

1

Life Form Patents - The
Schmeiser Case

2

Failure by Generic to Disclose
Product Samples
Results in Prohibition Order

3

Ontario Court of Appeal Finds
Trade-mark Registration a
Complete Defence in
Passing Off Action

4

Trade-marks: Functional Trade
Dress Not Protectable

5

The Peril of Filing Voluntary
Divisional Applications
in Canada

6

Two International
Surveys Recognize
Smart & Biggar/Fetherstonhaugh

6

Notes

Life Form Patents - The Schmeiser Case

On September 4, 2002, the Federal Court of Appeal delivered its judgment in *Percy Schmeiser and Schmeiser Enterprises Ltd. v. Monsanto Canada Inc. and Monsanto Company* (Neutral Citation 2002 FCA 309). This judgment, affirming the judgment of the Trial Division of the Federal Court, is an important early indication of how biotechnology patents will be interpreted by the Canadian courts, particularly patents concerning plant biotechnology.

This case involved an action for patent infringement brought by Monsanto against Percy Schmeiser, a Saskatchewan canola farmer, for infringement of Monsanto's Canadian Patent No. 1,313,830 entitled "Glyphosate-Resistant Plants" (the "'830 patent").

For many years, Monsanto has sold glyphosate herbicides under the trade-mark "Roundup." The '830 patent concerns a technology wherein a chimeric glyphosate resistance gene is introduced into plant cells, with the result that plants grown from such cells are resistant to glyphosate herbicides such as Roundup. Monsanto identifies such glyphosate resistant plants and their seeds with the trade-mark "Roundup Ready." Crops of Roundup Ready plants, such as canola, may be safely sprayed with Roundup herbicide after the crop has emerged, so that non-glyphosate resistant plants such as weeds are killed, without harming the crop of interest. The '830 patent contains claims directed to chimeric plant genes encoding a polypeptide that enhances glyphosate resistance in a plant, and claims drawn to glyphosate-resistant plant cells containing these chimeric plant genes.

In 1997, Mr. Schmeiser sprayed Roundup herbicide around power poles and in ditches bordering his canola fields, with a view to killing weeds and volunteer canola plants. Several days after spraying, it was noticed that many of the canola plants had survived the spraying. In an attempt to determine why the plants had survived, Mr. Schmeiser sprayed approximately three acres of one of his canola fields

with Roundup, and found that about 60% of the plants survived. Seed from these Roundup tolerant canola plants was combined with other canola seed, and used by Mr. Schmeiser to plant his entire 1998 canola crop.

At trial, it was held that the growing and selling of the 1998 Roundup tolerant canola crop constituted infringement of the '830 patent. The Court awarded Monsanto typical remedies for patent infringement, including an accounting for profits made by Mr. Schmeiser, an injunction and an order for delivery up to Monsanto of infringing plants and seeds.

On appeal, the Federal Court of Appeal affirmed the judgment and remedies granted at trial, and addressed various arguments raised by Mr. Schmeiser.

"Innocent infringer" defense rejected on the facts of the case.

Mr. Schmeiser argued that the '830 patent was only infringed if the Roundup Ready crop actually was sprayed with the Roundup herbicide, which Mr. Schmeiser had not done. The Court of Appeal found that the claims contained no limitation requiring the use of a glyphosate herbicide such as Roundup, and that this step was not a requirement of the claims.

Mr. Schmeiser also argued that Monsanto, by permitting farmers to plant Roundup Ready canola without taking steps to prevent the Roundup Ready canola from escaping and contaminating other farmers' fields (e.g. by the movement of pollen or accidental spillage of seed), had waived its rights under the '830 patent. This argument was rejected. The trial judge found, and the Court of Appeal affirmed, that Monsanto, through its licensing arrangements and monitoring efforts, had taken various measures to control the unwanted spread of

Roundup Ready canola. The Court of Appeal therefore found that there was no express waiver by Monsanto of its patent rights, and none could be implied from the company's conduct.

