

## COPYRIGHT REFORM LEGISLATION INTRODUCED

TONY TURCO AND ALEX MATHESON



**Tony Turco**

Tel: 416.863.5261 E-mail: antonio.turco@blakes.com

**Alex Matheson**

Tel: 416.863.3875 E-mail: alexander.matheson@blakes.com

On June 20, 2005, the Canadian Government introduced a bill which proposes significant amendments to the *Copyright Act* (Bill C-60) and represents the next step in Canada's ongoing copyright reform. The amendments focus primarily on the challenges that the Internet and digital technologies pose for copyright law.

A number of the proposed changes would implement protections found in two WIPO treaties, the WIPO *Copyright Treaty* and the WIPO *Performances and Phonograms Treaty*, which Canada has signed but has yet to ratify. It is expected that Canada will ratify these treaties once the *Copyright Act* has been amended to bring it into conformity with the treaties' requirements.

Generally, Bill C-60 is intended to address the challenges of digital technology by implementing the provisions of the WIPO treaties. In particular, rights holders would be given a variety of new rights. Many rights holders would have the sole right to control the making available of their copyrighted material on the Internet. The bill also places an express limitation on the scope of the private copying exemption, by providing that private copies of sound recordings cannot be uploaded to the Internet or further distributed.

Bill C-60 also introduces provisions dealing with the circumvention of technological protection measures (TPMs), such as encryption, and the alteration or removal of rights management information (RMI), which identifies content protected by copyright, or its author/maker, and the terms and conditions of its use. However, these acts would only attract liability when done to further or to conceal copyright infringement.

The role of Internet service providers (ISPs) is also addressed in Bill C-60. ISPs would be exempt from liability for copyrighted material circulating on their networks for which they act purely as intermediaries. In addition, caching of electronic information by ISPs, done for efficiency purposes, would not itself constitute infringement. These provisions incorporate the conclusions of the Supreme Court of Canada in its 2004 decision in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*. Copyright liability would remain with those persons, including ISPs, who post or transmit copyrighted material without authorization.

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**BLAKE,  
CASSELLS &  
GRAYDON LLP**  
Barristers & Solicitors  
Patent & Trade-mark Agents



Connie Guccione  
Tel: 416.863.3064  
E-mail: connie.guccione@blakes.com

## PRIOR USERS HUNG IN *EFFIGI*

CONNIE GUCCIONE

The Federal Court of Appeal decision in *Attorney General of Canada v. Effigi Inc.* has led to changes in the practice of the Canadian Intellectual Property Office (CIPO) regarding the issue of entitlement during the examination process when assessing confusingly similar marks.

### BACKGROUND

Effigi filed an application on December 19, 2000 to register the mark MAISON UNGAVA. The application was based on proposed use. The Examiner refused registration of the mark based on confusion with a co-pending application filed by Tricorn Investments on October 19, 2001 to register the mark UNGAVA. Tricorn claimed a date of first use of 1981. Based on Tricorn's date of first use, which was prior to the filing date of Effigi's application, the Registrar considered Tricorn to be entitled to registration of its mark, although it had a later filing date.

Effigi was unable to overcome the Examiner's objection, and the Registrar refused the application. Effigi appealed the Registrar's decision to the Federal Court.

### TRIAL DECISION

The Federal Court said that the only issue to determine was the interpretation of s. 37(1)(c) of the *Trade-marks Act* (the Act) which reads:

"The Registrar shall refuse an application for the registration of a trade-mark if he is satisfied that the applicant is not the person entitled to registration of the trade-mark because it is confusing with another trade-mark for the registration of which an application is pending."

The Court determined that the language of s. 37 is clear and requires the Registrar to refuse an application for the registration of a mark if he is satisfied that the applicant is not entitled to registration because it is confusing with another mark for which a prior filed application is pending.

The interpretation of s. 37 did not require reference to s. 16, which deals with an applicant's entitlement to registration, and which the Court held was only applicable as of the date of advertisement (after the examination process). The Court also stated that when an application was based on use, no particular evidence or evidence of the use had to be provided so the Registrar could not make a complete decision. Accordingly, the Federal Court allowed the appeal and referred the application back to the Registrar to approve and advertise the application.

### APPEAL

Tricorn appealed the decision to the Federal Court of Appeal. The Court of Appeal upheld the decision of the Federal Court. It supported its decision by noting that s. 37 does not make any reference to the date of use claimed in an application. The Court of Appeal emphasized that the date of use in an application is not substantiated by evidence, but is merely an alleged date of use, so entitlement based on an earlier date of first use should be determined through opposition proceedings where the date of first use can be substantiated by evidence given under oath.

### CIPO PRACTICE NOTICE

If an application is based on use in Canada, or on the mark having been made known in Canada, the adoption date is the date of first use or the date on which the mark was first made known. For proposed use applications, the filing date is the date of adoption.

Prior to this decision, CIPO's practice, when assessing entitlement between two applicants with co-pending applications for confusing marks, was to approve the application with the earlier adoption date in Canada, rather than the application with the earlier filing date.

As a result of the *Effigi* decision, CIPO issued a Practice Notice regarding entitlement when dealing with confusing marks.

Based on s. 37(1)(c) of the Act, during the examination process, the Registrar will no longer consider the date of first use or making known as the relevant date to assess entitlement. When pending applications concern marks which are confusing, the applicant with the earlier filing date or priority date will be considered to be the person entitled to registration of its trade-mark.

A subsequent applicant with an earlier date of use may oppose the first filed application and may request extensions of time to respond to any Examiner's objection regarding its own application pending completion of the opposition proceedings.

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## Prior Users Hung in *Effigi*

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### IMPACT OF DECISION AND PRACTICE NOTICE

Under previous Canadian practice, the criteria for determining priority between applications were the same in examination and in opposition. This decision and the subsequent reaction of CIPO make the Canadian practice similar to that in the United States.

The decision and practice notice confirm the importance of filing an application as soon as possible, whether it is based on proposed use or use. This ensures an earlier filing date for entitlement purposes and could avoid oppositions to applications for confusingly similar marks based on proposed use or with a later date of first use.

While CIPO will now focus on application dates to determine entitlement among applications, applicants should not make the mistake of thinking that a claim to registration based on use in Canada is irrelevant. Case law establishes that a claim to registration based on proposed use, when the applicant has actually used the mark, will invalidate an application. Failure to state the earliest date of first use may also be a source of invalidity if the failure was rooted in bad faith. Finally, as noted above, in an opposition proceeding, a date of first use (or of making known) will be relevant in determining entitlement.

