

WEDNESDAY 26 .04.06

REPORT ON BUSINESS

S&P/TSX

12,329.79
-12.44Industrial
shares lead de-
cline on com-
posite index

DJ Ind.

11,283.25
-53.07Blue-chip index
retreats on rate
hikes concern

Nasdaq

2,330.30
-3.08Google, CNET,
Discovery Labs
fall on tech-
laden index

Dollar

88.36¢ (U.S.)
+0.33Approaches 14-
year high fol-
lowing interest
rate increase

Gold

\$634.20 (U.S.)
+10.30Climbs on in-
vestment de-
mand for
metals

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THE LAW PAGE / TRADEMARKS

Lawyers provide support behind the bra wars



A battle over bras reveals a growing and costly litigation market, writes

JACQUIE McNISH

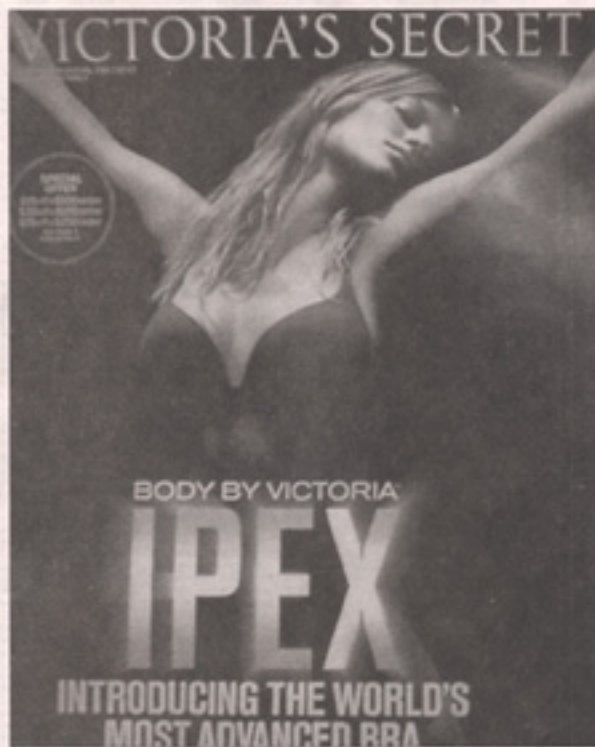
A small team of trained interviewers picked up the phones in a Toronto office last month and, posing as shoppers, called 162 La Senza lingerie stores to ask about a new line of IPEX bras. When they finished, 60 per cent of store clerks had confirmed that the undergarments were either in stock or expected, according to a survey filed in court.

That so many lingerie stores were carrying the bra hardly seems surprising. But Ruth Corbin, a market analyst who designed and supervised the telephone survey, knew better. La Senza does not make or sell IPEX underwear.

The popular line of IPEX undergarments is, in fact, sold by La Senza's biggest U.S. competitor, Victoria's Secret, which hired Ms. Corbin's Toronto company, Corbin Partners Inc., for the stealth call.

What La Senza has been selling since February is the ITEC bra, which, although it bears little resemblance to Victoria's Secret's patented IPEX line, has a similar name, marketing campaign and model. So similar, that according to Ms. Corbin's survey, most of La Senza's store clerks were confusing the brands.

"As the results started to come in, the statistical evidence started piling up. It was a very clear result," said Ms. Corbin, whose research became the centrepiece of a court dispute between the retailers.



Market researcher Ruth Corbin, right, did a survey for Victoria's Secret showing La Senza clerks confused their store's bras with a rival's.

These days, about half of Ms. Corbin's research work, which costs from \$20,000 to \$300,000 a survey, is used as courtroom evidence in brand battles. Trademark challenges are easily the fastest growing source of corporate litigation, and the courts' preference for surveys and research experts is sending the cost of lawsuits into orbit.

"Trademark litigation is becoming more expensive, more time

consuming and much more complex than ever," said Timothy Lowman, a trademark specialist with Sim Lowman Ashton & McKay LLP.

Survey evidence has been a courtroom weapon of choice since 1988, when Madam Justice Jean MacFarland ruled on a trademark dispute between an insurer and juice company that shared the name Sun Life. Judge MacFarland set a new standard for survey evi-

dence when she said it would be "an exercise in pure judicial fantasy" to decide, without the aid of a survey, that consumers were confused about the disputed brand names.

The other complication is that there is little clarity in case law about how surveys can be interpreted. One Canadian judge ordered an injunction after a plaintiff produced surveys showing just 8 per cent of respondents were con-



KEVIN VAN HANSEN/THE GLOBE AND MAIL

fused about the similarity of a competitor's products. Some judges have applied different standards for survey methods, while others have applied conflicting tests for proving consumers are confused about a product and its source.

"It's a mess," said May Cheng, a Fasken Martineau DuMoulin lawyer hired by Victoria's Secret. Because of the confusion, "our courts are not reacting as harshly and as

expeditiously as they should be."

The battle of the bras began in February when a Victoria's Secret market analyst discovered La Senza's plans for the ITEC bras while she poked around the Montreal-based company's website as part of a regular surveillance of competitors' activities. Shortly after, Victoria's Secret, based in Columbus, Ohio, hired Ms. Cheng to take action against La Senza.

Victoria's Secret has sold \$800,000 of its IPEX bras to Canadian catalogue consumers since it introduced the line last year, and Ms. Cheng alleged in court that the Montreal company was seeking to "divert" some of its competitor's Canadian sales with a similarly named and marketed bra.

To back up her argument that La Senza sought to "benefit significantly from the confusion" between the two bra brands, she hired Corbin Partners to do a market survey. Within days of receiving the survey, Ms. Cheng was winning the report before Ontario Superior Court Justice Victor Paisley, arguing that La Senza's marketing campaign was confusing the public.

On March 30, Judge Paisley decided against slapping La Senza with an injunction. But he did open the door to a potential battle by concluding, partly on the basis of the research, "there is at least a serious issue for trial based on the marketing campaign literature."

Ms. Cheng declined to comment on the company's plans and a spokesman for Victoria's Secret could not be reached to comment about whether the retailer intends to file a lawsuit against La Senza. A few weeks after Judge Paisley's decision, La Senza stopped selling its ITEC bra on its website.

The Montreal retailer's president, Laurence Lewin, said the bra's removal from the site is a coincidence. "Things come and go on our website. There is nothing out there to stop us from continuing to market the La Senza ITEC," he said.