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Canada May Facilitate Access of Third World Countries to AIDS Drugs

Against the background of the World Trade Organization Decision of August 30, 2003, that would permit companies to obtain a patent licence to manufacture and export advanced drugs for treating epidemics such as AIDS, malaria and tuberculosis to poorer countries, the Canadian government has announced its intention to address the specific issue of AIDS. In particular, the government has said it will enact amendments to the *Patent Act* that would permit the export of AIDS drugs to developing nations by Canadian generic companies free of infringement of Canadian patents. The legislation may contain pro-

visions to guard against the re-export of such drugs to other markets. The government has stated its intention to expedite the legislation.

Canada's Research-Based Pharmaceutical Companies (Rx&D) has declared its support for the WTO Decision. The Canadian Generic Pharmaceutical Association (CGPA) has recently released a statement indicating that it is "very pleased" with the government's response to this issue.

A. David Morrow, Ottawa

Government Intends to Resolve Small Entity Patent Fees Issue

In the [June 2003 issue](#) of *IP Perspectives*, we reported on the decision of the Federal Court of Appeal in *Barton No-Till v. Dutch Industries*. In that case, it was held that, if a small entity maintenance fee is incorrectly paid where a large entity maintenance fee was in fact required, and the time for reinstatement has passed, the patent is irrevocably lapsed, and the payment of a "make-up" fee is not possible. This holding puts at risk an unknown, but possibly significant,

number of Canadian patents. On August 8, 2003, the Government of Canada announced its intention to amend the *Patent Act* and *Regulations* in order to address this issue. The form that the amendments will take has not been announced, and will be the subject of consultations. However, it is expected that they will include some sort of provision that will permit retroactive make-up payments.

A. David Morrow, Ottawa

Functional Trade-Marks Unenforceable

Kirkbi AG v. Ritvik Holdings Inc., July 14, 2003, 2003 FCA 297.

On July 14, 2003, the Canadian Federal Court of Appeal rendered its decision in *Kirkbi AG v. Ritvik Holdings Inc.*, known as the "LEGO" case. The Federal Court of Appeal had to decide if a mark whose principal characteristics are functional — in this case the "LEGO Indicia trade-mark" — can constitute a distinguishing guise and therefore a valid trade-mark.

The LEGO Indicia trade-mark relates to the shape of the upper surface of a 2" x 4" LEGO brick. The Trial Division had concluded that the LEGO Indicia is primarily functional.

In dismissing the appeal, the Federal Court of Appeal, in a 2-1 decision, reaffirmed that a trade-mark cannot be valid within the meaning of the *Trade-marks Act* if it



Alain Adam

is primarily functional, namely, if its functional character relates to the wares in association with which it is used. The Federal Court of Appeal ruled that the LEGO Indicia, like any primarily functional trade-mark, does not give its owner the exclusive right to use this mark in association with those wares that are related to the functionality, i.e. sets of building blocks.

Following a detailed review of the jurisprudence on the matter, the Federal Court of Appeal concluded that the functionality doctrine applies in Canada to both registered and unregistered trade-marks. It stated that the underlying policy of the functionality doctrine is to prevent granting, through the guise of a trade-mark, an exclusive right to a function. Such exclusivity, it reiterated, could be obtained only through patent protection. A functional trade-mark

holder would receive an indefinite monopoly over the associated wares, whereas a patent holder would enjoy only a limited monopoly. It would otherwise be unfair for the public and for competitors to enable trade-mark holders to obtain indirectly by a trade mark what they cannot obtain directly by a patent.

In a strong dissent, Pelletier, J.A. expressed the opinion that while functionality is a bar to registrability, it is not a defense to an action of unfair competition under the *Trade-marks Act* where the subject matter is being used deceptively, as was the case here.

It is not known if the case will be appealed to the Supreme Court of Canada.

Alain Adam, Ottawa



Jonathan N. Auerbach

Update on Canadian Domain Name Dispute Resolution

On June 27, 2002, the Canadian Internet Registration Authority (CIRA), the not-for-profit corporation mandated to operate the Canadian dot-ca top-level domain name, announced the institution and implementation of the CIRA Dispute Resolution Policy (CDRP) [See the [June 2002 issue](#) of *IP Perspectives*]. The purpose of the CDRP is to give trade-mark and trade name rights holders, relatively quick, inexpensive and fair methods for dealing with bad faith registrations of dot-ca domain names.