Mr. Schmeiser's most compelling arguments were that the Roundup Ready canola had come onto his property without his knowledge or agreement and therefore no infringement could be found because he had taken no steps to cause glyphosate resistant canola plants to grow on or adjacent to his property. These arguments were rejected on the evidence regarding Mr. Schmeiser's identification of Roundup Ready canola in 1997, deliberately saving seed from it, and using that seed to plant his crop for 1998. On these facts, there was no question of lack of intent, or any possible "innocent infringer" defense.

However, the Federal Court of Appeal did, in what must be considered *obiter dicta*, find some merit in Mr. Schmeiser's arguments, even though they were not applicable to the facts of the case. The Court acknowledged that it has often been stated that intention is not material to a finding of infringement. But the Court suggested that the invention claimed in Monsanto's '830 patent fell into a novel category, on the basis that a patented invention in a living plant is self-propagating without human intervention.

Such plants could come onto a person's land and be propagated there without his knowledge. Moreover, that person could become aware of the properties of the plant, and tolerate its continued presence on his land, without doing anything to cause or promote the propagation of the plant or its progeny. The Court considered that the lack of intention of the alleged infringer in such circumstances might be relevant.

The Court of Appeal was unpersuaded by Mr. Schmeiser's additional argument that as the owner of real property, he had legal title to plants found growing on his land, the right to save seed from such a plant, and to harvest the seed for profit in subsequent years. The Court found that property rights do not displace patent rights.

It seems that throughout this litigation, Mr. Schmeiser's arguments went largely to broad questions of fairness, and were not confined to the typical defenses in a patent infringement action. These arguments proved to be unsustainable on the facts, the Court finding, both at trial and on appeal, that Mr. Schmeiser had knowingly saved Roundup Ready canola seed, planted it the following year, and subsequently sold the resulting crop.

David E. Schwartz, Ottawa

Failure by Generic to Disclose Product Samples Results in Prohibition Order

In *AB Hassle v. Apotex Inc.*, September 4, 2002, (Neutral Citation FCT 931), the Federal Court, Trial Division, has prohibited issuance of a Notice of Compliance to Apotex Inc. for omeprazole/omeprazole magnesium tablets on the basis that Apotex failed to disclose product samples that would have assisted in determining whether its tablets infringed patents owned by Hassle.

The principal issue in the proceeding, brought under the *Patented Medicines (Notice of Compliance) Regulations*, was whether Apotex' product would

incorporate a subcoating. The parties submitted conflicting expert evidence on this issue, which Mr. Justice Kelen was unable to resolve. He noted that the experts retained by the parties disagreed over the issue of whether the material at the interface of the core and the outer coating was a subcoating within the meaning of the patents. Referring to a related case *AB Hassle v. RhoxalPharma (2000)*, 10 C.P.R. (4th) 38, where tablets were produced and tested in respect of two of the same patents, the Court found that Apotex' tablets could have been analysed to identify the existence and characteris-

tics of the subcoating. Further, Apotex could have submitted evidence to prove non-infringement, but declined to do so. As a result, the Court found that Apotex' allegation was deficient and granted an Order of Prohibition against the sale of Apotex' products during the term of the patent.

This case is particularly significant to pharmaceutical patentees as it suggests that, in circumstances

where product samples are the best evidence for assessing infringement, the generic must produce such samples or risk having the Court grant an Order of Prohibition.

AB Hassle was represented by Gunars A. Gaikis and J. Sheldon Hamilton of Smart & Biggar.

J. Sheldon Hamilton & Gunars A. Gaikis, Toronto

Ontario Court of Appeal Finds Trade-mark Registration a Complete Defence in Passing Off Action

A recent decision of the Ontario Court of Appeal has recognized an important reason to register trade-marks in Canada.

