Agreement and Public Health (Doha Declaration).

The legislation would provide the ability of Canadian drug manufacturers to obtain compulsory licenses to export specified amounts of specified patented drugs to specified countries.

Parliament had given second reading to the Bill when Parliament was prorogued on November 12, 2003. The proposed legislation was reinstated by the Government on February 12, 2004, with the same text as the previous Bill and has been referred to the Standing Committee on Industry, Science and Technology.

Nancy P. Pei, Toronto



Jeremy E. Want

## Patent Litigation - *Markman*-type Hearings Overturned in Canada

*Realsearch Inc. et al v. Valone Kone Brunette Ltd. et al*, January 9, 2004, 2004 FCA 5.

In US patent litigation, claim construction is routinely carried out in a separate hearing before trial, a procedure known as a *Markman* hearing (named after the 1996 decision of the US Supreme Court in *Markman v. Westview Instruments, Inc.*). In May of 2003 (and as reported in our June 2003 issue of *IP Perspectives*), a Canadian Court had for the first time approved of a *Markman*-type hearing in

Canada. This decision has now been overturned on appeal.

On appeal, the Federal Court of Appeal was of the view that the lower Court did not give sufficient weight to all the relevant considerations. The Federal Court of Appeal pointed out that the Plaintiffs would lose the advantage of having the whole of the action tried at the same time by the same judge. The Court was also not satisfied that a *Markman*-type hearing would actually save time

and expense in the circumstances of the particular case at bar.

It is interesting that in its decision the Federal Court of Appeal does not completely foreclose the possibility of a *Markman*-type hearing pursuant to Rule 107. The Court indicated that "it is not to suggest that a *Markman*-type order would not be available in any circumstances under the rule which, admittedly,

is broadly phrased." However, the Court was hesitant in the *Realsearch* case to produce a change of this magnitude in current Canadian patent law practice without prior debate and careful consideration. As a result, for the time being, it appears that patent claims in Canada will continue to be construed for the first time by the Court at trial.

*Jeremy E. Want, Ottawa*



Philip D. Lapin

## Not Copyright Infringement to Copy Music from the Internet For Personal Use

Rather than making potential criminals of many Canadians, the Canadian government implemented legislation stipulating that it is not copyright infringement to copy music onto an audio recording medium for private use. The legislation does not specify the source of the music, and it therefore appears to cover any source, including the Internet. However, at the same time, the *Canadian Copyright Act* was further amended to permit the Canadian Copyright Board to impose levies on blank audio recording media. The levies are paid to the Canadian Private Copying Collective (CPCC) which then distributes the funds to eligible authors, performers and producers of recorded musical works.

The exception is limited to "the private use of the person who makes the copy." Therefore, if person A copies music from the Internet for her personal use, there is no copyright infringement. However, if person A copies music from the Internet intending to give the copy to a friend, she is infringing copyright. Moreover, if person A copies music over the Internet, the person who uploads the music for person A to subsequently copy is arguably infringing copyright.

In a decision recently rendered by the Canadian Copyright Board (on December 12, 2003), the Board helped to clarify the definition of the term "audio recording medium." The Board held that blank CDs are covered, but that blank DVDs do not constitute an "audio recording medium." It follows that blank DVDs are not subject to a levy, and copying music onto a blank DVD constitutes copyright infringement.

The Board also imposed a new levy on media in digital audio recorders like portable MP3 players. However, the levy was only set for those recorders that have permanently built-in recording media, like internal hard drives. No levy was set on the removable media that is used in many other types of recorders because these forms of media are also used in many other devices.

The Board's decision does not answer the question as to whether or not it is copyright infringement to copy music for personal use onto one's personal computer hard drive.

It should also be noted that while the levies set down by the Board are now firmly in place, the Board's comments regarding the legality of internet downloading have yet to be endorsed by the Canadian Courts, who are the ultimate authorities on the meaning of the provisions of the *Copyright Act*, including the provision relied upon by the Copyright Board in its decision. Therefore, while the statements of the Board are not binding in any future judicial determination that may take place, they should have persuasive effect. The Canadian Recording Industry Association, which has recently threatened legal action against individual file sharers in Canada, will likely need to consider the implications of this important Copyright Board decision before formulating any litigation strategy.

*Philip D. Lapin and Elliott S. Simcoe, Ottawa*



Elliott S. Simcoe



Arnold T. Ceballos

## Sound Marks Can Function as Trade-marks in Europe

The Canadian Trade-marks Office has recently confirmed its position that sound trade-marks are not registerable in Canada. At the same time, the European Court of Justice has concluded that sounds may function as trade-marks in Europe.

