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## The Schmeiser Case – Supreme Court of Canada Breathes New Life Into Life Form Patents

In a 5:4 split decision released on May 21, 2004, the Supreme Court of Canada has dismissed, in part, the appeal from the Federal Court of Appeal ruling in *Monsanto v. Schmeiser*.

In the proceeding, Saskatchewan farmer Percy Schmeiser was accused by Monsanto of growing genetically modified canola in violation of Monsanto's Canadian patent. The genetic modification renders the canola tolerant to spraying with the herbicide "Roundup," and the canola is marketed as "Roundup Ready Canola." The claims in issue were directed to modified genes and plant cells containing the modified genes, but the patent did not include claims to whole plants. Schmeiser was found to have infringed the Monsanto patent following a trial held in June of 2000. The trial decision was upheld on appeal to the Federal Court of Appeal in 2002.

The Majority decision, written by Chief Justice McLachlin and Justice Fish, upholds the findings of the Courts below in respect of the validity and infringement of the patent claims in issue, but reverses the award of an accounting of profits.

On the issue of validity, the Majority rejects the argument advanced by Schmeiser that the subject matter of the patent was invalid in view of the Court's prior holding in *Harvard College v. Canada*. In *Harvard*, the Court had found that patent claims to a genetically modified mouse, which the Court described as a "higher life form," were invalid as covering non-patentable subject matter. Nevertheless, the Majority holds that "whether or not patent protection for the gene and the cell extends to activities involving the plant is not relevant to the patent's validity." The Majority concludes that the patent claims in issue are valid.

On the issue of infringement, the Majority concludes that Schmeiser "used" Monsanto's patented invention when he cultivated his canola plants containing the patented gene and composed of patented cells. The Majority specifically rejects the argument that Schmeiser had not used the invention because he did not spray his crop with Roundup.

The Minority judgment, written by Justice Arbour, construes the claims in issue as being limited to modified genes and cells in the laboratory prior to regeneration. In the view of the Minority, Schmeiser did not use the claims so construed through the cultivation of plants containing the patented genes and cells. However, it is the Majority judgment which now represents the law in Canada.

With the decision in *Monsanto*, it now seems clear that patents may be sought and obtained in Canada with claims covering genes and cells (provided that such claims meet the other standard requirements of patentability, including novelty and non-obviousness), and that such claims may be enforced against infringers which are cultivating or breeding plants and animals incorporating the patented genes and cells.

For a fuller report, see the *IP Update* from [May 21, 2004](#), available on our web site.

A. David Morrow, and Colin B. Ingram of Smart & Biggar represented the Canadian Seed Trade Association, an intervener in this landmark case.

Colin B. Ingram, Ottawa



Nancy P. Pei

## Canadian Parliament Approves Legislation to Permit Exports of Patented Pharmaceuticals to Developing Countries

On May 14, 2004, Parliament approved Bill C-9, *An Act to amend the Patent Act and the Food and Drugs Act (The Jean Chrétien Pledge to Africa Act)*, making Canada the first country to implement the Decision of the World Trade Organization (WTO) General Council of August 30, 2003. The Decision implements paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health and allows any member country to export pharmaceuticals made under compulsory licences within the terms set out in the Decision.

The stated purpose of the Bill is “to facilitate access to pharmaceutical products to address public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.” The Bill permits exports of fifty-six defined products and permits exports to all WTO countries plus all non-WTO least-developed countries (LDCs), except the 23 WTO countries that have opted out. Apart from the requirement that the generic manufacturer must effectively obtain

Canadian regulatory approval, it will not be difficult to obtain a compulsory licence under the system. The Bill does not grant patentees any opportunity to provide submissions to the Commissioner regarding the appropriateness of the grant of a licence, but does provide patentees with some protection from potential abuses of the system. The system is described in the [June 2004](#) issue of *Rx IP Update*, available on our web site.

