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Filing Business Method Patent Applications in Canada

Applications corresponding to USPTO applications are being filed in Canada.

Much has been written in recent years about the patentability of business methods in the United States. While it has been suggested that the famous *State Street Bank* decision has given rise to a flood of patent applications in the United States Patent Office, there has been little discussion of what effect this decision has had on patent filings in Canada.

The question is, should business method patent applications corresponding to applications filed in the United States Patent Office and elsewhere be filed in Canada notwithstanding the current position taken by the Canadian Patent Office that business methods are not patentable? According to a recent review of laid open applications listed on the Canadian Patent Office web site, it would appear that some applicants for Canadian patents are clearly answering this question in the affirmative.

Many business method patent applications being filed in Canada are classified under International Patent Classification (IPC) group G06F 17 which is defined as "electrical digital data processing; digital computing or data processing equipment or methods specifically adapted for specific functions." Subgroup 60 covers "administrative, commercial, managerial, supervisory or forecasting purposes."

A search of this subgroup reveals a large number of laid open patent applications relating to business methods. Each of these applications claims priority from an earlier filed application in the United States. The business methods described in these patent applications extend to subjects such as:

- A method of managing incentive points for purchases;

- A method of marketing products and services through a pyramid marketing scheme; and
- A method of providing multiple discounts to a retail customer.

By contrast with some of the more publicized business method patents, the claims in these patent applications have nothing to do with the Internet, e-commerce, or even data processing. Instead, they relate to basic business methods not unlike those practised by companies throughout Canada every day.

As for the patentability of these methods, the Canadian Manual of Patent Office Practice (MOPOP) states that "subject matter that is only a scheme or

114 Canadian patents have issued within IPC subgroup G06F 17/60.

plan, system of doing business, method of accounting or providing statistics, personality or I.Q. Test and the like is not considered to be within the scope of 'invention' as defined by section 2 of the *Patent Act*." Though there are no court decisions directly on point, Canadian jurisprudence holding that professional skills are not patentable in Canada have been cited in support of the proposition that business methods are likewise not patentable subject matter.

However, judging from the kinds of patents issued in IPC subgroup G06F 17/60, it appears that the sweeping statements in the MOPOP may not necessarily reflect current Canadian Patent Office practice. A recent patent search revealed that 114 Canadian patents have issued within this IPC

subgroup. Arguably, many of these patents relate to business methods, though with claims that are drafted in such a way as to be acceptable to Canadian patent examiners.

Notwithstanding the stated position of the Canadian Patent Office, every organization should be taking a long, hard look at its business procedures (whether related to e-commerce or not) and mining them for possible patentable inventions. The policy of the

Canadian Patent Office towards business method patents may change. Hopefully, with the increased demand for and interest in business method patents, the courts will soon address the issue directly. Companies should be filing applications to these kinds of methods in this country to ensure the priority of their claims should the law change before the applications are examined.

Elliott S. Simcoe, Ottawa

Significant Differences between the Canadian and U.S. Patent Systems

While the patent laws of Canada bear many similarities to those in the United States, there are also important differences, such that the outcome of a fact scenario in Canada can be very different from the outcome of the same fact scenario in the U.S. The following discussion highlights some of the more important of these differences. This article is necessarily couched in very broad terms, and is not intended as a precise or comprehensive statement of the law in either country.

First to Invent Versus First to File

As between two independent inventors, Canada awards a patent to the first to file. In this regard, the

Examination

In Canada and the U.S., in order for a patent to issue, a patent application must be examined by an Examiner. In the U.S., examination of an application commences automatically. In Canada, examination must be explicitly requested and a government examination fee submitted. Examination may be deferred for up to five years from the Canadian filing date.

Prosecution History Estoppel

The Supreme Court of Canada has recently confirmed that, unlike the situation in the U.S., the prosecution history of an application for patent cannot be used in construing the claims of a patent.

Means Plus Function Claims

In the U.S., means plus function claims are subject of 35 USC 112(6), which provision has been interpreted by U.S. Courts as limiting the scope of such claims to the means disclosed. In Canada, no such statutory limitation exists, and means plus function claims are construed according to the "purposive construction" principles as expounded in the jurisprudence. These principles permit a construction that is literal, or that may be either broader or narrower than literal.

Continuation Practice

U.S. procedure allows for the filing of a continuation (or CIP) application which claims internal priority from a parent application at any time up to the date of issue of the parent application.

While it is possible to file a continuation or CIP-type application in Canada and claim internal priority

No file wrapper estoppel in Canada.

filing date is considered to be the earliest of the actual Canadian filing date, the filing date of a priority application and an international filing date in respect of a PCT application from which the Canadian application is derived.