## FAMOUS CANADIAN INVENTIONS

Contrary to popular belief, Thomas Alva Edison did not "invent" the light bulb, but rather improved on an invention co-invented by a Canadian. The light bulb was invented by Henry Woodward, of Toronto, and Mathew Evans, and patented in 1875. When the two entrepreneurs could not raise the financing to commercialize their invention, the enterprising Edison, who had been working on the same idea, bought the rights to their patent.

Edison's contributions to the technology were improvements based on lower current, a small carbonized filament, and an improved vacuum inside the globe. In 1879, with Edison's refinements, his bulb was able to produce a reliable, lasting source of light. While Edison then went on to develop a series of other inventions which resulted in an incandescent lighting system, the master invention was that of Evans and Woodward.



Sheldon Burshtein  
Tel: 416.863.2934  
E-mail: sb@blakes.com

# EXPERIMENTAL USE EXCEPTION TO PATENT INFRINGEMENT IN CANADA

SHELDON BURSHEIN

Significant research and development is conducted in Canada, especially in the biotechnology and pharmaceutical industries. Therefore, there has been much interest in a recent United States decision on experimental activity in the context of potential liability for patent infringement and the corresponding position in Canada.

## UNITED STATES DECISION

In a much anticipated decision, the United States Supreme Court held that the use of a patented compound in preclinical studies is exempt from patent infringement where there is a reasonable basis for believing that the compound could be the subject of a regulatory filing to the United States Food and Drug Administration (USFDA) or where the experiment may produce information for use in a USFDA submission: *Merck v. Integra Lifesciences*. Merck funded research by the Scripps Research Institute on potential anti-cancer drugs, some of the most promising of which made use of a peptide sequence that Merck supplied but which had been patented by Integra. Tests identified one of these drugs as a useful anti-cancer medicine that appeared to be worth testing on humans. When Merck sought approval from the USFDA, Integra sued Merck and the researchers for patent infringement.

Under United States law, any person who makes, uses or sells a patented product without authorization is ordinarily liable for infringement, but it is not infringement to make or use a patented invention "solely for uses reasonably related to the development and submission of information under a federal law which regulates the manufacture, use or sale of drugs or veterinary biological products". A person who conducts research on new drugs must provide experimental data to the USFDA to obtain approval to perform clinical tests of the drug on humans. If such clinical tests are successful, approval must then be sought from the USFDA to make and market the drug in the United States.

The United States Supreme Court held that use of a patented compound in research does not constitute patent infringement, at least where the researcher has a reasonable basis for believing that the compound may work, through a particular biological process, to produce a particular physiological effect, and uses the compound in research that, if successful, would be appropriate to include in a submission to the USFDA. The exempt activity need not be related to safety, but may also be directed to other areas of inquiry, such as efficacy, toxicology or pharmacological, pharmacokinetic or biological properties. The activity may be exempt even if the results of the research are never included in a USFDA submission. The ruling creates a fact-based standard that requires courts to determine

whether a person reasonably believes that its research is relevant to seeking USFDA approval. The Court remanded the case for a determination of whether the research in this case satisfied the legal standard.

However, the Court said that the exemption does not apply to all experimental activity. Specifically, the Court held that basic research on a compound, performed without a particular reasonable belief that the compound will cause a particular physiological effect that the research is meant to induce, is not necessarily related to the development and submission of information to the USFDA. The Court expressly declined to express a view as to whether the exemption applies to the use of patented research tools in the development of information for the regulatory process.

## CANADIAN POSITION

In 1993, the Canadian *Patent Act* (the Act) was amended to include a statutory exemption from infringement which is almost identical to that of the United States law. The Act provides that it is not infringement to make, use or sell a patented invention "solely for uses reasonably related to the development and submission of information required under the law of Canada, a province or a country other than Canada that regulates the manufacture, construction, use or sale of any product". The wording "solely for uses reasonably related to the development and submission of information under ... law" is identical to that in the United States legislation, so the holding and other comments in the *Merck* decision may be equally applicable in Canada. It is worth noting that, unlike the United States exemption, the Canadian exemption is not limited to drugs and is also available for research in Canada for a submission to a foreign regulatory agency, such as the USFDA.

The Canadian provision goes on to say that the statutory exemption does not affect any exception to a patent right that exists at law in respect of acts done: (i) privately and on a non-commercial scale; (ii) for a non-commercial purpose; or (iii) in respect of any use, manufacture or sale of the patented invention solely for the purpose of experiments that relate to the subject matter of the patent. This merely codifies the pre-existing judicial exception for experimental use.

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## Experimental Use Exception to Patent Infringement in Canada

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The leading decision on the judicial exemption is that of the Supreme Court of Canada in *Micro Chemicals v. Smith Kline & French Inter-American Corp. Micro Chemicals* arose in the context of an application for a compulsory licence under a drug patent. Prior to the grant of the license, Micro made a small amount of the drug to enable it to state in its compulsory license application that it had made, and was capable of making, the product by the patented process, as was then required by the Act. Then, Micro made several batches of the product to explore the procedure and conditions of manufacture, to get increased yields, and to establish that it could produce the product economically.

The Supreme Court of Canada held that, in this activity, Micro's activities during both of these periods were within the judicial experimental use exception. Even though Micro's experiments were carried out, not for the purpose of improving the process, but to enable Micro to produce the patented substance commercially as soon as the compulsory license could be obtained, they did not constitute infringement. The use Micro made of the patented substance was not for profit, but to establish that it could manufacture a quality product in accordance with the specification. Such experimentation and preparation is not an infringement.

The Supreme Court focused on the fact that, in this activity, Micro was not making the patented substance for commercial production and sale, but rather was acting prudently to establish whether it could manufacture a quality product in accordance with the specification of the patent. Consequently, it appears that, to qualify under the common law experimental use doctrine in Canada, it is the purpose for which the experimental use is conducted that is determinative. Micro's subsequent commercial activities conducted prior to settlement of the terms of the license were not exempt.

In more recent decisions, it has been held that, where use of the invention does not proceed beyond the experimental and testing phase, the activity is not an infringing use. Until a person, at some stage of its product development, decides to finalize a particular product and takes steps to manufacture, promote and sell it, use of a patented invention does not constitute patent infringement.

Therefore, in Canada, neither the use of a patented product or process to obtain information to be used for a regulatory approval process, nor the use, manufacture or sale of a patented product or process solely for the purpose of experimental or testing activity prior to finalization of a commercial product for manufacture, promotion or sale is an infringing use. The Canadian exemption appears to extend to basic research.