Bill C-9 will come into effect once the regulations under the Bill have been passed, likely this Fall. A review of the amendments and their application must be completed by the Minister within two years after they come into force. While it is not yet clear whether the system will actually be used by the Canadian generic industry, the public will become aware of any applications as they will be posted on the Canadian Intellectual Property Office web site. We will report on further developments in future issues of *Rx IP Update* and *IP Perspectives*.

Nancy P. Pei, Toronto



Denise L. Lacombe

## “Rare” Summary Judgments Get Rarer

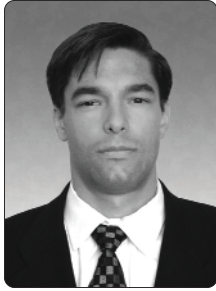
In *Trojan Technologies, Inc. v. Suntec Environmental Inc.* [2003 FC 825], a rare summary judgment in a patent validity and infringement action was granted, despite conflicting expert evidence (as reported in the [October 2003](#) issue of *IP Perspectives*). On April 5, 2004, the Federal Court of Appeal overturned that judgment [2004 FCA 140].

In the appeal decision, the Court confirmed that the jurisprudence is clear that issues of credibility should not to be decided on summary judgment applications. The Court also provided guidance on how to assess credibility, finding that the assessment of credibility is not simply a determination of

which witness appeared more sincere. It also involves examining the witness’ testimony and “its consistency with the probabilities that surround currently existing conditions.” Having found that serious issues of credibility did arise, the Court concluded that the motions judge should have sent the matter on for trial.

The decision confirms that summary judgment will rarely be granted in patent infringement cases in Canada since there will very often be conflicting expert testimony, giving rise to credibility issues.

Denise L. Lacombe, Toronto



Franc Boltezar

## Supreme Court Keeps the Law Library Open

*Law Society of Upper Canada (The) v. CCH Canadian Limited et al.*, March 4, 2004, (2004) 30 C.P.R. (4th) 1

This was the final disposition of a lawsuit by a number of legal publishers against Ontario's lawyers' professional association for copyright infringement by the reproduction of portions of their legal works for courthouse library users.

The Court in *CCH* rejected both of these tests for a "middle ground," and held that the "exercise of skill and judgment" that would necessarily involve intellectual effort was the *sine qua non* of originality in Canada.



Emily Stock

The Court found that the headnotes, case summaries, topical indexes and compilations of reported judicial decisions are all original works in which copyright subsists. An "original" work under the *Copyright Act* is one that originates from an author and is not copied from another work. In addition, it must be the product of an author's "exercise of skill and judgment." The exercise "... must not be so trivial that it could be characterized as a purely mechanical exercise." Creativity is not required to make a work "original." The judicial reasons, in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright.

However, the court found that the Law Society did not authorize copyright infringement by providing self-service photocopiers for use by its patrons in the Great Library. A person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. There was no evidence that the copiers had been used in a manner that was not consistent with copyright law.

This judgment has clarified the test for the degree of "originality" required to support copyright in Canada. While the test of originality always necessitated that a work originate with its author (*i.e.*, not be copied), according to some jurisprudence, originality also required something more. This additional requirement varied between an easily satisfied "sweat of the brow" approach, whereby an author need only exert energy in order to generate a copyrightable work, to a comparatively robust requirement of a "modicum of creativity."

In any event, the Law Society was protected by the "fair dealing for the purpose of research or private study" provisions of the *Copyright Act*.

"Research" must be given a large and liberal interpretation, and is not limited to non-commercial or private contexts. Lawyers carrying on the business of law for profit are conducting research.

This important decision clarifies the law as to what may be copyrighted, and gives a liberal interpretation of the scope of "fair dealing" under the Canadian *Copyright Act*.