The CIRA process shares many features of the Uniform Dispute Resolution Policy (UDRP) used to resolve disputes relating to dot-com domain names.

There are, however, a number of differences which exist between the two dispute resolution processes. A complainant must be a Canadian resident, or the owner of a trade-mark registered in Canada. The CDRP allows owners of unregistered trade-marks and trade names to bring a complaint, not only owners of registered trade-marks. Disputes under the CDRP are resolved by a three-person panel, except in cases where the domain name registrant chooses not to participate. In addition, the CDRP affords a certain amount of protection for registrants of dot-ca domain names against disputes that are commenced unfairly and without colour of right. A complainant that brings a complaint against a registrant in bad faith could be sanctioned to pay up to \$5,000 to defray the costs incurred by the registrant.

Similar to the UDRP, the CDRP requires the complainant prove that:

1. the registrant's dot-ca domain name is confusingly similar to the complainant's trade-mark or trade name;
2. the registrant has no legitimate interest in the domain name; and
3. the registrant has registered the domain name in bad faith.

At present, there have been thirteen decisions rendered under the CDRP. In eight of the decisions, the panel has found in favour of the complainant. In four cases, the registrant has succeeded in maintaining its registration. In the remaining case, the complainant sought the transfer of ten domain names but only succeeded in causing nine of them to be transferred. In no case has the panel sanctioned a complainant for bringing a complaint in bad faith.

Though it is a bit too early to draw any conclusions from these first few decisions, it appears that some Canadian panelists are taking a "Made in Canada" approach to the resolution of dot-ca domain name disputes. All decisions released under the CDRP can be found on CIRA's website at www.cira.ca.

Jonathan N. Auerbach, Ottawa



Denise L. Lacombe

Federal Court Grants Rare Summary Judgment in Patent Case

In a judgment issued on July 3, 2003, Mr. Justice Gibson of the Federal Court, Trial Division, granted summary judgment in a patent validity and infringement case, despite conflicting expert evidence; see *Trojan Technologies, Inc. v. Suntec Environmental Inc.* [2003 FC 825]. The patent in suit related to an ultraviolet fluid purification device.

Summary judgment on issues of patent validity or infringement is rare, especially where there is conflicting expert evidence.

The Canadian Federal Court Rules permit summary judgment in cases where there is no genuine issue for trial or where the only genuine issue is the amount to which the moving party is entitled or is a question of law. Furthermore, even where there is a genuine issue, the Court may still grant summary judgment if the Court is able to find the necessary facts on the basis of the evidence before it. Each case must be interpreted in its own context and if the necessary facts cannot be found, or if there are serious issues of credibility, the matter should go to trial.

The first step in determining either infringement or validity is to construe the claims of the patent. In *Trojan Technologies*, the evidence of two experts, one

for each party, was considered on the issues of construction, validity and infringement.

When concluding that the necessary facts could be found to support summary judgment, and that there was no serious issue of credibility, the judge stated: "While I find the affidavit evidence of both experts to be credible and trustworthy, I prefer the evidence of Trojan's [plaintiff and moving party] expert on each of the critical issues and I am satisfied that having the evidence of the experts presented at trial where a trial judge would have an opportunity to observe their demeanour and their reactions under cross-examination would not in all likelihood affect the end result in any significant manner."

Although the case may be viewed as an encouragement to seek summary judgment in patent cases, some caution is required since the decision has been appealed. The Federal Court of Appeal has stayed portions of the Order and has expedited the appeal, which will be heard November 12, 2003 [2003 FCA 309]. In granting the stay, the Court of Appeal found that a serious issue was raised by the treatment of the conflicting expert evidence.

Denise L. Lacombe, Toronto



Karen F. MacDonald

Interlocutory injunctions – The British Columbia Approach

Interlocutory injunctions (known in other jurisdictions as preliminary injunctions or temporary restraining orders) can be powerful and important tools for intellectual property ("IP") owners, as they provide a means for right holders to prevent continued infringement of their rights pending trial.

