

BOWLEY KERR NADEAU

PROFESSIONAL CORPORATION
BARRISTERS, SOLICITORS, PATENT AND TRADEMARK AGENTS

NEWSLETTER

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Grey Book IP Series— How does the law protect creative endeavour? At pages 3 and 4 of this edition you will find a copy of our Grey Book IP Basics, a guide to the essentials of patent, trademark, copyright and related law. Additional hard copies may be obtained by calling us, or you can download in pdf format from our website.

Halifax office— In January of this year we opened our Halifax office at 1657 Barrington Street, in the heart of the business district, between Citadel Hill and the harbour. In Halifax our practice is limited strictly to patent and trademark agency. Atlantic Canada is very well served by some of the country's finest law firms, but surprisingly is significantly under-served in intellectual property law. We intend to remedy that, providing a service to both the legal and the general community.

If I had six hours to chop down a tree, I would spend four of them sharpening the axe. **Abraham Lincoln**

Jesse— For years, many clients coming to the office after hours or over the weekend were boisterously greeted by an unofficial member of the team, Jess the Border Collie. Bright, quirky, attention seeking and idiosyncratic, he was perfect for a law office. Some called him our "Border Colleague". In February, our dear friend succumbed to old age and histiocytosis. He is much missed.

Going through the motions— Motions are an integral part of the litigation process and frequently determine the ultimate outcome of the litigation. The moving party may be seeking an order compelling the other party in the action to do or refrain from doing something, or perhaps may be asking the court to rule on the application of the law to some specific fact situation. At the motion, the role of the judge, master, or prothonotary is analogous to that of a referee, except that it is on request.

Let's say that on his examination for discovery, a witness refuses to produce a certain relevant document, or drags his heels. The examining party will bring a motion asking the court to order production of the document, with penalties for non-compliance. Counsel for the witness, of

course, will argue that the document is not relevant, or that it is privileged, and it is up to the court to sort it out.

Given the critical importance of the outcome, motions often turn into rather intense dogfights!

Corporate checkup-- Once upon a time it was the seventy point corporate checklist. Then it grew to eighty something. Now it's somewhat longer. Every responsible business person should visit and review the checkup at <http://www.bkn.ca/services/Business/CChecklist.pdf>

Jail and Bail— Anyone around our Ottawa office on April 5 would have seen our Robert Nadeau being hauled off to jail in handcuffs— but all in a good cause. As it turned out, the police officers and the judge (who just happened to be our Rick Kargus) were all part of an elaborate scheme to raise money for Crime Stoppers. Thanks to all of our friends who pledged funds to 'bail out' Robert, we raised more money than any other participant except the banks. For actual photographs of Robert behind bars and the lurid details of his crimes, go to <http://www.bkn.ca/bailjail/index.shtml>

Good judgment comes from experience, and experience - well, that comes from poor judgment.

A.A. Milne

Spoilation— what the heck is that? It's the hottest new topic in the law of evidence, that's what.

In civil litigation, there is a general obligation to produce all documents which are relevant, whether you like them or not. However, as you might guess, there have been one or two cases where the bad guys don't cough up all their relevant documents, so you have to haul their sorry carcasses in front of the motions court for an order making them produce. Therefore, seeing this coming, they will just destroy key documents and other evidence prior to litigation. That is spoliation, and it is particularly pernicious in the case of electronic evidence.

US jurisprudence is perhaps ten or more years ahead of us in the area, and Canadian courts frequently consider

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American experience in seeking to find the correct response in spoliation cases. In the most extreme situations, the courts may go so far as to grant judgment against the offending party, but typically this occurs only where the court is outraged. More often, the courts will use costs sanctions and will simply deem the destroyed documents to have been unfavorable to the party who deliberately destroyed them- probably a safe bet.

Selling your house? If so, you should spend a couple of minutes reading Rick Kargus' article "*Selling Your Home: Knowing What You Agreed to Sell and Do*". While the helpful realtor may talk about using cut flowers and the smell of fresh-baked bread to make your home more appealing, Rick's article is calculated to keep you out of costly trouble. Download it from our website at <http://www.bkn.ca/library/pdf/SellingHome.pdf>

e-counsel

Legal and strategic advice for e-business

Barristers, Solicitors, Patent and Trademark Agents

This edition of e-counsel takes a break from technology law, given that half the Newsletter is devoted to the Grey Book IP Basics! In its place is a bit of history and lexicography to satisfy those clients who ask us, from time to time, exactly what are barristers and what are solicitors.

Canada's legal tradition flows mostly from the Common Law of England, but (especially in Quebec and in the Federal Court system) with a strong influence of French Civil Law. Even in the earliest pioneer days, the rule of law was integral to our society and Canada rarely experienced the lawlessness characteristic of many frontier societies.

Finding a lawyer in the small pioneer towns and settlements was not always so easy, however, and it was this scarcity of legal talent that led to a number of Canadian peculiarities. In particular, the luxury of having two classes of lawyers was simply not available. While the English could have barristers (who were members of the various Inns of Court and argued cases before the bar) and solicitors (who were transactional lawyers who attended to the documentary needs of their clients), pioneer Canada had no such luxury. The few lawyers who existed were called upon to serve vast tracts of territory and to perform all legal services from arguing criminal and civil cases to drafting deeds, wills and business contracts. They were Barristers and they were Solicitors, and thus it remains. All lawyers in the Common Law provinces of Canada are both.

Interestingly enough, Quebec more closely follows the English tradition! In that province, law school graduates must decide if they wish to become either Avocats or Notaires. More or less like their English brethren, the Avocats are members of the Barreau while the Notaires belong to a separate professional organization, the Chambre des Notaires.

Although the term "Attorney" is occasionally used in common parlance to refer to a lawyer, it is generally not much liked and frequently indicates that the speaker gets most of his or her legal knowledge from American television. In Canada, the term "Attorney" is more properly reserved for an individual who acts under a Power of Attorney. The difference between Canadian and American terminology derives from the fact that American legal tradition links to an earlier age of English history when the Courts of Chancery and Attorneys were a more active part of the legal scene. It is for the same reason that "felonies" and "misdemeanors" are part of American legal language and unknown in Canada.

Patent Agents and Trademark Agents are often also lawyers, but need not be. To qualify as a Patent Agent, one must sit for a series of very difficult technical examinations of which the failure rate is distressingly high. The same is generally true of Trademark Agents, although lawyers who have the appropriate experience may apply to have their names added to the list of Trademark Agents.