

1

Patenting Higher Life Forms –
Canadian Biotechnology Advisory
Committee Releases Report

2

Canadian Domain Name Dispute
Resolution Policy Now In Force

3

Canadian Skirmish in the
Copyright War Leads
to a Split Decision

4

Federal Court of Canada Grants
Order Permitting Seizure of
Defendant's Goods Before
Trial in Copyright Action

5

Changes to National Phase
Entry Under Chapter I in Canada

5

Bills of Discovery

6

James D. Kokonis Listed in
The Best of the Best

6

Smart & Biggar/Fetherstonhaugh
Selected as a Leading Firm

6

IP Perspectives Now Available
in Electronic Format

6

Notes

Patenting Higher Life Forms – Canadian Biotechnology Advisory Committee Releases Report

Proposes significant changes to Patent Act.

The Canadian Biotechnology Advisory Committee (CBAC) has recently issued a Report to the Government of Canada's Biotechnology Ministerial Coordinating Committee entitled "Patenting of Higher Life Forms and Related Issues".

The Report contains 13 recommendations, including proposals that would result in significant amendments to the Canadian *Patent Act*. Other recommendations merely propose conducting further study. Those recommendations that are of particular relevance to current Canadian patent law are discussed below.

One of the most significant recommendations in the Report is the CBAC recommendation that higher life forms, including plants, seeds and non-human animals be recognized under the existing *Patent Act* as being patentable subject matter (subject to certain limits on the rights of the patentee), provided that such subject matter meets the ordinary standards of novelty, non-obviousness and utility. The Federal Court of Appeal endorsed this very interpretation of the *Patent Act* in the "Harvard Mouse" case. The Harvard Mouse case has been heard by the Supreme Court of Canada and a decision is pending.

The Report proposes amending the *Patent Act* to prohibit patenting human beings "at all stages of development". Despite this language, it is not intended to preclude patenting of DNA sequences, gametes, stem and other cells, or organs of human origin.

Another interesting proposal put forward in the Report is a recommendation that the *Patent Act* be amended to include provisions that protect innocent bystanders from claims of patent infringement with respect to natural or accidental spreading of patented seed, patented genetic material, or the insemination of an animal by a patented animal. This

"innocent bystander" argument was raised unsuccessfully in the matter of *Monsanto Canada Inc. v. Schmeiser*, wherein the defendant argued that his fields had become contaminated with Monsanto's "Roundup-Ready" canola, without any advertent act on his part. The Monsanto case was appealed and is pending decision by the Federal Court of Appeal.

The Report also contains a recommendation that a "farmer's privilege" provision be included in the *Patent Act*. Such a provision would specify that farmers are permitted to save and sow seeds from patented plants or to reproduce patented animals, provided

Report contains 13 recommendations.

these offspring are not sold as commercial propagating material, in the case of plants, or commercial breeding stock, in the case of animals.

Perhaps the most interesting recommendation in the Report is the proposal that the *Patent Act* be amended to include a research and experimental use exception that would allow the use of a patented process or product for either (a) private or non-commercial study, or (b) conducting research on the subject-matter of the patented invention to investigate its properties, improve upon it, or create a new product or process.

Furthermore, the Report recommends that Canada support international efforts to determine whether and how intellectual property can be used to protect traditional knowledge. A related proposal is a recommendation that the description of prior art in patent applications must include, so far as is practicable, traditional knowledge that has been made public through oral, as well as written or published,

transmission. These proposals may not actually involve any change in existing laws.

Other recommendations in the Report address: establishing Patent Office guidelines for the patenting of biological material; developing of service standards for the Patent Office and publishing of Patent Office performance results; international patent harmonization, including ratification of the

Patent Law Treaty, which addresses the formal requirements for filing patent applications and maintaining patents; and the establishment of an opposition procedure to permit a patent to be opposed on the grounds that it is invalid or void. We will report on any future developments stemming from the Report in upcoming issues of *IP Perspectives*.