The Supreme Court of Canada has held that in order to obtain an interlocutory injunction, a plaintiff must satisfy the following three-pronged test:

1. there is a serious issue to be tried;
2. it will suffer irreparable harm if an interlocutory injunction is not granted; and
3. the balance of convenience favours the plaintiff.

In recent years, the Federal Court of Canada has been very reluctant to grant interlocutory injunctions in IP cases, based on a number of Federal Court of Appeal decisions which set a very high bar for the evidence of irreparable harm. The result is that fewer IP rights holders seek injunctive relief in the Federal Court.

In contrast, the Supreme Court of British Columbia, which has concurrent jurisdiction with the Federal Court of Canada on most IP issues, has a different and arguably lower threshold with respect to finding irreparable harm.

Our Vancouver Office was recently successful in obtaining an *ex parte* interlocutory injunction in a trade-mark dispute in the British Columbia Supreme

Court, on behalf of a well-known United States based manufacturer of nutritional and dietary supplements, against its previous distributors in Canada. The following evidence of irreparable harm was accepted by the Court as being sufficient to obtain an interlocutory injunction:

1. evidence that there was a lack of control by the Plaintiff over the quality of the goods, which could result in a loss of goodwill in their trade-marks;
2. evidence of loss of actual and potential customers by the Plaintiff, which would flow from the Plaintiff losing control over the character and quality of the goods;
3. evidence regarding the inability of the Plaintiff to re-establish a market presence in Canada through a new distributor;

4. evidence showing that there would be a loss of distinctiveness of the Plaintiff's trade-marks based on concurrent use by two parties in the market place; and
5. evidence of the possibility of general confusion in the marketplace.

Obtaining the injunction led to the settlement of the case.

Where it is appropriate from a jurisdictional and evidentiary perspective, IP owners may wish to consider the possible advantages of bringing their infringement action in the Supreme Court of British Columbia, or in the Courts of the other provinces, which also may have less exacting standards for irreparable harm than the Federal Court.

Karen F. MacDonald, Vancouver



A. David Morrow

No More “Canadian Champagne”?

In June, 2003, Canada and the European Union announced that they had entered into an agreement that will commit the parties into protecting each others' geographical indications for wines and spirits. The agreement has yet to be ratified by the European Council and the Canadian Parliament, and it is not known when ratification will occur. However, the main effect of the agreement appears to be to phase out the generic use in Canada of a number of European geographical indications for wines. While the terms of the agreement and how they will dovetail with Canada's existing laws regarding the protection of geographical indications, which are incorporated into the *Canadian Trade-marks Act*, remains unclear, the intent appears to be that Canadian wine makers will cease use of certain French geographical indications in three stages. In the first stage, the use by Canadians of Bordeaux, Chianti, Claret, Madeira, Malaga, Marsala, Medoc, and Mosel will cease as soon as the agreement comes into force. Since these indications are not presently used by Canadian wine makers, this particular provision is of no more than academic interest. The use of Bourgogne/Burgundy, Rhin/Rhine and Sauterne/Sauternes will cease by December 31, 2008. Since the use of these geographical indications by Canadians is today virtually unknown, this provision is also of no great signifi-

cance. Finally, the use of Chablis, Champagne, Port/Porto and Sherry will cease after December 31, 2013. These geographical indications are currently in widespread use by Canadians as part of generic wine terms like “Canadian Chablis” and “Canadian Champagne”. This therefore appears to be the principal real effect of the agreement.

The agreement also creates a mechanism for the protection of certain Canadian geographical indications in Europe, and provides for certain reciprocal agreements regarding production and quality standards for wines and spirits.

The Canadian wine industry has been moving toward its own system of protected geographical indications, together with a voluntary quality control system, and its use of foreign geographical indications has been diminishing over time. This agreement will impose a legal framework over these existing trends.

Presumably, the Canadian legislation putting the agreement into effect will have the effect of prohibiting the sale in Canada of wines from other countries that use the European geographical indications as generic or semi-generic terms, for example, California Burgundy or New York Champagne.