*A. David Morrow, Ottawa, Franc Boltezar and Emily Stock, Vancouver*



Patrick Reimer

## Canadian File Swappers Skirt Infringement Action – For Now

*BMG et al v. John Doe et al.*, March 31, 2004, [2004] FC 488

Major recording labels brought the music industry's fight against online file swapping to Canada in February, by filing suit against 29 unnamed John and Jane Does for copyright infringement in Federal Court. This action is similar to well-publicized suits in the United States, where the Recording Industry

Association of America (RIAA) has sued several hundred file sharers, extracting settlements from those unwilling or unable to fight along the way. However, the Federal Court recently refused to order Internet Service Providers (ISPs) to disclose the identities of their file sharing customers, and

has, at least temporarily, halted the attempt to quell music swapping in Canada.

The recording labels filed their action on February 10, 2004. They had tracked the activities of prolific file sharers, and collected their online names, the names of the files traded and the Internet Protocol (IP) addresses used in sharing the files. However, the plaintiffs also required the true identities of the individuals sharing files in order to name them personally in the action.

To learn the identities of the file sharers in the Canadian action, the plaintiffs brought a motion to compel the ISPs to divulge the names and addresses of their customers using the IP addresses involved. Most of the respondent ISPs opposed the motion, seeking to keep the identities of their customers private.

On March 31, 2004, Justice von Finckenstein handed down his highly anticipated judgment. He refused to order the ISPs to disclose the identities of their customers, holding that the Canadian Recording Industry Association (CRIA) Had failed to make its case for production of the individual names.

The finding most crippling to the plaintiff's case was that a demonstrable case of copyright infringement had not been made out. While based in part on evidentiary concerns, the judgment also stated that

the act of using file sharing programs to trade music did not infringe copyright. Relying on the recent decision of the Supreme Court of Canada in *CCH Canada Ltd. v. Law Society of Canada*, Justice von Finckenstein held: "I cannot see a real difference between a library that places a photocopy machine in a room full of copyrighted material and a computer user that places a personal copy on a shared directory linked to a P2P service." Justice von Finckenstein also relied on the fact that Canadians pay a levy on blank audio recording media under provisions of the *Copyright Act* that allow individuals to make copies of music for private use. (This topic was discussed in more detail in the [February 2004](#) issue of *IP Perspectives*.)

Justice von Finckenstein's judgment has been appealed to the Federal Court of Appeal. While the identities of Canadian online file sharers are currently safe from prying eyes, a reversal at the Federal Court of Appeal could clear the way for waves of similar cases, as has been the situation in the United States. But even if the recording industry can obtain the identities of file sharers in Canada, the larger question of whether such lawsuits will ultimately be effective against the immensely popular practice of file sharing remains an open issue.

*Patrick Reimer, Ottawa*



A. David Morrow

## Missed Payments for Patent Fees — Door Closes Tighter

*P.E. Fusion, LLC v. Canada (AG, Commissioner of Patents), April 29, 2004, [2004] FC 645*

*This updates previous notes on the subject, most recently in the [February 2004](#) issue of IP Perspectives.*

Where a maintenance fee was not paid on time, and an application to reinstate was not filed on time, the Commissioner has no jurisdiction to accept a late payment, either on the basis of a clerical error under section 8 of the *Patent Act*, or on the basis of any inherent jurisdiction to correct inadvertent loss of rights. In this case, the patentee argued that through a clerical error in a solicitor's office resulting in non-payment of the fees, the notation of the patent as "lapsed" on records in the Patent Office constituted a correctable error in an instrument of record. This argument was rejected. The argument on inherent jurisdiction was based on the *Parke-Davis* case, in which an inadvertent dedication to the public was allowed to be reversed. However, that decision was distinguished on its facts, in view of the clear

wording of the *Patent Act* regarding the deadlines for paying fees and the consequences of non-payment. The Court rejected the general proposition that the Commissioner has any inherent jurisdiction to correct genuine mistakes made by patentees or their agents.