David E. Schwartz, Ottawa

Canadian Domain Name Dispute Resolution Policy Now In Force

After months of consultation, the Canadian Internet Registration Authority (CIRA) has just announced that the Domain Name Dispute Resolution Policy for dot-ca domain names is now in force. This means that owners of Canadian trade-marks now have available to them a mechanism for disputing the registration of confusingly similar dot-ca domain names that is as quick and inexpensive as the mechanism under ICANN's Uniform Dispute Resolution Policy (UDRP) for disputing the registration of dot-com domain names.

Michael D. Manson, a partner in our Vancouver office, has been appointed as a panellist by the British Columbia International Commercial Arbitration Centre, one of two private sector dispute resolution service providers appointed by CIRA to administer the policy.

Though the Canadian domain name dispute resolution policy shares many features of the UDRP, it differs in several significant respects. First, persons who wish to bring a complaint under the policy must comply with the Canadian Presence Requirements for registrants of dot-ca domain names. The only exception to this rule is a non-Canadian owner of a registered trade-mark in Canada. Second, the policy includes a penalty of up to \$5000 for filing clearly spurious complaints against legitimate domain names. Third, all disputes must be resolved by a three-person panel, except in those cases

where the domain name registrant chooses not to participate.

The new policy is designed to provide a forum in which clear cases of bad faith registrations of dot-ca domain names can be addressed. Under the policy, a bad faith registration of a domain name is one that is intended (i) primarily for the purpose of sale to someone who has rights to a trade-mark or trade-name that is confusingly similar to the domain name; (ii) to prevent someone who has rights to a trade-mark or trade-name from registering it as a dot-ca domain name; or (iii) to disrupt the business of a competitor who has rights to a trade-mark or trade-name.

A domain name registrant will succeed against a complainant under the policy if it can prove that it has a legitimate interest in the domain name in dispute. The policy includes a broad definition of legitimate interests that takes into account most good faith uses of a domain name, whether commercial or non-commercial.

Proceedings under the policy are expected to take up to 120 days, from start to finish.

For more information on initiating a complaint under Canada's new domain name dispute resolution policy, please contact Elliott Simcoe (Ottawa), Mark Evans (Toronto), Christian Bolduc (Montreal) or Tim Lo (Vancouver).

Elliott S. Simcoe, Ottawa

Canadian Skirmish in the Copyright War Leads to a Split Decision

New test for infringement introduced.

The Supreme Court of Canada recently released judgment on a copyright case that may have introduced a new test for copyright infringement in Canada. Arguably, the majority decision also heralds an increased level of recognition of the property rights of purchasers of copyrighted material.

In *Théberge v. Galerie d'Art du Petit Champlain inc.* ("*Théberge*"), the issue revolved around an interlocutory order granted to the respondent Théberge for the seizure before judgment of certain canvas-backed reproductions embodying his works. Théberge is a painter of international stature, who assigned to a publisher the right to publish reproductions of certain of his works.

Transfer of image to new medium is not infringement.

The appellants were a number of art galleries, that purchased cards, photolithographs and posters from the publisher and subsequently transferred the images contained thereon to canvas, using a transfer process that lifted the ink from the original document and transferred it to a canvas, leaving the original document blank.

Displeased with this action, Théberge applied for an injunction, accounting and damages against the appellants in the Quebec Superior Court. The artist also sought and obtained, on an interlocutory basis, a writ of seizure before judgment.

Under the *Act*, "infringing", in relation to a work, is defined as "any copy, including any colourable copy, made or dealt with in contravention of this *Act*". Generally, the copyright owner has the right "to produce or reproduce the work ... in any material form whatever".

The appellants applied to quash the seizure. Concluding that transferring an authorized paper reproduction onto canvas did not amount to infringement within the meaning of the *Act*, the Superior Court granted the appellants' request.

However, on appeal to the Quebec Court of Appeal, the seizure was restored with regard to the canvas-backed reproductions.