Although the *Trade Mark Directive* that harmonizes the trade mark laws of the member states of the European Union does not mention sounds as trade marks, the European Court found that it must be interpreted as meaning that sounds can constitute trade-marks.

The case arose when a Dutch law firm, Shield Mark, obtained trade-mark registrations from the Benelux Trade Marks Office for the opening tones of Beethoven's "Für Elise" and for the crowing of a rooster. When a court refused to enforce the trade-marks, the firm appealed to the Netherlands Supreme Court. The Supreme Court suspended the hearing of the case and instead asked the European Court of Justice to rule on a number of preliminary questions with respect to the interpretation of the *Trade Mark Directive*.

On November 27, 2003, the Court of Justice concluded that the *Directive* was to be interpreted as "meaning that sound signs must be capable of being regarded as trade marks provided that they are capable of distinguishing the goods or services of one undertaking from those of other undertakings and are capable of being represented graphically."<sup>[1]</sup>

Many jurisdictions, including some in Europe, explicitly allow sounds to be protected as trademarks, including Germany, France and Italy. Others, such as the United Kingdom, do not explicitly provide for the registration of sound trade marks in their legislation, but have allowed sounds to be registered. In the United States sound trade-marks have been registered under Section 45 of the *Lanham Act*, which states that a mark includes "any word, name, symbol, or device, or any combination thereof." Registered sound marks include, for instance the famous five tone Intel Corporation sound and Yahoo! Inc.'s yodel.

Canada's Trade-marks Office has consistently shown a reluctance to allow registration of sound marks. While one sound mark for a series of musical notes

was registered in 1989 (Registration No. TMA359,318), subsequent applications have not been approved.

There are currently a handful of pending applications in the Canadian Trade Marks Office for sound marks. These include applications for Intel Corporation's five tone sound, the Yahoo! yodel and MGM's roaring lion.

Registrability in Canada is governed by Section 2 of the *Act*, which defines a trade-mark as being "a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others."

There appears to be nothing which would prevent a sound mark from acting as a trade-mark in Canada, as long as it was used to distinguish.

In addition to being capable of distinguishing, the European Court of Justice in the Shield Mark case stated that it must be possible to represent sounds graphically. The proprietor of the marks at issue in the European case had attempted to "cover all the bases" by obtaining registrations which included a variety of representations of the marks, ranging from a staff on which the first nine bars of Für Elise are noted, to a representation of the musical notes (E, D sharp, E, D Sharp, E, B, D Sharp, C, A), to an onomatopoeic representation of the crowing rooster ("Kukelekuuuuu").

The Court concluded that, in the end, it will be up to the national courts in Europe to decide in each particular case whether the requirements for a clear representation of the mark have been met. However, it added that the requirements are generally satisfied by representation on a staff. On the other hand, it noted, description in written language, including onomatopoeia and the naming of musical notes in a specific sequence, are insufficient to meet the requirements. In this respect, the decision may make it difficult to register non-musical sounds as trade-marks.

The issue of registrability of sound marks is likely to be adjudicated in the Federal Court of Canada at some



Brian P. Isaac

point in the future. It remains to be seen whether the international trend toward what the authors view to be the proper recognition of sound marks as trademarks will prevail in Canada.

*Arnold T. Ceballos and Brian P. Isaac, Toronto*

*[1] Judgment of the European Court of Justice dated November 27, 2003, case C-283/01 Shield Mark BV v. Joost Kist*

*[2] (1998), 80 C.P.R. (3d) 247 (F.C.A.)*

## The First Annual Smart & Biggar Scholarship Award

It gives us great pleasure to announce the winners of the first annual Smart & Biggar Scholarship Award. The winners are four exceptional engineering students who attend the University of Ottawa and have each received \$2000.00. The recipients were selected by the Faculty Selection Committee for their superior academic records and outstanding achievements.

The winners of the scholarship are Ms. Natasa Blitvic, a fourth year electrical engineering student; Mr. Hanna Farah, a fourth year software engineering student; Mr. Philippe Laliberté, a third year software engineering student; and Mr. Andy Pan, a fourth year electrical engineering student.

On January 28, 2004, three of the winners, and two members of the Faculty, Dr. David Gibbons,

Associate Dean of Academic Affairs along with Carol Mothersill, Manager of Faculty Development, celebrated the students' success at the Ottawa Office of Smart & Biggar.

To fund the scholarship, the Firm donated its earnings as a result of teaching a course at the University, "Intellectual Property and Technology Law for Engineers" taught by Elliott Simcoe, Philip Lapin and David Schwartz, all Partners in the Ottawa Office. The objective of the course is to introduce students to the legal mechanisms for protecting their inventions and other forms of intellectual property.