Pauline Wong  
Tel: 416.863.2386  
E-mail: pauline.wong@blakes.com

## PRO SWING DRIVES FOREIGN JUDGMENTS FORWARD

PAULINE WONG

Canadian courts have long held that injunctions granted in foreign courts could not be enforced in Canada. Instead, only foreign judgments for a fixed sum of money or 'definite sum certain' could be enforced. In a recent decision in a trade-mark infringement case, *Pro Swing Inc. v. ELTA Golf Inc.*, the Ontario Court of Appeal has indicated that the time has come to lift this prohibition.

Pro Swing, an Ohio corporation, manufactured and sold customized golf clubs and components under the trade-mark TRIDENT. In April 1998, Pro Swing sued ELTA, an Ontario corporation, in the U.S. District Court for the Northern District of Ohio, Eastern Division, alleging that ELTA was selling golf clubs and components under the infringing trade-mark RIDENT. The action was settled in July 1998 when Pro Swing and ELTA reached an agreement, which included a consent decree endorsed by the U.S. District Court and signed by the parties. The consent decree enjoined ELTA from selling infringing golf clubs and components, and required ELTA to deliver infringing materials to Pro Swing. The decree also provided that the U.S. District Court retained jurisdiction over the parties to enforce it and that the parties would not contest that jurisdiction.

Years later, in December 2002, Pro Swing brought a motion for contempt of court against ELTA, alleging that ELTA was selling golf heads bearing the RIDENT and TRIDENT marks. Notice of the motion was given to ELTA, but it did not respond. In February 2003, the U.S. District Court found ELTA in contempt, enjoined ELTA again, required ELTA to provide the names and addresses of suppliers and purchasers, and awarded Pro Swing damages to be determined by an accounting to be provided by ELTA. Again, the U.S. District Court retained jurisdiction over the parties to enforce the order. ELTA did not comply, which meant that Pro Swing did not have ELTA's sales information and, therefore, could not propose an amount and obtain the award for compensatory damages. In June 2003, Pro Swing brought an action in the Ontario Superior Court of Justice to enforce the consent decree and the contempt order. In response, ELTA filed a defence arguing that the two foreign judgments were not for fixed sums of money and, therefore, could not be recognized and enforced in Ontario. Pro Swing moved for summary judgment.

The Supreme Court of Canada outlined the principles applicable to the interprovincial recognition of judgments in *Morguard Investments Ltd. v. De Savoye* and later extended those principles to the recognition of judgments rendered outside Canada, in *Beals v. Saldanha*. For a foreign (whether from another province or another country) judgment to be

enforceable, *Morguard* required that (i) comity apply, (ii) the foreign court's jurisdiction was reasonable based on a real and substantial connection, (iii) the foreign court's exercise of jurisdiction was fair to the defendant, and (iv) there are no reasons, such as fraud, public policy, or conflict with the law of the foreign state, for refusing to enforce the foreign judgment.

The issue in *Pro Swing* was whether there was still a requirement that a foreign judgment be for a fixed sum. At the motion for summary judgment, counsel were able to locate only one decision that addressed the issue, *Uniforêt Pâte Port-Cartier Inc. v. Zerotech Technologies Inc.*, in which a Quebec company sought to enforce a Quebec judgment in British Columbia. The British Columbia Supreme Court determined that *Morguard* abrogated the common law and there was no longer a requirement that a foreign judgment be for a 'sum certain'. However, the Court dismissed the application for enforcement, holding that the judgment was not 'final and conclusive'.

The motions judge in *Pro Swing* applied *Uniforêt*. The Court held that while *Morguard* did not change the law relating to the need for a sum certain, the requirement may be relaxed or removed depending on the circumstances of the case; in this case, an action for enforcement of a foreign monetary judgment is an action for a debt, thus diminishing the need for detailed knowledge of the underlying factual matrix. There was also the issue of whether the foreign court intended that the non-monetary judgment have extraterritorial application. *Pro Swing* involved a consent decree which was signed by the parties and reflected a settlement agreement, which set out the underlying factual matrix. By the terms of the consent decree, it was clear that extraterritorial application was intended. Thus, the motions judge enforced the consent decree.

*Morguard* did not change the common law with respect to the requirement of finality, which exists because a domestic court does not wish to be faced with enforcing a foreign judgment that is later changed. In the contempt order, some items, such as the determination of the amount of damages, were left outstanding. In the result, the motions judge enforced only the provisions in the contempt order that mirrored the consent decree.

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## ***Pro Swing* Drives Foreign Judgments Forward**

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ELTA appealed the decision, arguing that the Court should not enforce any part of either foreign judgment.

The Court of Appeal agreed with the motions judge that the time was ripe for a re-examination of the rules governing the recognition and enforcement of foreign non-monetary judgments. However, the Court of Appeal disagreed that the consent decree was sufficiently certain that it could be enforced without having to interpret its terms or vary it. In the Court's view, both judgments were ambiguous in respect of material matters, for example, the scope of the extraterritorial application of the judgments. Thus, the Court granted the appeal.

With the decision in *Pro Swing*, Ontario courts have shown a willingness to set aside pre-*Morguard* common law rules to facilitate the conduct of business across national borders. Leave to appeal to the Supreme Court of Canada has been granted and the appeal hearing has been scheduled for December 2005.

The results should indicate whether the Supreme Court of Canada agrees with this application of its *Morguard* principles.

## **Copyright Reform Legislation Introduced**

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ISPs would potentially play a significant role in curbing infringing activities by virtue of the proposed "notice and notice" regime, under which an ISP would be required to forward any notice it receives from a copyright owner to a subscriber who is alleged to be engaged in infringing activities online. The ISP would also be required to retain, for a period of up to six months, information sufficient to identify the subscriber in question.

Additionally, Bill C-60 contains provisions that aim to facilitate the use of digital technologies for educational and research purposes. Specifically, educational institutions would be permitted to use the Internet to deliver certain copyright protected material, for example, lectures and licensed teaching material, electronically, provided that appropriate safeguards are in place to prevent the unauthorized transmission of works.

Performers would also be given additional rights, such as rights over fixation, communication by telecommunication, public performance, and rental. Moral rights protection would be extended to performers' performances.

The copyright bundle of rights is to be expanded by the inclusion of a "first sale" right over any tangible, material form of work.