A. David Morrow, Ottawa



L. Catherine Eckenswiler

Reviewing Your Intellectual Property Portfolio

A company's intellectual property portfolio is one of its most valuable assets and, as such, it should be properly maintained and well managed. Proper maintenance requires that the intellectual property portfolio be reviewed on a regular basis and updated in view of budgetary constraints and marketing strategies. This article summarizes some aspects of such a review and certain considerations that should be addressed in conducting it.

Maintaining An Inventory

Every business should have an inventory of its intellectual property assets which is complete and up-to-date. The inventory should include records of all of the technologies owned by the business and should include such relevant information as all patents, patent applications, industrial design registrations, invention disclosures and trade secrets. Intellectual property which is protected by copyright should also be included such as software, manuals, training videos and any works of an artistic nature.

Brands are an important part of a business' intellectual property and the inventory should include records for each brand including examples of all trade-marks, logos and business names along with the dates that they were first used and that any trade-mark applications were filed or registered.

Finally, it's important to maintain copies of all agreements to which the company is party relating to intellectual property, confidentiality and employment matters as these agreements are important in establishing ownership of, and rights to use, intellectual property.

Reviewing Patents and Patent Applications

The cost of obtaining patent protection around the world is high so it's important to ensure that budgetary resources are allocated to those technologies, and those countries, of most relevance to the business' current activities and future plans. Patents and patent applications in areas of waning interest may need to be withdrawn or abandoned to reduce costs. Similarly, patent applications may need to be filed in countries which could become important markets. Another important consideration is the country where products, and competitors' products, are manufactured. Strong intellectual property protection in these countries can be used to curtail the manufacturing activities of infringers. Marketing, sales and manufacturing are dynamic processes, therefore

ongoing evaluation is necessary to ensure that the business' patent strategy and its business plan are aligned.

The claims of issued patents and pending patent applications must be reviewed on a regular basis to ensure that they adequately cover important product lines, including those that are on the market now and those that will be launched in the future. Deficiencies in this area must be addressed by amending existing applications or filing new ones.

Confirming Ownership Issues

Nothing can be more devastating to a business than discovering that it doesn't have adequate ownership of its intellectual property due to a failure to obtain appropriate assignments or suitable contracts with employees and third parties. A complete intellectual property portfolio should include documentary evidence of the business' ownership of its intellectual property in the form of contracts with its employees and contractors along with assignments from the inventors of each invention. This is a particularly important consideration to a business seeking to attract investment since investors are becoming more concerned about ownership and rights to use intellectual property and are increasingly requiring that documentary evidence be clear, complete and up-to-date.

Protecting Trade-Marks

A comprehensive intellectual property inventory should include samples of use of each of the business' brands. By carefully monitoring these samples, the business can ensure that its trade-marks are being used properly, both by itself and by third parties such as distributors and sublicensees. Improper use of trade-marks can result in loss of trade-mark rights and a consequent inability to enforce trade-marks against infringers. Accordingly, it's very important that the use of the trade-marks be consistently monitored and controlled. If variations of trade-marks are being used, this use must be corrected or, alternatively, new applications must be filed for the variations in use.

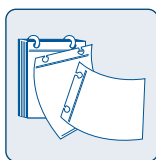
Samples of trade-mark use are also important should conflicts arise with infringers. In these circumstances, it may be necessary to provide evidence that the business has properly used its trade-marks. This will necessitate providing examples of how each trade-

mark has been used over time in such places as advertisements, labels, packaging and invoices.

The use of trade-marks by distributors, sales agents, franchisees, sublicensees or other third parties must be governed by appropriate licensing agreements. A failure to ensure that proper licensing agreements are in place can result in a loss of trade-mark rights. Accordingly, each of the licensing arrangements with such parties should be examined to ensure that adequate licensing agreements are in place.

As it should be clear from the points mentioned above, reviewing your company's intellectual property portfolio is not a single task that can be carried out on a one-time basis. Inventions, patents, patent applications, trade-marks and intellectual property agreements must be reviewed on a regular basis to ensure that intellectual property assets are adequately protected and that budgetary resources are allocated effectively.