Smart & Biggar is proud to recognize the achievements of these admirable students and would like to encourage their further studies in the field of engineering.



*back row, left to right: Mr. Andy Pan, Mr. Elliott Simcoe, Mr. David Morrow, Dr. David Gibbons  
front row, left to right: Mr. Philip Lapin, Mr. Hanna Farah, Ms. Natasa Blitvic, Ms. Carol Mothersill  
Absent: Mr. Philippe Laliberté  
Photograph taken by: Ms. Mélanie Provencher*

## Firm Prominent in LEXPERT Survey Once Again

LEXPERT/American Lawyer Media has published The 2004 Guide to the Leading 500 Lawyers in Canada and the Guide has once again acknowledged the Firm and several of its partners.

"...it is important to note that many intellectual property practitioners have national practices, with their work in no sense being limited to the city where the firm has its principal office. 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)

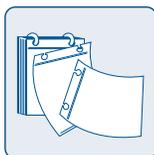
## New Partners

The partners of Smart & Biggar / Fetherstonhaugh are pleased to announce that effective January 1, 2004, David E. Schwartz and Kohji Suzuki have become partners of the Firms.

*David Schwartz* practices in our Ottawa office, focusing on biotechnology patent drafting and prosecution. Mr. Schwartz is a registered Canadian patent and trade-mark agent, and a registered US patent agent. He serves on the Intellectual Property Institute of Canada's (IPIC) Biotechnology Legislation Committee and the Joint Liaison

Committee - Biotechnology Patenting. He is also a member of the Canadian Bar Association.

*Kohji Suzuki* practices in our Ottawa office, covering all areas of intellectual property including patent drafting and prosecution both before the Canadian and US patent offices, litigation, as well as trade-mark prosecution. A member of the Bar of Ontario since 1997, Mr. Suzuki is also a registered patent agent in both Canada and the US, as well as a trade-mark agent. Prior to entering law, Mr. Suzuki gained industry experience in the telecommunications, and mechanical engineering consulting industries.



## Notes

### Announcements

We are pleased to announce that *Harvey Auerback* of our Montreal office was called to the Quebec Bar on November 12, 2003.

*Christian Bolduc* has accepted the position of Assistant Program Director for the 2004 Trade-marks I Course at McGill University.

We are pleased to announce that *May Ming Lee* of our Ottawa office and *Sally A. Hemming* of our Toronto office have passed the Canadian patent agent examination and are now registered patent agents.

*Shadi Monemdjou* has joined our Ottawa office as a technical consultant. Ms. Monemdjou was educated at the University of Ottawa, Faculty of Medicine where she received her M.Sc. and Ph.D. in Biochemistry.

*Euan R. Taylor* and *Yawen Liu* spent several weeks in November 2003 working in China and gathering information on Chinese patent prosecution and practice in the Life Sciences.

### Seminars & Presentations

*Michael D. Manson* and *Alakananda Chatterjee* presented on the topic of "Managing Intellectual Property and IP Basics" to the Aquanet Network, Canada's research network in Aquaculture on October 26, 2003.

*Euan R. Taylor* gave three presentations entitled "Canadian IP Update"; "Responding to Office Actions"; and "Drafting Patent Applications" to the lawyers and patent agents at China Science Patent &

Trade-mark Agents Ltd., during a visit to Beijing, China this November, 2003. He also spoke to patent examiners at the State Intellectual Property Office of China.

*Kavita Ramamoorthy* presented at a University of Western Ontario IP Panel on the topic of "Patent Pathos: Life without the Mouse" on November 6, 2004.

*Brian P. Isaac* presented on the Oland Export case at a Law Society of Upper Canada CLE program, the Six-Minute Intellectual Property Lawyer, held on November 7, 2003, in Toronto.

*François Guay* spoke on the topic of "Les litiges en matière de brevets: comment gérer votre technologie afin de les éviter" held at the Centre de Ressources du Parc Technologique in Ste-Foy, Quebec on November 27, 2003.

*Brian P. Isaac* presented a paper on "Extending IP Monopolies" at the INFONEX Intellectual Property Forum held in Toronto on December 5, 2003.

*Joy D. Morrow* was co-chair of Insight's Commercializing Intellectual Property in the Life Sciences conference, held in Ottawa from January 15 - 16, 2003. *L. Catherine Eckenswiller* presented on the subject of "Royalties and Other Compensation Issues in the Life Sciences," and she and Theodore W. Sum co-hosted and conducted a half-day licensing workshop.

*Kavita Ramamoorthy* was a guest lecturer on the topic of "PM(NOC) Regulations" for law students in the Biotechnology Law Course at the University of Western Ontario in London on January 16, 2004.