The Supreme Court of Canada, in a 4-3 decision, again quashed the seizure. Mr. Justice Binnie, speaking for the majority, characterized Théberge's claim of infringement as a colourable attempt to appropriate the *Act*'s economic remedies in order to extend his moral rights, which are given a circumscribed scope under the *Act*.

Going to the merits of the case, Mr. Justice Binnie concluded that the concept of "reproduction" is usually defined as the act of producing additional or new copies of the work in any material form. There must be multiplication of the copies to have reproduction. In the ink transfer method, there is no multiplication of copies as the paper poster from which the ink is taken is left blank. Nevertheless, His Lordship took pains not to foreclose the possibility that a change of substrate might amount to reproduction, if part of a more extensive set of changes.

Under this definition, there was no reproduction by the appellants, thus there was no infringement, and consequently, no basis upon which to deem the canvas-backed reproductions to be the property of the respondent pursuant to s. 38(1) of the *Act*.

In dissent, Gonthier J. concluded that the respondent had expressly confined the assigned rights to producing reproductions of his works on paper, and thus retained all rights to produce reproductions in any other medium whatsoever. Accordingly, in transferring authorized reproductions of his works onto canvas, the appellants "produce[d] or reproduce[d] [these] work[s] or any substantial part thereof in any material form whatever", contrary to s. 3(1) of the *Act*.

In summary, the test for copyright infringement in Canada now appears to incorporate a requirement that the works be multiplied in number. It will be interesting to see how the Courts grapple with this new requirement.

Steven B. Garland & Dennis S.K. Leung, Ottawa

Federal Court of Canada Grants Order Permitting Seizure of Defendant's Goods Before Trial in Copyright Action

First use of recent amendment to Copyright Act.

In *Diamant Toys Ltd. v. Jouets Bo-Jeux Toys Inc.* 2002 FCT 384 (“*Diamant*”), the Federal Court-Trial Division relied for the first time upon a recent addition to the *Copyright Act* (the “*Act*”) and ordered allegedly infringing goods to be seized prior to trial. Accordingly, this amendment to the *Act* may now constitute a significant armament in copyright owners’ ongoing war against infringement of their works in Canadian court proceedings.

The plaintiff, Diamant Toys, alleged that it had acquired all of AMAV’s intellectual property, including copyright, in the relevant product line. The intellectual property at issue included thousands of illustrations and photographs used on the AMAV packages and instructions that were compiled in approximately 900 CD-ROMs, which were also purchased by the plaintiff.

The defendant began to market its own line of arts and crafts products that, the plaintiff alleged, infringed Diamant Toys’ copyright in the illustrations and photographs. The plaintiff sued in the Federal Court, alleging copyright infringement and passing off.

In late December, 2001, the plaintiff’s motion for seizure before judgment came on for argument before Mr. Justice Nadon of the Federal Court-Trial Division. On April 5, 2002, he issued an order granting seizure before judgment of goods from the defendant’s warehouse and from four retailers supplied by the defendant.

It is anticipated that this remedy will be available in those provincial jurisdictions, including Ontario, that permit seizure before judgment.

François Guay of our Montreal office and Steven Garland and Dennis Leung of our Ottawa office represented the plaintiff, Diamant Toys Ltd., in the above-noted matter.

Steven B. Garland & Dennis S.K. Leung, Ottawa

Infringing goods seized before judgment.

The new provision of the *Act* provides for the seizure prior to judgment of copies of the defendant’s impugned works that are alleged to infringe the plaintiff’s copyright, without requiring the plaintiff to demonstrate compliance with the standard tripartite test for interlocutory injunctive relief. The plaintiff need only establish a *prima facie* case of copyright infringement in respect of the works.

The dispute in *Diamant* centered on the assets of AMAV Industries Ltd., a Canadian manufacturer of a line of children’s arts and crafts products. Recently, AMAV’s parent company encountered financial difficulties, causing AMAV to sell off its assets to several companies, among them Diamant Toys and Jouets Bo-Jeux Toys.