There now appears to be no hope for the revival of patents lapsed for incorrect or missed maintenance and reinstatement fees, unless the Government passes remedial legislation. The Government has in the past stated its intention to do that (as covered in the [October 2003](#) issue of *IP Perspectives*), but it remains to be seen how this will play out after the Canadian national election.

A. David Morrow and Colin B. Ingram of our firms represented P.E. Fusion in its application.

*A. David Morrow, Ottawa*





David E. Schwartz

## Changes to Requirements for Filing Sequence Listings in Canadian National Phase Applications

Amendments to the Canadian *Patent Rules* having effect from March 30, 2004 have simplified the manner in which sequence listings are handled in the Canadian national phase of PCT applications and have partially resolved a significant problem in the *Patent Rules*.

As in many jurisdictions, there are special requirements in Canada for the presentation of nucleotide or amino acid sequences in patent applications.

Until March 30, 2004, the *Patent Rules* contained a significant defect with respect to the requirements for a sequence listing in a Canadian national phase application. The *Rules* effectively provided that, if a sequence listing where required was not filed within the later of six months from national entry or 36 months from the earliest priority date, the application was deemed to be abandoned. This would apply whether or not the Patent Office requisitioned the submission of a sequence listing. In many cases, the Patent Office would not issue a letter requisitioning a sequence listing until very close to the deadline, or sometimes, even after the application was abandoned.

Even worse, if the requirement for a sequence listing was not detected until more than a year from the date of deemed abandonment had passed, the application was arguably irrevocably abandoned, without possibility of reinstatement — all without the Patent Office ever alerting the applicant to the requirement for the submission of a sequence listing!

The amendments to the *Rules* that came into force on March 30, 2004, removed the requirement to file a sequence listing within a prescribed time from national entry. Instead, a sequence listing will only be required in response to a specific requisition by the Patent Office. Hence, applications will no longer be deemed to be abandoned for failure to submit a sequence listing in the absence of a Patent Office communication on this issue.

These amendments to the *Patent Rules* are not retroactive. That is, the amendments do not revive applications that were already deemed to be abandoned on March 30, 2004. It is hoped that further amendments to the *Rules* will be made, providing a retroactive remedy to this problem.

David E. Schwartz, Ottawa



Arnold Ceballos

## Are Design Trade-marks with Otherwise Descriptive Elements Registrable in Canada?

Two recent contradictory decisions of the Federal Court of Canada throw into question whether it is possible to obtain a trade-mark registration in Canada for design trade-marks that include otherwise descriptive wording.

Section 12(1)(b) of the *Trade-marks Act* prohibits registration of a trade-mark if, whether depicted, written or sounded, it is either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the wares in association with which it is used or proposed to be used. Section 35, however, allows an applicant to disclaim the right to the exclusive use of a portion of

the trade-mark that is not independently registrable, such as any elements that are descriptive.

In *Fiesta Barbeques Limited v. General Housewares Corporation*<sup>1</sup>, Justice Russell held that a stylized design trade-mark comprising the words GRILL GEAR in association with barbeque accessories was registrable, even though the words GRILL and GEAR were disclaimed. The court found that, being a design mark, it was not accurate to say that when sounded, the mark was clearly descriptive of the character or quality of the wares, since, at most, it is only the verbal component of the mark that could be sounded in that way. The court found that the

mark as a whole was distinctive enough to be registrable.

The GRILL GEAR decision reflects the thinking that it was possible in Canada to obtain a registration of design marks even if all the words in the mark were disclaimed, if the mark as a whole was still distinctive.

However, following on the heels of the GRILL GEAR decision, in late January 2004, another Federal Court judge weighed in with a different opinion which explicitly questioned the GRILL GEAR decision.