L. Catherine Eckenswiller, Ottawa



Notes

Announcements

Nicholas H. Fyfe has recently been appointed a member of the editorial board of *Trademark World*.

Steven B. Garland has been named Vice-President of the Intellectual Property Institute of Canada (IPIC). He has also been recently named Chairman of *Patent World's* editorial board.

Euan R. Taylor is currently working in Beijing at the offices of China Sciences Patent and Trademark Agents Ltd., from November 1 - 30, 2003.

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

Timothy H. Briggs has joined our Vancouver office. Mr. Briggs has a B.Sc. in Chemical Engineering. He also has an LL.B. from the University of Alberta and his J.D. from the University of Tulsa. He was called to the Oklahoma Bar in 1985, the California Bar in 1997, and the British Columbia Bar in 2003.

Alakananda Chatterjee has joined our Vancouver office. She has a B.A. in Biology from Smith College and a Ph.D. in Biochemistry from the Sackler School of Biomedical Sciences at Tufts University. Ms. Chatterjee earned her J.D. from Suffolk University Law School. She was called to the Massachusetts Bar in 2003.

Roger T. Gallant has joined our Montreal office. Dr. Gallant has a B.Sc. (Chemistry) the University of Prince Edward Island and an M.Sc. in Theoretical/Computational Chemistry from the University of Ottawa. He also has an M.B.A. from Wilfrid Laurier University and a Ph.D. in Organic Chemistry from the University of Western Ontario.

Daniel C. Smith joined our Montreal office. Mr. Smith has a B.Eng. in Mechanical Engineering from McGill University.

Mark S. Starzomski has joined our Ottawa office. Mr. Starzomski has a B.Eng. in Electrical Engineering from the Technical University of Nova Scotia and an M.A.Sc. in Electrical Engineering from DalTech Dalhousie University. Mr. Starzomski is a Registered Professional Engineer with APENS.

Euan R. Taylor has joined our Vancouver office. Dr. Taylor has a B.A. in Natural Sciences from the University of Cambridge and a Ph.D. from the University of London. He received his LL.B. from the University of British Columbia and was called to the British Columbia Bar in 1998. Dr. Taylor is also a Registered Trade-mark Agent.

Nick P. Toth has joined our Vancouver office. Mr. Toth has a B.A.Sc. in Electronics Engineering from Simon Fraser University and an LL.B. from the University of Victoria. He was called to the British Columbia Bar in 2003.

David M. Walters joined our Ottawa office. He has a B.Eng. in Electrical Engineering from Memorial University and is a Registered Patent Agent.

We are pleased to announce that *Scott A. Beeser* and *Kavita Ramamoorthy* of our Toronto office have been called to the Ontario Bar, and *Timothy H. Briggs*, *David A. Gileff* and *Nick P. Toth* of our Vancouver office have been called to the British Columbia Bar and are now associates with the Firms.

We are pleased to announce that *Jennifer L. Ledwell*, *Kelly L. Miranda* and *Jeremy E. Want* of our Ottawa

office, as well as *Mark G. Biernacki*, *Colin C. Climie*, *Peter A. Elujiw* and *Denise L. Lacombe* of our Toronto office and *Trina K. Sarin* of our Montreal office have recently passed the Canadian patent agent examination and are now registered patent agents.

Seminars and Presentations

Euan R. Taylor taught a course to visiting Chinese tax officials entitled "Canadian Intellectual Property Law & Related Tax Issues" held at Simon Fraser University in Vancouver, July 28 - August 1, 2003.

Steven B. Garland lectured at the International & Comparative Intellectual Property Law Program for Professionals, held at St. Peter's College, Oxford University, July - August 2003.

Matthew Zischka was the Program Director, as well as a facilitator in several tutorials and lecturer on the topic of patent claim drafting, for the IPIC / McGill University Patents Course that was held in Montreal from August 4 - 8, 2003. *Sanjay D. Goorachurn* participated as a tutor in the course's Patent License Workshop.

Philip Lapin was the Program Director of and presented a paper at the week-long IPIC / McGill University course entitled "Understanding Trade-marks" held in Montreal from August 11 - 15, 2003. *Christian Bolduc* tutored a workshop and *A. Dennis Armstrong* lectured for this course as well.