Reforms introduced by the bill also extend to copyright in photographs. Photographs have historically been treated quite differently from other copyright works. Ownership of copyright would reside in the person commissioning (for valuable consideration) the original, rather than the author, even without a written assignment. The term of protection is a fixed time running from creation (rather than from the death of the author), for photographs owned by any corporation in which the author does not have voting control. Under the proposed legislation, these distinctions would cease to exist.

Comments have been invited regarding the details of the draft legislation and so changes may well occur as the bill moves forward.

## IP UPDATE

### PATENT ACT

The *Jean Chretien Pledge to Africa Act* contains amendments to the *Patent Act* and *Patent Rules* that permit Canadian entities to seek approval to export certain listed pharmaceutical products to certain listed countries. These amendments came into force on May 14, 2005.

Bill C-29, *An Act to Amend the Patent Act*, received Royal Assent on May 5, 2005. The Bill amends the *Patent Act* to allow for the retroactive correction of the difficulties caused by the *Dutch Industries* decision with respect to patent fee payments made at the small entity level. The amendments will become effective on proclamation, likely in 2006.

### TRADE-MARKS ACT

The Canadian Intellectual Property Office has issued a discussion paper on Canada's possible adherence to the *Madrid Protocol* and other possible changes to the *Trade-marks Act*.

### SIGNIFICANT CASES

The appeal of *Veuve Clicquot Ponsardin v. Les Boutiques Cliquot Ltée* was heard by the Supreme Court of Canada earlier this month. The case relates to the scope of protection to be afforded to famous marks.

## FIRM SEMINARS

**Blakes** hosted a client seminar in our Toronto office on *Hot Button IP and Technology Topics*. The following topics were discussed:

- **Elizabeth McNaughton** chaired the program and discussed *What's New in Advertising*
- **Sheldon Burshtein** presented *Tune In: Music on the Internet*
- **Santosh Chari** discussed *Patenting Business Methods*
- **Richard Corley** discussed *Electronic Contracts*
- **Gary Daniel** talked about *Protecting Product and Packaging Shape*
- **Chris Hale** discussed *Linking, Metatagging, Keying, Pop-ups and Phishing*
- **Sunny Handa**, of our Montréal office, presented *Copyright: What Can you Copy?*
- **Gary Jessop**, of our Ottawa office, spoke on *Cross-Border Satellite Television*
- **John Koch** discussed *Liability for Damages and Profits in IP Infringement*
- **Mark Penner** spoke on *Patenting Life*
- **Tony Prenol** discussed *Cross-Border Patent Infringement*
- **Alice Tseng** presented *Internet Pharmacies*

We also presented a seminar to clients in our Toronto office on *Outsourcing Services – Beyond the IT Sector*. Topics included:

- **Richard Corley** spoke on *Lessons Learned from the IT Sector*
- **Ron Deyholos**, of our Corporate and Commercial Group in the Calgary office, presented *Outsourcing from the Perspective of the Service Provider*
- **Judy Wilson** discussed *Starting the Process and Facing the Procurement Issue: Is There a Right Way to do a Request for Proposal?*

If you would like a copy of the printed materials for either program, contact Andréa Dietsche at 416.863.2495 or [andrea.dietsche@blakes.com](mailto:andrea.dietsche@blakes.com).

# NEW FACES AND HONOURS

**Blakes Intellectual Property Group** is pleased to announce that, of 16 new Partners admitted to the partnership in 2005, two are members of the Intellectual Property Group: **John Koch** and **Alice Tseng**. John's practice is directed to intellectual property litigation. Alice, who is a licensed pharmacist, focuses on pharmaceutical, food and medical device related matters.

## NEW PARTNERS



**Mark Hayes** has joined the partnership to practise in the Intellectual Property and Information Technology Groups in the Toronto office. Prior to joining Blakes, he practised at another major Canadian law firm. Mark's practice focuses on intellectual property, information technology, electronic commerce, privacy and access to information, telecommunications, new media and broadcasting. Mark has extensive experience with regulatory matters and Canadian federal tribunals, including the Copyright Board. He is certified by the Law Society of Upper Canada as a Specialist in both Intellectual Property (Copyright) and Civil Litigation.

Mark is widely regarded as one of Canada's leading information technology, e-business and privacy lawyers. He has been recognized as one of the leading "Internet and E-commerce" lawyers in the world by the *International Who's Who of Business Lawyers* and *Euromoney's Guide to the World's Leading Technology, Media & Telecommunications Lawyers*. He is also recognized in *Mondaq Business Briefing* and *Lexpert/American Lawyer's* ranking of the Leading 500 Lawyers in Canada.

Mark is the incoming chair of the Ontario Bar Association Privacy Section. He was a co-author of *The Cyberspace is Not a No Law Land*, the 1997 study commissioned by Industry Canada on liability on the Internet. Mark is a founding member of the editorial board of *Cyberspace Lawyer* and serves on the Advisory Board of *Internet and E-Commerce Law in Canada*. He has written and lectured extensively on issues relating to intellectual property, technology and the Internet, privacy and entertainment law. Mark has also taught intellectual property and "Cyberlaw" courses to undergraduate and graduate law students, including the E-Regulation course he developed for Osgoode Hall Law School's Canada-wide LL.M. program.

## NEW FACES

Five lawyers have joined the Intellectual Property Group. **Francis Chang** has joined our Vancouver office. Prior to joining Blakes, Francis was based in Hong Kong where he worked as vice-president and deputy general counsel of legal affairs for the Asian subsidiary of one of the world's top media conglomerates. Francis has extensive experience dealing with the formation, management and dissolution of joint ventures, investments and strategic alliances in major Asian markets including India, China, Taiwan, Korea, Pakistan and the Middle East. He also has expertise in dealing with television broadcasting, production, program syndication and other media content matters. Francis has spoken extensively on pay television and anti-piracy matters. Francis' practice focuses on corporate matters in relation to the media and entertainment areas, licensing, private equity investment, and mergers and acquisitions.

**Daphne Maravei** has joined the Ottawa office. She has a degree in chemical engineering from McGill University and obtained her law degree at the University of Ottawa. Daphne is a recipient of the Harold G. Fox Scholarship. She is qualified as both a patent agent and a trade-mark agent and is bilingual. Since her call to the bar, she has practiced at a major intellectual property firm. Daphne's practice will focus on patent and trade-mark prosecution and related litigation.

