

# Intellectual Property Weekly Abstracts Bulletin — Week of June 20

22 juin 2016

## Trademark Decisions

### Partial Success on a Motion to Strike Pleadings

[LBI Brands Inc. v. AquaTerra Corporation, 2016 ONSC 3572](#)

In this case, the defendants brought a motion to strike various parts of the Statement of Claim without leave to amend. Counsel settled parts of the motion before hearing. Success was divided. Where paragraphs were struck, the plaintiff was allowed to amend its pleading.

Seven paragraphs dealt with allegations that the defendants made false and misleading representations. The defendants filed evidence to try to show these allegations were frivolous and vexatious. However, the Court held that it must accept the facts alleged in the pleading as proven or true unless they are patently ridiculous or incapable of proof. In this case, although the facts pleaded are in dispute, they are material to the pleadings. Thus, the allegations are not scandalous, frivolous or vexatious, and were not ordered struck. Similarly, a further paragraph relating to conspiracy was not struck, as the Court held that the necessary facts were pleaded to establish both types of conspiracy claims.

The next impugned paragraphs dealt with allegations under s. 36 of the Competition Act. The Court held that such a cause of action requires that the plaintiff must have suffered loss as a result of the defendants' conduct contrary to s. 52(1) of the Competition Act. In this case, the causal connection was held not to be plead. Thus those portions of the claim that advanced claims pursuant to s. 36(1) of the Competition Act were struck. However, the Court held that the usual practice was to allow leave to amend, and so ordered.

Similarly, the Court held that the intellectual property aspect was missing from a claim pursuant to s. 7(d) of the Trade-marks Act. This was held to be a necessary element. Thus the paragraph was struck with leave to amend. However, further paragraphs were struck without leave to amend, as they were held to relate to origin and quality representations, and not intellectual property.

# Industrial Design Decisions

## Summary Judgment Invalidates an Industrial Design that Was Dedicated to the Public

E. Mishan & Sons. v. Supertek Canada Inc., 2016 FC 613

The Federal Court has granted a summary judgment motion and declared an industrial design invalid.

This action is the second part to a bifurcated proceeding. The Federal Court had previously found the plaintiffs' asserted patent to be invalid and dismissed the infringement action (2014 FC 326 and summarized the week of April 14, 2016; affirmed 2015 FCA 163 and summarized the week of July 27, 2015).

The industrial design at suit relates to an expandable garden hose comprising an inner flexible stretchable hose encased by an outer fabric hose affixed at both ends with customary garden hose fittings.

Before the hearing the plaintiffs had dedicated the industrial design to the public, discontinued the assertion of the design infringement portion of this action, and provided a letter containing a covenant not to sue to the defendants.

It was argued that the issue of validity was now moot after the dedication, but the Court questioned the effect of the dedication and noted that the dedication was made after the counterclaim as to invalidity was filed. The Court still proceeded to assess its validity, and found that the design is not original and is dictated solely by function.

Also, it was questioned whether the defendants are "persons aggrieved" considering the dedication and discontinuance of the industrial design claim. It was found that these actions, all unilaterally made by the plaintiffs, could not serve to eliminate the defendants' status as persons aggrieved.

The Court further ordered a summary trial with respect to Supertek's claim under section 7(a) of the Trade-marks Act. The claim pursuant to section 7(a) of the Trade-marks Act was found to require live witnesses, where their credibility will play a part in a proper determination of the matter. The Court stated that it would like to hear from the relevant witnesses by subpoena, if necessary, to give evidence in person in Court.

### Par

Chantal Saunders, Beverley Moore, Adrian J. Howard

### Services

Propriété intellectuelle, Droit d'auteur, Brevets, Octroi de licences, Marques de commerce

## BLG | Vos avocats au Canada

Borden Ladner Gervais S.E.N.C.R.L., S.R.L. (BLG) est le plus grand cabinet d'avocats canadien véritablement multiservices. À ce titre, il offre des conseils juridiques pratiques à des clients d'ici et d'ailleurs dans plus de domaines et de secteurs que tout autre cabinet canadien. Comptant plus de 725 avocats, agents de propriété intellectuelle et autres professionnels, BLG répond aux besoins juridiques d'entreprises et d'institutions au pays comme à l'étranger pour ce qui touche les fusions et acquisitions, les marchés financiers, les différends et le financement ou encore l'enregistrement de brevets et de marques de commerce.

[blg.com](http://blg.com)

### Bureaux BLG

#### Calgary

Centennial Place, East Tower  
520 3rd Avenue S.W.  
Calgary, AB, Canada  
T2P 0R3  
  
T 403.232.9500  
F 403.266.1395

#### Ottawa

World Exchange Plaza  
100 Queen Street  
Ottawa, ON, Canada  
K1P 1J9  
  
T 613.237.5160  
F 613.230.8842

#### Vancouver

1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC, Canada  
V7X 1T2  
  
T 604.687.5744  
F 604.687.1415

#### Montréal

1000, rue De La Gauchetière Ouest  
Suite 900  
Montréal, QC, Canada  
H3B 5H4  
  
T 514.954.2555  
F 514.879.9015

#### Toronto

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto, ON, Canada  
M5H 4E3  
  
T 416.367.6000  
F 416.367.6749

Les présents renseignements sont de nature générale et ne sauraient constituer un avis juridique, ni un énoncé complet de la législation pertinente, ni un avis sur un quelconque sujet. Personne ne devrait agir ou s'abstenir d'agir sur la foi de ceux-ci sans procéder à un examen approfondi du droit après avoir soupesé les faits d'une situation précise. Nous vous recommandons de consulter votre conseiller juridique si vous avez des questions ou des préoccupations particulières. BLG ne garantit aucunement que la teneur de cette publication est exacte, à jour ou complète. Aucune partie de cette publication ne peut être reproduite sans l'autorisation écrite de Borden Ladner Gervais S.E.N.C.R.L., S.R.L. Si BLG vous a envoyé cette publication et que vous ne souhaitez plus la recevoir, vous pouvez demander à faire supprimer vos coordonnées de nos listes d'envoi en communiquant avec nous par courriel à [desabonnement@blg.com](mailto:desabonnement@blg.com) ou en modifiant vos préférences d'abonnement dans [blg.com/fr/about-us/subscribe](http://blg.com/fr/about-us/subscribe). Si vous pensez avoir reçu le présent message par erreur, veuillez nous écrire à [communications@blg.com](mailto:communications@blg.com). Pour consulter la politique de confidentialité de BLG relativement aux publications, rendez-vous sur [blg.com/fr/ProtectionDesRenseignementsPersonnels](http://blg.com/fr/ProtectionDesRenseignementsPersonnels).

© 2025 Borden Ladner Gervais S.E.N.C.R.L., S.R.L. Borden Ladner Gervais est une société à responsabilité limitée de l'Ontario.