*A. David Morrow* co-wrote a paper with Donald H. MacOdrum for the Law Society of Upper Canada entitled "Update on Patents: Legislative Changes and Case Law 2003." *David Morrow* presented this paper at the Intellectual Property Law The Year in Review conference in Ottawa on January 16, 2004.

*Theodore W. Sum* presented on the topic of "Hot Topics in Licensing" to the Vancouver Chapter of the Licensing Executives Society (USA and Canada) held in Vancouver on January 22, 2004.

*Marc Gagnon* presented to the Intellectual Property Institute of Canada (IPIC) on the topic of "Everything You Always Wanted To Know About Industrial Designs

(Canada and United States) But Never Dared To Ask" in Montreal on January 27, 2004.

*Sanjay D. Goorachurn* presented on the topics of "Negotiating Alliances" and "Negotiating Licenses" at the "Atelier de sensibilisation en transfert technologique" held in Quebec City on February 5, 2004.

*Michael D. Manson* presented on the topic of "The Real Costs of IP Litigation and IP Insurance" at the Intellectual Property Institute of Canada (IPIC) conference on Managing the Intellectual Property Portfolio held in Vancouver on February 16, 2004.

*Brian J. Kingwell* will be moderating a panel discussion in Vancouver entitled The Future of Biotech: IT Opportunities in Life Sciences organized by the BC Technology Industry Association, in partnership with BC Biotech and the BC Medical Devices Association on February 23, 2004.

*François Guay* spoke on "Les litiges en matière de brevets: comment gérer votre technologie afin de les éviter" at Le Congrès Québécois pour Conseillers Juridiques held at the Hotel Omni Mount-Royal in Montreal February 23 - 24, 2004.

*Euan R. Taylor* presented on the topic of "Law in China" to the Asia Pacific Law Club at the University of British Columbia on February 25, 2004. He will present this same topic to the Graduate Class of the Faculty of Law at the University of British Columbia on March 4, 2004.

*Theodore W. Sum, S. Serge Shahinian* and *L. Catherine Eckenswiller* will be presenting a poster on the topic of Commercializing Research Tools at the AUTM Annual General Meeting being held in San Antonio, Texas on March 5, 2004.

*Theodore W. Sum* will be speaking on the topic of "Drafting License Agreements to Maximize Your IP Value" at the Institute of Professional Development conference on Negotiating and Drafting Major Commercial Agreements and Transactions in Vancouver from March 8 - 9, 2004.

*A. David Morrow* will be presenting a paper entitled "Patenting Living Matter: The Harvard Mouse and Schmeiser Cases in the Supreme Court of Canada" at Insight's 3rd Annual Drug Patents: The Latest Legal, Policy and Strategic Developments conference, in Toronto on March 29, 2004.

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*Euan R. Taylor* will present on the topic of "Law in China" to the International Law Section of the Canadian Bar Association CBA in Vancouver, in April 2004.

*François Guay* will be speaking on the topic of "L'utilisation trompeuse de votre marque de commerce par un compétiteur: quels sont les recours qui s'offrent à vous?" at the Canadian Institute conference on Droit de la publicité et du marketing at the Hotel Intercontinental in Montreal from April 19 - 20, 2004.

*Christian Bolduc* will speak on the topic on "Théories et considérations pratiques sur le choix, l'usage et la gestion des marques de commerce" at Le Centre du commerce mondial in Montreal on April 28, 2004.

## Publications

*Jean-Sébastien Brière*, "L'encadrement international du droit de la propriété industrielle - Première partie," Vol. 16, no. 1 of Les Cahiers de Propriété Intellectuelle in October, 2003.

*Jean-Sébastien Brière*, "L'encadrement international du droit de la propriété industrielle - Deuxième partie," Vol. 16, no. 1 Les Cahiers de Propriété Intellectuelle in October, 2003.

*Arnold T. Ceballos* and *Brian P. Isaac*, "Sound Marks Can Function as Trade-marks in Europe," The Lawyers Weekly, February 2004.

*Stephen J. Ferance*, "The Experimental Use Defence to Patent Infringement," 20 C.I.P.R. 1.

*A. David Morrow*, Chapter on Canada, "Getting the Deal Through: Patents 2004," Global Competition Review, January 2004.

*Nancy P. Pei*, "Review of Look-alike/Sound-alike drug names by Health Canada," Law Lore & Practice, December 2003.

*Ekaterina Tsimberis*, "What Every Trade-mark Litigator Needs to Know about Trade-mark Oppositions," Vol. 197 Développements récents en droit de la propriété intellectuelle, October/November, 2003.

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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 (extn. 386).