**Elizabeth Sale**, of our Commercial Group, has been seconded to the IPG in Toronto. She has an undergraduate degree from Wesleyan University in Connecticut and received her law degree at Osgoode Hall Law School. Elizabeth is fluent in French and, prior to attending law school, taught English in Korea. While with the IPG, her practice will focus on information technology and privacy with an interest in the healthcare sector.

**Wendy Mee** has also joined the IPG in Toronto. She obtained her law degree at the University of Toronto and holds an Honours Bachelor Degree in Nutrition and Nutraceutical Sciences from the University of Guelph. Wendy has worked as a student case worker at Enterprise Legal Services, conducted research for Pro Bono Students of Canada, and was an associate editor of the University of Toronto Law Review. She also volunteered with the University of Guelph Health and Performance Centre. Wendy articulated with the Firm before joining the IPG as an Associate. Her practice will focus on advertising and marketing, life sciences, and privacy.

**Maria Amore** has joined the Montréal office. She completed her Bachelors of Civil Law and Common Law at McGill University, where she had also obtained her Bachelor of Arts in Psychology. Maria is fluent in French and English. She articulated with the Firm. In addition to working on technology-related transactions, Maria's practice involves advising companies on intellectual property and also regulatory and other issues in the pharmaceutical and telecommunications industries.

## MORE HONOURS

### Career Contribution

**George Fisk** was honoured for his significant contribution to intellectual property law in Canada by the Canadian Bar Association, IP Section, Court Practice Committee at the Annual Federal Court Judges' Dinner.

### Managing Intellectual Property

**Blakes** has again been selected one of the "Leading Intellectual Property Firms in Canada" in the 2005 *Managing Intellectual Property* survey.

**Blakes** has again been named one of the "Leading Patent Firms in Canada" in the 2005 *Managing Intellectual Property* survey.

**Blakes** has again been chosen one of the "Leading Trade Mark and Copyright Firms in Canada" in the 2005 *Managing Intellectual Property* survey.

### Macleans

**Blakes** was named by *Macleans* magazine as one of the "Top 10 Companies for Promoting Women".

### Lexpert

**Blakes** has again been highly honoured in the leading Canadian lawyer peer review publication. In the 2005 *The Canadian Legal Lexpert Directory*, the Firm as a whole was again mentioned as one of the "Seven Sisters" of Canadian law firms. With respect to intellectual property and technology, Blakes was referenced in:

- Intellectual Property: Who's Who
- Technology: Who's Who

In the specific practice area listings, the Firm was selected in:

- Computer and Information Technology
- Intellectual Property
- Technology

Although *Lexpert* did not select firms for the "Advertising and Marketing" practice area, no firm had more individuals selected than Blakes.

In addition, the following individuals were recognized in categories related to Intellectual Property and Technology:

- **Sheldon Burshtein** for "Computer and Information Technology", "Intellectual Property" and "Technology"
- **George Fisk** for "Intellectual Property" and "Intellectual Property Litigation"
- **Richard Corley** for "Computer and Information Technology" and "Technology"
- **Sunny Handa** for "Computer and Information Technology" and "Technology"
- **Elizabeth McNaughton** for "Advertising and Marketing"
- **Bert Bruser** for "Defamation and Media Related Litigation"
- **Rob Kwinter** for "Advertising and Marketing"
- **Paul Schabas** for "Defamation and Media Related Litigation"
- **Dawn Mains** for "Intellectual Property"
- **Chris Hewat** for "Technology"
- **Alison Woodbury** for "Defamation and Media Related Litigation"

## Which Lawyer

**Blakes** has again been highly rated in another global peer review. In the 2005 *Which Lawyer* survey conducted by Practical Law Company, Blakes was chosen as one of the overall leading firms in Canada. With respect to Intellectual Property and Technology, Blakes was selected in the following categories:

- Intellectual Property
- IT and E-Commerce
- Life Sciences – Corporate & Commercial
- Life Sciences – Intellectual Property
- Life Sciences – Regulatory

In addition, the following individuals were recognized in the survey:

- **Sheldon Burshtein** for “Intellectual Property”, “IT and E-Commerce”, and “Life Sciences – Intellectual Property”
- **Elizabeth McNaughton** for “Life Sciences – Regulatory”
- **Richard Corley** for “IT and E-Commerce”

## International Who's Who

**Blakes** was named as one of Canada's leading firms in Law Business Research's *The International Who's Who of Patent Lawyers*.

**Sheldon Burshtein** was one of 16 lawyers worldwide selected as the “Most Highly Regarded Individuals – Global” in Law Business Research's *The International Who's Who of Trade Mark Lawyers*.

**Sheldon Burshtein** was the most frequently named Canadian in *The International Who's Who of Patent Lawyers*.

**Blakes** had numerous other lawyers selected in other practice areas in Law Business Research's *Who's Who of Business Lawyers*.

## OTHER INDIVIDUAL RECOGNITION

**George Fisk** and **Sheldon Burshtein** were named to the *Euromoney Guide to the World's Leading Patent Law Experts*.

**Sunny Handa** is one of four Blakes lawyers named to the 2005 *Lexpert* “Top 40 Under 40” Canadian lawyers.

**Sheldon Burshtein** was again named to the 2005 Practical Law Company *Communications Law Handbook*.

**Jim Christie**, Firm Chair, was named a member of the Advisory Board for the Canadian General Counsel Awards.

**Alex Ross** was awarded the J. Edward Maybee Memorial Prize and the Marie F. Morency Memorial Prize for the 2004 Patent Agent Examinations.

# PROFESSIONAL NOTES

## ADVERTISING AND MARKETING

**Elizabeth McNaughton** and **Rob Kwinter**, speakers, *Industry Rights and Obligations Under the Medical Device Inspection Program*, Legal Conference, MEDEC.

**Alice Tseng**, speaker, *Summary Basis of Decision – Legal Issues*, Legal Conference, MEDEC.

**Rob Kwinter**, of our Competition Group, speaker, *Challenging Comparative Advertising Under the Competition Act*, Advertising & Marketing Law, The Canadian Institute.

**Gord McKee**, of our Litigation Group, *Class Actions: How to Manage the New Level of Risk*, Advertising & Marketing Law, Insight Information.

**Gail Lilley**, of our Commercial Group, moderator, *Common Issues in the Agency/Client/Counsel Relationship: What Each is Looking For and How to Manage the Relationship*, Advertising & Marketing Law, The Canadian Institute.

## ALTERNATIVE DISPUTE RESOLUTION

**Alan Aucoin**, speaker, *Important Considerations for ADR Clauses and How to Draft Them*, Negotiating and Drafting Intellectual Property License Agreements, The Canadian Institute.