In Best Canadian Motor Inns Ltd. v. Best Western International, Inc.<sup>2</sup>, Justice Gibson found a design trade-mark which included the disclaimed words BEST CANADIAN MOTOR INNS in association with hotels and accommodation-related services to be non-registrable on the basis of descriptiveness. In so finding, Justice Gibson stated that the judge in

the GRILL GEAR decision ignored principles of statutory interpretation when considering the words of section 12(1)(b) of the *Act*.

Finding that the grammatical and ordinary sense of the words of the *Act*, and in particular the word “sounded,” were clear on their face, Justice Gibson found that the mark was clearly descriptive.

It appears difficult to reconcile these two recent decisions from the same court and it appears that the matter may have to be clarified by a higher court or even the Canadian Parliament. However, to the extent that the *Best Canadian Motor Inns* case stands, it certainly calls into question whether there has been a move away from the spirit and intention of section 35 of the Canadian *Trade-Marks Act*.

Arnold Ceballos, Toronto

<sup>1</sup> (2004), 28 C.P.R. (4th) 60

<sup>2</sup> January 29, 2004, docket no. T-656-02 (unreported) (F.C.T.D.)

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## LEGO Toys Go to Supreme Court

In the October 2003 issue of *IP Perspectives*, we reported on the decision of the Federal Court of Appeal in *Kirkbi AG v. Ritvik Holdings Inc.*, July 14, 2003. 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. The Supreme Court has now agreed to hear an appeal. The Supreme Court's decision is likely to clarify the Canadian law on the relationship between functionality and the registrability of a

“distinguishing guise,” which is a special kind of trade-mark involving either the shaping of an article or the mode of packaging of an article. The Court should also consider to what extent functional considerations prevent or limit the protection of a distinguishing guise in an unfair competition action. The Supreme Court's decision will be reported in a future issue of *IP Perspectives*.

A. David Morrow, Ottawa

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## 2004/2005 Edition of Global Counsel 3000 Recognizes Smart & Biggar/Fetherstonhaugh

In the 2004/2005 edition of the *Global Counsel 3000 Intellectual Property Handbook*, Smart & Biggar/Fetherstonhaugh has been ranked as one of Canada's leading law firms in the area of “Intellectual Property.”

We would like to congratulate our partners who have been so recognized:

**Ranked as “highly recommended”:**

A. David Morrow

**Ranked as “recommended”:**

Nicholas H. Fyfe

John Bochnovic

John R. Morrissey

Brian P. Isaac

## Our Montreal Office is Moving!

As of July 1, 2004, the Montreal office of Smart & Biggar/Fetherstonhaugh will be moving to the 33rd floor of its present office building.

Our phone, fax and email will remain the same.

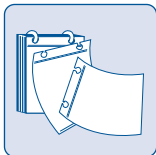
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## Notes

### Seminars & Presentations

*Philip Lapin* was a panelist in a discussion/debate at the Spring Meeting of the Intellectual Property Institute of Canada on the topic of "Should There Be Trade-marks Rights in Public Icons," held in Ottawa on April 19, 2004.

*L. Catherine Eckenswiler* spoke on the topic of "Designing the Search" as part of a workshop on IP Due Diligence at the Canadian Corporate Counsel Association Spring Meeting held in Halifax, Nova Scotia on April 19, 2004.

*Kohji Suzuki* was a moderator for a session on the topic of "Alcohol and Tobacco Trade-mark Protection" at the 2004 International Trademark Association conference held in Atlanta, Georgia from May 1 - 5, 2004.

*Mark G. Biernacki* spoke to the Innovators Alliance on an "Introduction to Intellectual Property" in Mississauga, Ontario on May 14, 2004.

*Theodore W. Sum* presented on the topic "Key Issues in Software Development Agreements and Software Licenses" to the Manitoba Subsection of the Canadian Corporate Counsel Association, held in Winnipeg, Manitoba on May 20, 2004.

*Sanro Zlobec* presented on the topic of "La Demande Provisoire Américaine, Un Outil Stratégique pour Maximiser les Actifs de PI" held at the Centre de Ressources du Parc Technologique in Ste-Foy, Quebec on May 27, 2004.