The decision exemplifies the benefits that may be realized through obtaining trade-mark registrations.

In *Molson Canada v. Oland Breweries Limited* (May 27, 2002)(19 C.P.R. (4th) 201 (Ont. C.A.)) the Ontario Court of Appeal dismissed Molson's claims of passing off by Oland as a result of the sale of OLAND EXPORT ale in Ontario. The Court found that Oland's registration of its label as a trade-mark was a complete defence to Molson's claim. As stated by the Court, "the respondent holds the trump card." The Court's rationale was that, pursuant to section 19 of the *Trade-marks Act*, the owner of a registered mark has the exclusive right to the use of the trade-mark throughout Canada. Thus, if a competitor takes exception to the use of the registered mark the competitor must attack the validity of the owner's registration. Molson failed to do so in this case.

No leave to appeal to the Supreme Court of Canada has been sought and accordingly, it is now clearly settled law in Ontario that a registration, unless found to be invalid, will constitute a complete

defence to an action for passing off.

From a practical point of view, the decision exemplifies the benefits that may be realized through obtaining trade-mark registrations in Canada. In addition to the ability to stop others from using confusing trade-marks in Canada, a registration may also provide some comfort as a shield. While a competitor may seek to invalidate the registration, the onus will be on that competitor to show that the registration is invalid. Further, after five years a registration can be invalidated on the basis of prior use only if it can be shown that the registrant had knowledge of the prior mark at the time of filing. This decision thereby reinforces the importance of monitoring the Register of Trade-marks and the Canadian Trade-marks Journal for potential confusing applications.

The decision not only confirmed a fundamental point in Canadian trade-mark law, but also clarified the ability of Oland to sell its product in the Province of Ontario and awarded significant legal costs payable from Molson to Oland.

Oland Breweries Limited was represented both at trial and on the appeal by Nicholas H. Fyfe, Q.C., Brian P. Isaac and Kevin K. Graham of Smart & Biggar.

Brian P. Isaac, Toronto

Trade-marks: Functional Trade Dress Not Protectable

Kirkbi and Lego Canada v. Ritvik, Gibson, J., May 24, 2002, 2002 FCT 585.

The Federal Court of Canada, Trial Division, recently ruled on a passing off case based on the trade dress of the basic LEGO block, referred to in the decision as the “Lego Indicia.”

The defendant, Ritvik, manufactured building blocks that looked exactly like LEGO building blocks, except that they lacked the trade-mark LEGO which appears on the top of all the knobs of a LEGO block. The Ritvik blocks were made to work with LEGO blocks. Lego sued Ritvik for statutory passing off under the *Trade-marks Act* based on trade dress. The main defence was that the LEGO block configuration was functional and that, as a matter of law, a functional configuration cannot be protected as a trade-mark in Canada. The Court found as a fact that the configuration of the basic LEGO building block was functional. Based on established jurisprudence, particularly *Remington v. Philips* (1995), 64 C.P.R. (3d) 467, the Court held that the action must be dismissed.

dismissed, not on the ground of functionality, but rather on the ground of lack of proof of distinctiveness of the plaintiff’s mark. It appears to be arguable that, while functionality may negate registrability, it does not, *per se*, negate protectability under the law of passing off or its statutory equivalent.

In the *Lego* case, the Court went on to make findings on other issues, even though it could have disposed of the case on the sole ground of functionality.

The Court held that the Lego Indicia was claimed or disclosed in an expired patent, and made it clear that it would have dismissed the case on that ground as well. This finding probably went too far. The blanket proposition that the subject matter of an expired patent cannot be protected as a trade-mark was rejected by the Federal Court of Appeal in *Thomas & Betts v. Panduit* (2000), 4 C.P.R. (4th) 498.

With respect to the passing off action itself, the Court found that the plaintiff had goodwill derived from the Lego Indicia and that the Ritvik trade dress was likely to cause deception. The Court said that it would nevertheless have dismissed the passing off case because Ritvik had no deliberate strategy to cause confusion. This conclusion is *obiter*, and questionable, because intent has never formed a necessary element of a passing off case.