**Bill Kaplan**, chair, *The Future of Mediation – Business ADR Commercial Arbitration and Mediation*, ADR Institute of Canada.

**Bill Horton**, of our Litigation Group, speaker, *Issues Arising From the Proposed Use of Practising Counsel as Arbitrators*, Negotiating and Drafting Effective Arbitration Provisions in Commercial Agreements, Osgoode Hall Law School.

## COMMUNICATION

**Sunny Handa**, speaker, *New Frontiers in Communications Regulation*, McGill University.

**Sunny Handa**, speaker, *Legal Issues in Convergence and E-Commerce*, ICT Development Management Program, The Telecommunication Executive Management Institute of Canada.

**Sunny Handa**, speaker, *Telecoms and NAFTA*, Trilateral Symposium, Universidad Panamerica Law School.

## COMPETITION

**Rob Kwinter**, speaker, *Effective Compliance Strategies for Pricing*, Price Point, The Canadian Institute.

**Cal Goldman**, of our Competition Group, co-chair, *International Competition Law*, Insight Information. **Cal** also participated on a panel on *Mergers – Is the Promise of Convergence Being Fulfilled?*

**Crystal Witterick**, of our Competition Group, moderator, *Dealing with the Single-Firm Conduct Conundrum: Efficiency or Exclusion*, International Competition Law, Insight Information.

## COPYRIGHT AND DESIGNS

**Sunny Handa**, speaker, *Focus on Computer Programs*, Understanding the Business of Copyright, McGill University/Intellectual Property Institute of Canada.

**George Fisk** and **Sheldon Burshtein**, speakers, *Copyright and Industrial Designs*, *Intellectual Property: Year in Review 2004*, The Law Society of Upper Canada. The paper was also co-authored by **Prakash Narayanan**, of our Competition Group, and **Zoe King**, summer student.

**Sunny Handa** and **Alex Matheson**, co-authors, *Copyright Law and the Internet: The Tariff 22 Case*, North American Free Trade & Investment Report.

**Parna Sabet**, author, *Canada: Ontario Court of Appeal Examines Right of Freelance Authors*, Mondaq.com.

**Sunny Handa**, speaker, *Recent Developments in Copyright and Information Technology Law*, Dalhousie University Law and Technology Institute.

**George Fisk**, **Sheldon Burshtein** and **Prakash Narayanan**, co-authors, *Intellectual Property: Year in Review – 2004: Copyright and Industrial Designs*, Federal Court of Appeal Judges' Seminar, National Judicial Institute.

**Sunny Handa**, speaker, *The SOCAN Decision*, International Discussion Forum, Canadian Bar Association.

**Pauline Wong**, author, *Private Copying Collective Appeals Federal Court's Ban On MP3 Levy*, World Copyright Law Report.

**Tony Turco** and **Alex Matheson**, authors, *Government Announces Long-awaited Copyright Reforms*, World Copyright Law Report.

**Sunny Handa**, moderator, *Copyright in the Library*, Canadian Copyright and the University, McGill University Faculty of Law/Center for Intellectual Property Policy.

**George Fisk**, **Sheldon Burshtein** and **Prakash Narayanan**, co-authors, *Intellectual Property: Year in Review – 2004: Copyright and Industrial Designs*, International Association for the Protection of Intellectual Property – Canadian Group Website.

**Parna Sabet**, author, *Ontario Court of Appeal Examiner's Right of Freelance Authors*, Entertainment.

**Sunny Handa** and **Alex Matheson**, co-authors, *Canada Copyright Law and the Internet: The Tariff 22 Case*, Global Intellectual Property Asset Management Report.

**FOOD, DRUGS AND DEVICES**  
**Elizabeth McNaughton** and **Alice Tseng**, keynote speakers, *Monitoring Pharmaceuticals Throughout the Supply Chain to Ensure Regulatory Compliance and Product Integrity*, Pharma Supply Chain Summit 2005, The Canadian Institute.

**Alice Tseng**, speaker, *Online Pharmacy*, Issues in E-Commerce, Toronto Computer Lawyers' Group.

**Gord McKee**, speaker, *Product Liability Issues for Refurbished Devices*, Legal Conference, MEDEC.

**Jill Lawrie**, of our Litigation Group, speaker, *Mitigating Your Legal Damages When Drug Recalls Occur*, Drug Safety Summit 2005: A Pharmaceutical Industry Forum, The Canadian Institute.

**Jeff Galway**, of our Litigation Group, chair, *Regulatory Investigations: Effectively Managing Your Client's Exposure*, Osgoode Hall Law School.

**Ben Little**, of our Competition Group, and **Jeffrey Shafer**, student-at-law, co-authors, *Canadian Competition Law and Internet Pharmacies*, Food and Drug Law Institute Update.

## INTELLECTUAL PROPERTY GENERALLY

**Dawn Mains** and **Tony Prenol**, editors, *Intellectual Property World Desk Reference: A Guide to Practice by Country, State and Province* (Aspen Publishers).

**Sunny Handa**, panellist, *Best Practices in Managing Complex International Files*, Playing the Global Game: Managing the Legal Function Across Borders, LexisNexis Martindale-Hubbell Counsel to Counsel Forum.

**Tony Prenol**, speaker, *Cross-Border Intellectual Property Practices*, Canada/Wisconsin Technology Co-operation Symposium.

## LICENSING AND TECHNOLOGY TRANSFER

**Sheldon Burshtein**, co-author, *Developments in Canadian Licensing Law*, 2005 Licensing Update (Aspen Publishers).

**Sheldon Burshtein** and **Gary Daniel**, co-chairs, *Negotiating and Drafting Intellectual Property License Agreements*, The Canadian Institute.

**Sheldon** also spoke on *A Comprehensive Practice Guide to Representations and Warranties*.

**Sheldon Burshtein** and **Chris Hale**, co-authors, *Advanced License Drafting Strategies for Life Sciences: Workshop Clauses*, Technology Transfer and Commercializing Intellectual Property in the Life Sciences, Insight Information.

**Sheldon Burshtein**, speaker, *The Dance of Negotiation in Complex International Licensing Transactions*, Advanced Multi-National IP Licensing, Law Seminars International.

## LITIGATION AND ARBITRATION

**Gary Daniel** and **Tony Turco**, co-authors, *Enforcing Intellectual Property Rights North of the Border: A Canadian Perspective*, IP Litigator.