The defendant, Jouets Bo-Jeux Toys, purchased a number of AMAV’s capital assets and some inventory.

Changes to National Phase Entry Under Chapter I in Canada

The Canadian government has published an amendment to the Patent Rules effective April 1, 2002. This amendment affects the due date for National Phase entry under Chapter I of the PCT.

Prior to April 1, 2002, the due date for entering the National Phase in Canada under Chapter I was 20 months from the priority date, extendible to 32 months on payment of a \$200 late fee.

The amendment is now in effect, and the due date for entering the National Phase in Canada under Chapter I is now 30 months from the priority date, extendible to 42 months on payment of the aforementioned late fee.

The due date for entering the National Phase under Chapter II continues to be 30 months, extendible to 42 months on payment of the aforementioned late fee.

The amended rules prohibit entry into the National Phase under Chapter I in situations where, before April 1, 2002, 32 months have elapsed from the priority date. Since the Canadian Patent Office was closed on April 1, 2002, we believe that PCT applications designating Canada and having a priority date of July 29, 1999 or later can take advantage of the amended rules.

John W. Knox, Vancouver

Bills of Discovery

An important part of an IP owner's legal tool kit.

Since the rise of the Internet, intellectual property owners have struggled with issues relating to the protection of their rights in cyberspace. It is trite law that almost all web sites, to varying degrees, are protected by copyright law. Moreover, various types of contractual relationships may be formed between Internet users and web site owners, by virtue of web-wrap or click-wrap licenses. However, due to

using chains of aliases or switching IP addresses to stay ahead of a web site owner's blocking efforts. So how does a web site owner stop unidentified or unauthorized persons from attacking his or her web site? Rather than seeking relief through an Anton Piller-type order, or a "John Doe" Order, which may be costly and not timely enough to identify these web user(s), the best first step may be to obtain a "bill of discovery".

A bill of discovery compels an innocent person to provide information about a wrongdoer.

A bill of discovery permits an aggrieved person (e.g. a web site owner) to compel an innocent person (e.g. an ISP) who becomes involved in the wrongful acts of another, to assist the aggrieved person by providing information about the wrongdoer. Fulfillment of this duty may be compelled through a free standing court application or action against the innocent party by way of a bill of discovery.

the nature of the Internet and privacy issues between Internet Service Providers (ISPs) and their subscribers, a web site owner may not have access to information that identifies people who have made unauthorized copies or who have violated the terms of a user agreement. Substantive rights cannot be protected or enforced when a wrongdoer cannot be identified.

Bills of discovery may also be useful in a wide variety of other intellectual property contexts.

Technological solutions to determine the true identity of Internet users are not always practical, or even available. To the extent that technological solutions (e.g. authentication protocols) may be available, the Internet user may counteract them by, for example,

In summary, any time that it is impossible to identify an IP infringer, but an innocent third party with knowledge is available, there may be judicial means to compel cooperation and identify the wrongdoer.

Franco Boltezar, Vancouver

James D. Kokonis Listed in *The Best of the Best*

Congratulations to *James D. Kokonis, Q.C.* who has been listed for the second time as one of the world's leading patent practitioners in Euromoney's *The Best*

of the Best. Mr. Kokonis is one of only 25 intellectual property lawyers in the world selected to appear in the guide, and the only practitioner from Canada.

Smart & Biggar/Fetherstonhaugh Selected as a Leading Firm

The editors of the *Global Counsel 3000* have recently selected Smart & Biggar/Fetherstonhaugh as a leading firm in the areas of intellectual property and life sciences in Canada. We would like to congratulate our partners *Gunars A. Gaikis* and *Joy D. Morrow* who have both been selected as leading practitioners in the area of life sciences. We are the only firm in Canada to have two professionals recognized at this level.