*Theodore W. Sum* spoke on the topic "Issues and Problems in Software and IT Agreements" at the Federated Press Negotiating and Drafting IP Licensing Agreements Conference, held in Toronto on June 7 - 9, 2004.

*Michael D. Manson* spoke at the "Artists and Designers and Entrepreneurs" workshop on the topic of "Copyright Laws & How to License Your Artwork" held at the University of British Columbia on June 10, 2004.

*John R. Morrissey* spoke on the topic of "Fair Use of Trade-marks" at the American Bar Association IP Law conference held in Toronto from June 16-20, 2004.

*L. Catherine Eckenswiler* spoke on the topic of "Licensing v. Ownership" at the Federal Partners in Technology Transfer Annual General Meeting held in Halifax Nova Scotia on June 18, 2004.

*L. Catherine Eckenswiler* spoke on the topic of "Key Terms in a Licensing Deal" at a course entitled "Advanced Licensing for Pharmaceuticals and Biotechnology" hosted by the Federated Press in Toronto on June 21-22, 2004.

*Theodore W. Sum* will speak on "Protecting IP in Cyberspace" at the International Intellectual Property Law Conference in Vancouver on July 16 - 17, 2004. At this same conference, *Michael D. Manson* will speak on two topics: "Claim Destruction, Foibles of Opinions, and What Can We Really Protect and Where" and "Remedies and Litigation Strategies for International Protection of IPRs." *A. David Morrow* will present a paper entitled "Of Mice and Seeds: The Patenting of Genetically Modified Life in Canada," and *Mark K. Evans* will speak on "Canadian and U.S. Trademark Hot Topics: Dilution, Functionality, Fair Use, Trade Dress, Protection of Colour and Other Non-Traditional Marks."

*Christian Bolduc* will speak on "Preparing a Trade-mark Application, Use and Registrability Opinions"

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and *Philip Lapin* will lecture on "How to Conduct an Opposition" at the week-long IPIC/McGill University course entitled Understanding Trade-marks — An Introductory Course, in Montreal from August 9 - 13, 2004.

*Christian Bolduc* will tutor three workshops on the following topics: "Use and Registrability opinions / Preparation of applications," "Responses to Office Actions" and "Tips and Strategy in Opposition," as well as speak in the topic of "Factual and Expert Evidence" at the week-long IPIC/McGill University course entitled Understanding Trade-marks — An Advanced Course, in Montreal on August 16 - 20, 2004.

*Michael D. Manson*, *Brian G. Kingwell* and *Franc Boltezar* will be teaching "Intellectual Property Law, Law 247" at the University of Victoria from September 10 to November 26, 2004.

## Publications

*Steven B. Garland* and *Patrick Reimer*, "Prairie Showdown," *Patent World*, February 2004.

*Nancy P. Pei*, "Canada signs up to Doha," *Managing Intellectual Property*, April 2004.

*Elliott Simcoe* and *Patrick Reimer*, "A Busy Year: Getting to Grips with Copyright in the Internet Age," *Copyright World*, April 2004.

*Keltie R. Sim* and *Heather Tonner*, "Protecting Colour as a Trade-mark," *The Lawyers Weekly*, April 16, 2004.

*Keltie R. Sim*, "Marketers Using Trade-marks for Branding Fashionable Clothing," *The Lawyers Weekly*, April 16, 2004.

*Franc Boltezar*, "Heritage Report Suggests Copyright Act Needs Modernizing," *World Copyright Law Report*, May 13, 2004.

*Elliott Simcoe* and *Patrick Reimer*, "Canada: Vanuatu of the north?", *Managing Intellectual Property*, June 2004.

*Patrick Reimer*, "Canadian File Swappers Skirt Infringement Action — For Now," *CCCA Inside Counsel*, August 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 (extn. 386).