**Paul Schabas**, of our Media Group, panellist, *Access to Information: From Soft Law to Hard Law*, Freedom of Information Litigation and Advocacy Strategies, Open Society Justice Initiative.

**Ryder Gilliland**, of our Media Group, co-author, *E-Torts: Emerging On-Line Perils*, Annual Institute of Continuing Education, Ontario Bar Association.

**Paul Schabas**, co-chair, *Electronic Evidence in the Litigation Process*, Osgoode Hall Law School Continuing Legal Education. **Paul** also spoke on *Practical Challenges with Electronic Evidence*.

**Bill Horton**, co-author, *Confidentiality in Canadian Litigation*, The Advocates' Quarterly.

**Glenn Leslie**, of our Litigation Group, panellist, *Managing and Handling Conflicts, Confidentiality & Other Ethical Issues*, Business Development Forum.

**Gord McKee**, speaker, *Search Warrants and Discovery Requests in Canadian Competition Law*, International Association of Defence Counsel.

**Bill Kaplan**, speaker, *Preparing for Negotiations*, Litigation Management Supercourse, Network of Trial Lawyer Firms.

**Glenn Leslie**, speaker, *Private Enforcement – Leave Applications and Granting Principles*, Competition Litigation Invitational Forum, Northwind Professional Institute.

## MEDIA

**Paul Schabas**, **Tony Wong** and **Ryder Gilliland**, all of our Media Group, co-authors, *Recent Developments in Media and Defamation Law*, The Canadian Legal Expert Directory.

**Sunny Handa**, interview, *Obscenity Laws & the Internet*, CTV Television.

**Paul Schabas**, speaker, *The Media, Open Courts and Sealing Orders: Recent Developments*, Charter Conference, Ontario Bar Association. The paper was co-authored by **Ryder Gilliland**.

#### PATENTS

**John Orange**, speaker, *Patents Worldwide: The Strategy, Understanding Patents*, McGill University/Intellectual Property Institute of Canada.

**Tony Prenol**, speaker, *Parallel Imports of Pharmaceuticals Between Canada and The United States*, Patent Life Cycles Conference, C5.

**John Koch**, speaker, *Internet Pharmacies and Parallel Importation*, Drug Patents, Insight Information.

**Sheldon Burshtein**, participant, *Intellectual Property Expert Roundtable on the Economic Implications of Intellectual Property Regimes Involving Human Genetic Materials*, Canadian Biotechnology Advisory Committee and Canadian Genetic Diseases Network.

**Mark Penner**, speaker, *Tips for Drafting Successful Pharma Patent Applications*, Fundamentals of Patent Law, The Canadian Institute.

**John Orange**, speaker, *Developing Trends and Issues in Patenting IT*, Technology in Bloom, Information Technology & E-Commerce Section of Ontario Bar Association.

**Sheldon Burshtein**, author, *How are Patent Rights Transferred?*, Pharmaceutical Canada.

**Mark Penner**, author, *AZT is Finally Immune*, Communiqué.

**John Orange**, speaker, *Patents Worldwide: The Costs and Value*, Understanding Patents, McGill University/Intellectual Property Institute of Canada.

**Sheldon Burshtein**, author, *How are Patent Rights Infringed?*, Pharmaceutical Canada.

**Mark Penner** and **Prakash Narayanan**, co-authors, *Another Canadian First! Amendments to the Patent Act to Address Drug Access – Is Help on the Way?*, Intellectual Property.

**John Orange**, speaker, *Change and Challenge in the Patent World*, Understanding Patents, McGill University/Intellectual Property Institute of Canada.

**Sheldon Burshtein**, author, *How are Patent Rights Enforced?*, Pharmaceutical Canada.

#### PRIVACY

**Elizabeth McNaughton** and **Ian Hay**, co-authors, *Federal Court of Appeal Weighs in on Privacy and Consent*, Mondaq.com.

**Andrea Freund**, of our Commercial Group, author, *Transfers of Personal Information to U.S. 'Linked' Service Providers*, Mondaq.com.

**Jodie Harris** (née Puscas) and **Patricia Taylor**, co-authors, *Top 10 Recent Changes to the B.C. Freedom of Information Act*, Mondaq.com.

**Elizabeth McNaughton**, panellist, *The Long Arm of United States Law: Data Protection, Privacy and the Patriot Act*, International Law and Practice Section Meeting, New York State Bar Association. The paper was authored by **Richard Corley**, **Marc Shewchun** and **Ian Hay**.

**Andrea York**, of our Labour & Employment Group, author, *Privacy in Practice – FAQs & Fiction*, North American Free Trade & Investment Report, World Trade Executive.

**Elizabeth McNaughton**, speaker, *Privacy Law in Canada and the European Union*, Advanced Corporate Counsel Forum on Advertising Law, American Conference Institute. The paper was co-authored by **Alex Matheson**.

**Elizabeth McNaughton**, speaker, *Current Issues in Outsourcing Transactions: Canadian Privacy Laws, the Patriot Act and Other Considerations*, New York State Bar Association.

#### TECHNOLOGY AND E-COMMERCE

**Sunny Handa**, co-author, *E-Commerce Legislation and Materials in Canada*, LexisNexis Butterworths.

**Dawn Mains**, co-chair, *Annual Meeting*, Canadian IT Law Association.

**Richard Corley**, co-author, *Cross-Border Outsourcing: Navigating the Canadian Laws*, Guide to the Leading 500 Lawyers in Canada, Lexpert/American Lawyer.

**Sunny Handa**, general editor, *Video Game Law*, Information Technology Law Services, Butterworths.

**Alex Ross**, co-author, *E-Commerce and the Law of Digital Signatures*, Canada – Electronic Commerce (Oceana Publications).

**Richard Corley**, speaker, *IT Law Practice Tips and Strategies*, Corporate Counsel Breakfast, Canadian IT Law Association.

**Elizabeth McNaughton** and **Parna Sabet**, co-authors, *Consumer Protection Act Affects Internet Agreements With Consumers*, The Lawyers Weekly.

**Richard Corley**, speaker, *Competition Law and Technology Transactions*, Advising Business on Technology Law Issues, Osgoode Hall Law School.

**Sunny Handa**, author, *Cryptography and the Swinging Pendulum of Regulation*, The Corporate Lawyer & Advisor.

**Richard Corley**, moderator, *How to Structure a Successful Long-Term Relationship*, Global IT Outsourcing Projects – How to Successfully Structure Outsourcing Projects and Agreements, Techlaw.