We would also like to congratulate the following firm members who were also recognized in the guide:

Nicholas H. Fyfe, Q.C., recommended in the area of intellectual property

Brian P. Isaac, recommended in the area of intellectual property

James D. Kokonis, Q.C., highly recommended in the area of intellectual property

A. David Morrow, highly recommended in the area of intellectual property

J. Christopher Robinson, recommended in the area of life sciences

Michael E. Wheeler, recommended in the area of life sciences

IP Perspectives Now Available in Electronic Format

We are pleased to now offer the option to our readers to receive *IP Perspectives* in electronic format. If you

wish to be added to our e-mail distribution list, please send an e-mail to ipperspectives@smart-biggar.ca.

Notes

Announcements

We are pleased to announce that the following individuals have joined the Firms:

Arnold T. Ceballos has joined our Toronto office. Mr. Ceballos has a B.A. in Political Science & American Studies, an M.A. in Journalism and was called to the Ontario Bar in 2000.

Benoît Huart has joined our Montreal office. Mr. Huart has a B.Sc. in Biochemistry and was called to the Quebec Bar in 2001.

Sohrab Sabet has joined our Ottawa office. Dr. Sabet has a B.Sc. in Chemistry, an M.Sc. in Analytical Chemistry and a Ph.D. in Atomic Spectroscopy.

Seminars and Presentations

Philip Lapin taught the trade-mark portion of the "Intellectual Property and Technology Law for Engineers" course at the University of Ottawa, during the winter term, 2002.

François Guay spoke on the topic of "Défense d'une technologie devant les tribunaux" at the Edilex/

Smart & Biggar Joint Conference that took place in Quebec City on January 31, 2002.

Stephen J. Ferance spoke on the topic of "Business Methods Patents: Canadian Perspective" to the Corporate Counsel and Business Law sections of the Canadian Bar Association - British Columbia, in Vancouver on March 5, 2002.

Matthew Zischka guest lectured at the Queen's University Faculty of Law in Kingston, Ontario on March 11, 2002, presenting an *Introduction to Patent Law* for students taking the Cyberlaw and Policy course.

Steven B. Garland gave a talk to University of Ottawa Engineering School students on "Engineering and Intellectual Property" on March 26, 2002.

Theodore W. Sum presented on the topic of "Drafting License Agreements to Maximize Your IP Value" at an Atlas Information conference entitled "Negotiating and Drafting Major Commercial Agreements and Transactions", held April 8 - 9, 2002 in Vancouver.

Theodore W. Sum and *Ronald D. Faggetter* held a licensing workshop on the topic of "Drafting Software Development and License Agreements" at the Federated Press conference entitled "Negotiating and Drafting License Agreements" that took place in Toronto on April 26, 2002.

Christian Bolduc was a presenter at the EDILEX course entitled "The Contractual Bases of Research & Development and Technology Transfer" which took place in Montreal on May 9, 2002. He spoke on the topic of "The Contractual Bases of R & D".

John W. Knox and *Terry N. Kuharchuk* were co-presenters of a Smart & Biggar/Fetherstonhaugh seminar on May 16, 2002 entitled "Advanced Patent Strategies for Maximizing Competitiveness in the Computer, Electronics and Telecommunications Industries". This seminar was held at the Telus Centre for Professional Development in Edmonton, Alberta and was co-sponsored by the Edmonton Council for Advanced Technology.

Brian G. Kingwell and *Terry N. Kuharchuk* were co-presenters of a Smart & Biggar/Fetherstonhaugh workshop in Edmonton, Alberta on May 23, 2002. The workshop was entitled "Advanced Patent

Strategies for Maximizing Competitiveness in the Medical, Pharmaceutical and Biotechnology Industries" and was held at the Telus Centre for Professional Development. The Alberta Health Industry Alliance was a co-sponsor of this workshop.

