BOWLEY KERR NADEAU
PROFESSIONAL CORPORATION
BARRISTERS, SOLICITORS, PATENT AND TRADEMARK AGENTS

NEWSLETTER

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Twenty-five years!– Hard to believe, but true. In the depths of the 1981 recession, the solemn Call to the Bar, the well-wishing friends and family, then immediately off to work. The established firms were not hiring– if you wanted to practice law, you hung up a shingle and competed against your hungry but much more experienced colleagues! On Legal Aid certificates, bail hearings, the odd business and real estate transaction, the first year produced a net income of $3700– pretty thin, but better than the majority of classmates who actually lost money. Over the years such grand technology as a mag-card typewriter, an AES word processor (with a screeching dot-matrix printer under a plexiglass sound cover) and one of the first PC's (leased, if I recall correctly) made its way into the firm. But mostly, it has been the people, hardworking, clever, loyal and always willing to go above and beyond.

Has it been worth it? You bet. Consider this: the Newsletter you are reading goes out to nearly two thousand addresses– friends and clients who have stood by us over those years– that's what makes it worth it!

> Character consists of what you do on the third and fourth tries. **James Michener**

The law of bailment– If I leave an object with you, with the explicit or implicit understanding that you are to look after it for me, you are said to be the *bailee* of the goods. Your duty of care depends on whether you are a gratuitous bailee, or a bailee for hire. In the former case, your duty is simply to deal with the goods with the same degree of care you would prudently bestow on your own property– you wouldn't leave your own household furniture out in the rain, for instance. If you are a bailee for hire, however, the duty is much higher, and generally the court will shift the onus to you to explain why a loss or damage was not your fault.

Frustrated? A contract is said to be *frustrated* when its performance is rendered impossible by virtue of external causes beyond the contemplation of the parties.

SR&ED's– The Scientific Research and Experimental Development Program is a federal incentive calculated to encourage new, improved, or technologically advanced products or processes. It provides a tax credit of up to 35% of qualified expenditures in Canada– including wages, materials, machinery, equipment, and some overhead. SR&ED cheques of several hundred thousand dollars are not unusual, and for early stage companies this can make the difference between success and failure. We work closely with a group of SR&ED experts. Call us if you suspect you may qualify.

Halifax update– In the last Newsletter we announced our Barrington Street office. Since then, the phone has been ringing and we have met and served numerous Atlantic Canadians with patent prosecution work.

Speakers' Circuit– This fall, our lawyers will be busy presenting papers and speaking to various professional groups. On September 13, Robert Nadeau will present on "Doing Business in Canada" at the University of Ottawa Executive MBA program, in conjunction with the Canadian Manufacturers & Exporters, & CDC International Inc. Norman Bowley will be the dinner speaker at Manulife Bank's Ontario fall conference September 15 and at the Halifax event October 13. He will present on the fundamentals of Intellectual Property.

"Publish & Perish: How to Lose Your Patent Rights in the Blink of an Eye" will be Philip Kerr's topic at the October 26 U of O Executive MBA Breakfast Series, while Robert Nadeau will discuss "De-Mystifying Government Contracting: How to Win the Contracts that Matter to You" at the November 23 breakfast in the same series. Both of these breakfasts are open to our clients. Cost is $40.00.

Res ipsa loquitur– "The thing speaks for itself"– a legal doctrine much loved by law professors. Nevertheless, it has much practical value– in a very early case a plaintiff who had been struck on the head by a bag of flour was not required to produce witnesses to prove that the bag had fallen from the miller's window under which he had been passing– the court ruled that flour bags don't fly and shifted the onus to the defendant to put forward some

J. NORMAN BOWLEY PHILIP B. KERR ROBERT D. NADEAU RICHARD D. KARGUS
200 Isabella Street, Suite 203, Ottawa, Ontario, Canada K1S 1V7 Phone (613) 238-2002 Fax (613) 233-7965 e-mail: info@bkn.ca

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plausible alternative story.

Some wag, of course, has said of *res ipsa loquitur* that the thing ought not to be allowed to speak for itself, it should pay a lawyer to speak for it.

A doctor and a lawyer were at a cocktail party. Both were being pestered for free advice. The lawyer took it all very calmly, the doctor became more and more annoyed. Finally the doctor took his friend aside and asked him how he managed to remain so unruffled.

"It's easy," replied the lawyer. "I just send out bills to everyone who asked my advice!"

The doctor thought that was brilliant, so off he went and wrote out a bill for each person who had accosted him. Then he took them all down to the post office.

When he got there, the bill from the lawyer was awaiting him.

e-counsel

Legal and strategic advice for e-business

Electronic signatures

We all recognize a personal signature as an authentication and a binding commitment. Just as your word is your bond, more so is your signature. It can turn a scrap of paper into a million dollars. But how do you sign in cyberspace?

First of all, there is the common law. In ancient days, illiterate persons solemnized their contracts with an "X" or perhaps a wax seal embossed with a unique signet ring. Signing without a pen is not entirely new– we have been signing by telegraph for well over a hundred years, and by fax for about twenty years. Contracts of enormous importance have been negotiated and formalized by telegraph, and later by fax. One judge spoke of a great copper pen, hundreds of miles long, inking the deal at a great distance. Perhaps the best summary of the law of signature is this: "A signature is what a signature does." That is, the affixation of one's name or mark to signify one's intent or agreement to be bound. Whether the signature is a scrawl of blue ink on a cheque or a unique mathematical hash function, the deliberate application of one's personal mark to indicate, permanently and publicly, one's agreement to be bound, is exactly the same– "This is my mark, and this is my bond."

For greater certainty, however (or perhaps because they didn't get the simple common law principle), lawmakers have spelled out the terms of electronic signatures. Sometimes we are a little dull or suspicious, and we need statutes to let us breathe easier. In Canada, the Personal Information Protection and Electronic Documents Act (what a name– must have been an election year!!) provides that an "electronic signature" is a signature that consists of one or more letters, characters, numbers or other symbols in digital form incorporated in, attached to or associated with an electronic document– in other words, "a signature is what a signature does". Ontario's Electronic Commerce Act, 2000, the brainchild of John Gregory, the ultimate "functionalist", sets out that an "electronic signature" means electronic information that a person creates or adopts in order to sign a document and that is in, attached to or associated with the document. Again, a signature is what a signature does.

In sum, there is nothing cute or dazzling about an electronic signature. No matter how elegant the algorithm or how sophisticated the encryption, the bottom line is this: when you perform some step which says to the world, "This is my unique commitment to this act", you have electronically signed. What could be simpler?

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