The *Lego* case has been appealed to the Federal Court of Appeal, and it will be interesting to see how the latter Court disposes of the issues of functionality, expired patent rights and intent, as discussed above.

At present, the *Lego* case stands for the proposition that a functional trade-mark is not protectable in Canada, whether or not it is registered, and whether or not it is distinctive in fact.

A. David Morrow, Ottawa

Federal Court, Trial Division, holds that a functional trade dress can be copied by competitors.

The *Remington* decision was based in part on the seminal decision of the Supreme Court of Canada in *Parke, Davis v. Empire* (1965), 43 C.P.R. 1, in which the Supreme Court made the following widely quoted statement:

“The law appears to be well settled that if what is sought to be registered as a trade-mark has a functional use or characteristic, it cannot be the subject of a trade-mark.”

The latter statement related to registrability, and not to protectability in a passing off action. The *Parke, Davis* case also concerned a claim for passing off based on trade dress. The passing off claim was

The Peril of Filing Voluntary Divisional Applications in Canada

May lead to issues of double patenting.

In those instances when a Canadian patent application relates to more than one invention, the Commissioner of Patents is entitled to require that the applicant restrict the claims of the application to one invention. In such a situation, the applicant may, if desired, file one or more divisional applications directed to the non-selected invention(s).

It sometimes happens that an applicant wishes to file a divisional application even though the Commissioner has not objected to the application on the grounds that it relates to more than one invention. This may occur when, for example, the applicant wishes to take a patent on claims that have been indicated as allowable in an application and file a second, divisional, application to fight for broader claims.

Unfortunately, however, there is a risk that a “voluntary divisional” application will not form the basis of a valid patent in Canada.

The rationale for impugning a patent issuing from a voluntary divisional application stems from Canada’s law on double patenting. More particularly, our Supreme Court (in *Whirlpool Corp. v. Camco* (2000), 9 C.P.R. (4th) 129) has affirmed that a patent is invalid if its claims are either co-terminous with those of an earlier patent obtained by the same patentee or are obvious in light of the claims of the earlier patent. Further, there is no mechanism similar to the “terminal disclaimer” in the United States to avoid an obviousness-type double patenting problem.

The Supreme Court articulated two reasons for the prohibition on double patenting. The first was that it would prolong the patent term. This was certainly the situation with respect to the specific patents considered by the Court, as they issued under Canada’s old Act under which the term of a patent was 17 years from issue. However, under our new Act (post-October 1989), a patent issuing on a divisional application expires on the same day as a patent on the original application and thus the patent term is not extended. The second reason given by the Court was that our *Patent Act* indicates that only one patent can be granted for one invention. This proposition is arguably also inherent in the current *Patent Act*.

In another Supreme Court decision (in *Consolboard v. MacMillan Bloedel* (1981), 56 C.P.R. (2d) 145), the Court made it clear that a double patenting rejection would not be appropriate if the second patent resulted from a request by the Commissioner of Patents to file a divisional application. Thus, only second patents resulting from voluntary divisional applications are at risk.

Therefore, the filing of a voluntary divisional application carries with it the risk that the later patent to be granted would be invalid by reason of double patenting if its claims do not define subject matter that is inevitably distinct from that of the earlier patent.

Ronald D. Faggetter, Toronto

Two International Surveys Recognize Smart & Biggar/Fetherstonhaugh

In the most recent edition of *Managing Intellectual Property's* "World IP Survey," published in October, 2002, Smart & Biggar/Fetherstonhaugh has been ranked as the leading patent law firm in Canada.