**Judy Wilson**, of our Commercial Group, co-chair, *Legal & Business Guide to Public Procurement For Purchasers, Vendors and Their Legal Advisors*, The Canadian Institute. **Judy** also spoke on *Apples and Oranges: Keeping the Evaluation Process Fair*.

**Craig Thorburn**, of our Commercial Group, *IT Due Diligence*, Annual Due Diligence Conference, Federated Press.

**Richard Corley**, speaker, *Successfully Navigating Acquisitions and Outsourcings*, In-House Counsel Congress, The Canadian Institute.

**Lee Shouldice**, of our Labour & Employment Group, author, *Outsourcing Heating Up on Many Fronts*, The Lawyers Weekly.

**Richard Corley**, speaker, *Current Issues in Outsourcing Transactions: Canadian Privacy Laws, the Patriot Act and Other Considerations*, New York State Bar Association.

## TRADE-MARKS AND DOMAIN NAMES

**Chris Hale**, co-author, *Canada*, Annual International Report of Trademark Jurisprudence, The Trademark Reporter.

**Sheldon Burshtein**, lecturer, *Introduction to Trade-marks*, Understanding Trade-marks: An Introductory Course, McGill University/Intellectual Property Institute of Canada.

**Tony Turco**, speaker, *.ca Domain Name Dispute Resolution: Looking Out for Pitfalls*, The Six Minute Intellectual Property Lawyer, Law Society of Upper Canada. **Sheldon Burshtein** authored the paper.

**Mark Penner**, author, *The Limits of Convergence: No Net Finding of Confusion*, Intellectual Property.

**Sheldon Burshtein**, lecturer, *Trade-mark Use: The Who, What, Where, When, Why, How and Future*, Understanding Trade-marks: An Introductory Course, McGill University/Intellectual Property Institute of Canada.

**Tony Turco**, speaker, *Evolution of IP Support Staff in Litigation and Trade-mark Prosecution – A Canadian Perspective*, Intellectual Property Retreat, Association of Legal Administrators.

**Sheldon Burshtein**, moderator, *Who Owns Professional Sports Marks – League, Teams, Players, Players Associations?*, International Trademark Association.

**Tony Turco**, speaker, *Trade-mark Law and the Internet*, Entrepreneurship and the Internet Symposium, Centre for the Study of Nascent Entrepreneurship and Exploitation of Technology, Wilfred Laurier University.

**Sheldon Burshtein**, author, *Whazup with the WHOIS?*, Canadian Journal of Law and Technology.

## TRANSACTIONS

**Dawn Mains**, speaker, *Protecting Your Company's Rights to its Technology in Coalbed Methane Transactions*, Advancing the Business of Coalbed Methane Conference, The Conference Board of Canada.

**Monica Sharma**, author, *Commercial Transactions in the Internet Age*, World Internet Law Report.

**Sheldon Burshtein**, speaker, *Trade-mark and Domain Name Related Due Diligence in Business Transactions*, Identifying and Managing Your Internet Rights, International Trademark Association.

**Wei Shao**, of our Commercial Group, speaker, *Legal Considerations in Contracting/IP in China*, Asia Pacific Summit.

# INTELLECTUAL PROPERTY GROUP

## Blakes Intellectual Property Group

is one of the largest intellectual property practices in Canada and has repeatedly been recognized as one of the top practices in the country.

Ours is a full service IP practice with lawyers, patent agents and trade-mark agents who advise on the acquisition, transfer and enforcement of patent, trade-mark, copyright and numerous other IP rights.

We also have extensive experience in the litigation and mediation of IP infringements, and licensing and regulatory disputes.

Maria Amore (Mon)  
Alan Aucoin (Tor)  
Alan Blackwell (Ott)  
John-Paul Bogden (Van)  
Sheldon Burshtein (Tor)  
Francis Chang (Van)  
Santosh Chari <sup>PA</sup> (Tor)  
Marie-Hélène Constantin (Mon)  
Richard Corley (Tor)  
Gary Daniel (Tor)  
George Fisk (Ott)  
Louise Foong <sup>PA</sup> (Tor)  
Minami Ganaha (Tor)  
Connie Guccione <sup>TMA</sup> (Tor)  
Chris Hale (Tor)  
Sunny Handa (Mon)  
Ian Hay (Tor)  
Mark Hayes (Tor)  
Christine Ing (Tor)  
Bill Kaplan (Van)  
John Koch (Tor)  
Tricia Kuhl (Mon)  
Theresa Leung <sup>TMA</sup> (Tor)

Dawn Mains (Cal)  
Daphne Maravei (Ott)  
Alex Matheson (Tor)  
Elizabeth McNaughton (Tor)  
Wendy Mee (Tor)  
Ken Mills (Cal)  
John Orange <sup>PA, TMA</sup> (Tor)  
Mark Penner (Tor)  
Anthony Prenol (Tor)  
Janice Przystal <sup>TMA</sup> (Tor)  
Alex Ross (Tor)  
Parna Sabet (Tor)  
Elizabeth Sale (Tor)  
Greg Segal (Tor)  
Monica Sharma (Cal)  
Marc Shewchun (Tor)  
Brett Slaney <sup>TC</sup> (Tor)  
Alice Tseng (Tor)  
Tony Turco (Tor)  
Scott Turner (Van)  
Laura Weinrib (Tor)  
Pauline Wong (Tor)  
Sean Zhang (Tor)

**Contact our professionals at  
firstname.lastname@blakes.com**

PA - Patent Agent, not called to the Bar  
TMA - Trade-mark Agent, not called to the Bar  
TC - Technical Consultant, not called to the Bar

## EDITORS: CHRIS HALE AND PAULINE WONG

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**MONTREAL**  
Tel: 514.982.4000  
Fax: 514.982.4099

**OTTAWA**  
Tel: 613.788.2200  
Fax: 613.788.2247

**TORONTO**  
Tel: 416.863.2400  
Fax: 416.863.2653

**CALGARY**  
Tel: 403.260.9600  
Fax: 403.260.9700

**VANCOUVER**  
Tel: 604.631.3300  
Fax: 604.631.3309

**NEW YORK \***  
Tel: 212.893.8200  
Fax: 212.829.9500

**CHICAGO \***  
Tel: 312.739.3610  
Fax: 312.739.3611

**LONDON \***  
Tel: 0207.680.4600  
Fax: 0207.680.4646

**BEIJING \***  
Tel: 8610.6561.1515  
Fax: 8610.6561.0667

\* Practice restricted to Canadian Law