Brigide Mattar and *Matthew Zischka* spoke on the topic of "Extracting Value from Intellectual Property" to geomatics scientists and engineers at the Reseau Geoides 2002 Annual Conference that took place in Toronto on May 24, 2002.

François Guay co-Chaired and spoke on the topic of "Parallel Imports Problems" and *Sanjay D. Goorachurn* spoke on the topic of "International License Agreements" at a seminar held by the Canadian Institute entitled "Negotiating and Drafting IP License Agreements" that took place May 30 - 31, 2002.

Joy D. Morrow and *David E. Schwartz* presented on the topic of "Intellectual Property for Start-up Companies and SMEs" at the InNOVAcorp Business Incubation Group's Seminar Series in Dartmouth, Nova Scotia on June 4, 2002.

Joy D. Morrow spoke on the topic of protecting plant innovations in Canada as part of a seminar entitled "Plant Protection in the United States, Europe and Canada", during the BIO 2002 convention that took place in Toronto from June 9 - 12, 2002.

François Guay and *Sanjay D. Goorachurn* presented at a conference that was co-produced by Smart & Biggar and Marsh Canada Limited on June 19, 2002. Mr. Guay spoke on the topic of "IP Litigation Risks" and Mr. Goorachurn spoke on the topic of "Managing IP Risks and Rewards".

Terry N. Kuharchuk presented a paper entitled "The Obligations of the Licensee" and *Theodore W. Sum* presented a paper entitled "The Responsibility to Obtain and Maintain the Intellectual Property" at a Canadian Institute conference entitled "Intellectual Property License Agreements" that took place in Vancouver on June 24 - 25, 2002. The conference was co-Chaired by *Michael D. Manson*.

Michael D. Manson, *Mark K. Evans*, *Brian G. Kingwell* and *Steven B. Garland* will each be teaching sections of the Professional Specialization Certificate in International Intellectual Property Law at the

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University of Victoria. The course will be taught during July and August 2002.

François Guay will speak on the topic of "Exploiting Intellectual Property Rights" at the IPIC/McGill University Patent & Trade-marks courses being held August 3 - 9, 2002. *Sanjay D. Goorachurn* will present as part of the "Patent Licensing Workshop".

Philip Lapin will act as the Assistant Program Director, and will speak on the topic of "How to Conduct an Opposition" and will present a paper with the same title on August 15, 2002, as part of the week-long course entitled "Understanding Trade-marks - An Introductory Course" to be taught at McGill University in Montreal from August 12 - 16, 2002.

A. David Morrow will be speaking at the Canadian Institute's "Forum on Pharma Patents" taking place in Toronto, October 24 - 25, 2002. He will be speaking on "Emerging Issues in Biotech Patentability" and more specifically on the subject of the Harvard Mouse case. *Gunars A. Gaikis* will also be speaking at this Forum on the topic of "Navigating the Ever-Evolving NOC Regulations".

A. David Morrow will be speaking at The Canadian IT Law Association (IT.Can) Annual Conference on October 3, 2002 in Ottawa. He will be speaking on the subject of recent developments in trade-mark law.

Publications

Steven B. Garland & Dennis S.K. Leung, "Federal Court of Canada Grants Order Permitting Seizure of Defendant's Goods Before Trial in Copyright Action", *Lawyer's Weekly*, May 17, 2002.

Steven B. Garland & Dennis S.K. Leung, "Canadian Skirmishes in the Copyright Wars lead to a Split Decision", *Copyright World*, June/July 2002, pp. 18-20.

Steven B. Garland & May Ming Lee, "Patent Rights Permanently Lost Due to Incorrect Payment of Maintenance Fees", *Patent World*, May 2002, Vol. 142, p. 8.

Philip Lapin, "Intellectual Property Protection Unique to Canada: Official Marks", *Trademark World*, February 2002, pp. 31-36.

John R. Morrissey, "Insolvency and Intellectual Property", *Canadian Bankruptcy Reports*, May 2002, p. 135.

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+ of the British Columbia Bar only

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