Law Business Research has published the 2002 edition of *Who's Who Legal - The International Who's Who of Business Lawyers* and has recognized the Firm as having more pre-eminent lawyers in the fields of Patent Law and Trade-mark Law than any other firm in Canada. We would like to congratulate our partners who have been so recognized:

James D. Kokonis

(Patent Law and Trade-mark Law)

A. David Morrow

(Patent Law and Trade-mark Law)

Robert D. Gould

(Trade-mark Law)

John Bochnovic

(Patent Law)

Michael D. Manson

(Patent Law and Trade-mark Law)

Notes

Announcements

We congratulate *Jean-Sébastien Brière* who was awarded the Marie F. Morency Memorial Prize in October 2002 as a result of having achieved the highest mark in the drafting paper portion of the 2001 Canadian patent agent examination.

We are pleased to announce that *Daphne L. Maravei*, *Daphne C. Ripley* and *A. Oliver Stone* of our Ottawa office and *Serge S. Shahinian*, *Sanro Zlobec* and *Emma Start* of our Montreal office recently passed the Canadian patent agent examination and are now registered patent agents.

Steven B. Garland was elected Honorary Secretary of IPIC at the IPIC Annual General Meeting held on October 4, 2002.

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

Sally A. Hemming has joined our Toronto office. Dr. Hemming has a B.Sc. in Biochemistry from the University of Victoria and a Ph.D. in Biochemistry from McMaster University. She received her J.D. from the University of Toronto and was called to the Ontario Bar in 2002.

May Ming Lee has joined our Ottawa office. Ms. Lee has a B.Sc. in Pharmacy from the University of Toronto. She received her LL.B. from the University

of Western Ontario and was called to the Ontario Bar in 2002.

Andris D. Macins has joined our Vancouver office. Mr. Macins has a B.Sc. in Cell and Developmental Biology, an M.Sc. in Molecular/Cell Biology and an LL.B. from the University of British Columbia. Mr. Macins was called to the British Columbia Bar in 2002.

Kelly A. Miranda has joined our Ottawa office. Ms. Miranda has a B.Eng. in Electrical Engineering from the Royal Military College of Canada. She received her LL.B. from the University of Ottawa and was called to the Ontario Bar in 2002.

James Jun Pan has joined our Toronto office. Dr. Pan has a B.Eng. in Engineering Physics from Tsinghua University and a Ph.D. in Chemistry from the University of British Columbia. He received his LL.B. from the University of British Columbia and was called to the Ontario Bar in 2002.

Michiko Mizuno has joined our Ottawa office. Ms. Mizuno has a B.Eng. in Chemical Engineering from Toyohashi University of Technology in Japan.

Seminars and Presentations

Michael D. Manson spoke to the Canadian Institute on the topic of "Parallel Imports & Grey Market

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Michael D. Manson will speak to the Edmonton Chapter of The Licensing Executives Society on the topic of “Infringement of Licensed Technology” on November 27, 2002.

Francois Guay will be Président d’honneur at the INFONEX conference entitled “Sommet Quebecois sur la propriété intellectuelle – Nouveaux développements et protection internationale accrue.” The conference will be held in Montreal December 2-3, 2002.

Mark K. Evans will give a presentation on “The Responsibility to Obtain and Maintain the Intellectual Property” during a Canadian Institute course on Intellectual Property License Agreements in Toronto December 4-5, 2002.

J. Christopher Robinson, Timothy P. Lo and Theodore W. Sum will be teaching the intellectual property law course at the University of British Columbia Faculty of Law for the semester commencing January 2003.

A. David Morrow will speak on the subject of patent law at the Annual Intellectual Property Update Conference sponsored by the Law Society of Upper Canada in Ottawa, January 17, 2003.

Publications

Jean-Sébastien Brière, “Les importations parallèles : quand les marchés gris nous en font voir de toutes les couleurs!”, *Développements récents en droit de la propriété intellectuelle*, 2002.

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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).

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+ of the British Columbia Bar only ** of the Alberta Bar only • of the New York Bar also

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