Christian Bolduc participated in IPIC / McGill University's "The Trade-marks Practitioner" course held in Montreal from August 18 - 22, 2003.

Joy D. Morrow presented on "The Impact of the New Regulatory Standards on Establishing Intellectual Property Claims" at an Insight Information Conference entitled The New Regulations Governing Natural Health Products held in Toronto on September 16, 2003.

François Guay was a speaker at the 77th Annual IPIC Meeting on the topic of "Dealing with Patents after Insurance" held in Halifax from September 18 - 20, 2003. *Solomon M.W. Gold* was a panel member discussing Canadian patent prosecution at the same meeting.

A. David Morrow delivered a paper on the theme of "Intellectual Property and Biotechnology in the Age of Biotechnology: Challenges, Opportunities and Risks"

at the University of British Columbia Law School International Conference on Intellectual Property held in Vancouver from September 19 - 20, 2003.

Elliott S. Simcoe presented a talk on September 23, 2003, entitled "What Startups Need to Know about Planning an Effective IP Strategy" to The Ottawa Network's Venture Creations Group.

Joy D. Morrow was a keynote speaker at "The Queen's Business Forum on Biotechnology" at Queen's University in Kingston on September 26, 2003.

Gunars A. Gaikis is an instructor lecturing on "Drug Patents / Notice of Compliance" in the Fall 2003 Patent Course of Osgoode Hall Professional Development's L.L.M. Intellectual Property program.

Steven B. Garland is teaching the Fall 2003 Patent Law course at the University of Ottawa's Faculty of Law.

François Guay spoke at the Insight Information conference on "Les actifs de propriété intellectuelle dans le cadre de conventions commerciaux" held at the Hotel Intercontinental in Montreal from October 7 - 8, 2003.

Ronald D. Faggetter spoke on the law of trade secrets at the Center for Advanced Studies Conference on October 8, 2003.

Gunars A. Gaikis presented at the Pharmaceutical Trade Marks Group (PTMG) conference on the topic of "Internet Pharmacy Trade-mark issues" held in Montreal from October 8 - 11, 2003.

Gunars A. Gaikis spoke on the topic of "The Latest Strategic and Legal Developments under the NOC Regulations" at The Canadian Institute conference on Pharma Patents held in Toronto on October 16, 2003.

John R. Morrissey spoke on the topic of "Expanding the Arsenal: Other IP Strategies to Protect and Attack Pharma Patents" at the same conference.

Christian Bolduc spoke to microbiology students about the patent agent profession at Université Laval in Quebec City on October 24, 2003.

Matthew Zischka will be participating in the Law Society of Upper Canada's Six Minute Lawyer series, speaking on "The Patent Cooperation Treaty: Changes to Come" on November 7, 2003.

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Matthew Zischka will be a guest lecturer for the Cyberlaw and Policy course at Queen's University Faculty of Law on November 11, 2003.

Ekaterina Tsimberis will be giving a talk on trade-mark oppositions at a conference entitled *Récents développements en droit de la propriété intellectuelle* organized by the Continuing Education Service of the Quebec Bar on November 14, 2003.

Christian Bolduc will present at the EDILEX course entitled *Technologies I - R&D Contracts* on November 6, 2003, followed by a course entitled *Technologies II - The Contractual Bases of Research & Development and Technology Transfer* held on November 20, 2003.

Publications

Marc Gagnon, "La Cour suprême du Canada détermine que l'oncosouris n'est pas brevetable," published in Vol. 15 No. 3 of *Les cahiers de propriété intellectuelle* in May 2003.

Tokuo Hiram is the author of an article entitled "Harvard Mouse Found to Be Unpatentable by the Supreme Court of Canada," published in Vol. 48 No. 7 of the *AIPPI Journal* in July 2003.

Elliott S. Simcoe and *L. Catherine Eckenswiller*, "A Headline Year for IP in Canada," *Americas IP focus: protection and enforcement* (supplement to *Managing Intellectual Property*), September 2003.

SMART & BIGGAR FETHERSTONHAUGH

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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).