In contrast, subject to certain limitations, the U.S. awards a patent to the first to invent.

Inequitable Conduct (Disclosure Requirements)

In contrast to the U.S., there is no obligation on a Canadian patent applicant to disclose voluntarily all known material prior art to the Canadian Patent Office. Instead, an applicant need only respond to any requisition of the Canadian Patent Office to identify specified categories of prior art.

from an earlier Canadian parent application, there are some important limitations. Any continuation or CIP-type application is only entitled to internal priority if filed within one year of the earlier of the filing date of the earliest parent application and the priority filing date. As well, any applicant-derived public disclosure made more than one year prior to filing the continuation or CIP-type application will be considered prior art.

The Law on Novelty

While both Canada and the U.S. have a one-year grace period from public disclosure of an invention, Canada's grace period only applies to applicant-derived disclosures. The U.S. grace period, on the other hand, applies to all public disclosures, whether applicant-derived or not. Another difference is that the Canadian grace period will begin to run when

No treble damages for willful infringement in Canada.

there is a public disclosure anywhere in the world, while the U.S. grace period starts only where such disclosure occurs in the U.S. Further, Canada has no special on-sale bar provisions.

Maintenance Fees

Whereas U.S. maintenance fees are due only three times during the life of a U.S. patent, Canadian maintenance fees are due annually, commencing on the second anniversary of the Canadian filing date. However, Canadian maintenance fees are relatively small.

Jury Trials

A jury trial for a patent matter, which is available as of right in the U.S., is not an option in the Federal Court of Canada, which hears nearly all Canadian patent infringement cases.

Depositions

In most Canadian courts, including the Federal Court of Canada, an oral examination for discovery may be had as of right of only one representative of each party and of the inventor.

In contrast, in U.S. litigation, depositions may be taken from a wider group of individuals, such as potential witnesses.

Recovery for Infringement

The U.S. laws give a U.S. court the discretion to award treble damages and attorneys' fees in the case of willful infringement. Canada has no such provision. It is, however, open to a Canadian court to award punitive damages in an egregious case. Further, in Canada, while an award of costs (including attorneys' fees) is at the discretion of the court, costs are typically awarded to the successful party.

Damages in the U.S. are available from the date of notice of infringement. Notice can be given constructively through patent marking. In Canada no such notice is required. Further, there are no provisions for patent marking. Thus, in Canada, damages are available from the first date of infringement, subject to the statutory limitation period of six years.

In Canada, where infringement is proven, the patentee may be given the choice between an award of damages or an accounting of all of the profits made by the infringer by reason of the infringement. The accounting of profits remedy was removed from U.S. law many years ago.

Prior Rights

In Canada, if a person acquired the invention before the priority date of the patent, the person has the right to use and sell to others the specific article acquired free of the patent. This provision would, for example, protect someone who had secretly made and used a machine before the priority date of a patent on the machine. While the secret use would not destroy the novelty of the patent, the person would be free to use or sell the machine after issuance of the patent.

Recent amendments to the U.S. patent laws have added a somewhat similar provision, but one which applies only to methods of doing or conducting business.

Ronald D. Faggetter, Toronto

International Patent Application Deadlines Extended

International patent applications filed under the Patent Cooperation Treaty (PCT) may be used to defer the high costs associated with multiple direct national patent filings. A rule change under the PCT has been agreed upon that will facilitate the extension of the Chapter I national phase entry deadline, and thereby reduce the cost of deferring national filings using the PCT. The Chapter I national phase entry deadline is currently 20 months from the priority date in most jurisdictions. The rule change will allow PCT member countries to extend that deadline to at least 30 months from the priority

date. The change to Article 22(1) of the PCT is to take effect on April 1, 2002, and to apply to all PCT applications where the 20-month deadline for national phase entry has not expired as of April 1, 2002. It is important to note that while the change to the PCT is effective as of April 1, 2002, the details regarding the implementation of the rule change may differ among PCT jurisdictions. Extended deadlines will for example be adopted in Canada, the United States and Europe.

Brian G. Kingwell, Vancouver

Who's on First?

First use of a trade-mark in Canada - how much is necessary?

In a recent decision, the Federal Court of Canada has had an opportunity to consider and clarify the important issue of what level of prior use is required to invalidate a confusing trade-mark registration.

In *J.C. Penney Company, Inc. v. Gaberdine Clothing Co. Inc.*, J.C. Penney (represented by Glen Tremblay of our Ottawa office) successfully expunged Gaberdine's registration for the trade-mark ARIZONA BLUES JEANSWEAR CO. based upon J.C. Penney's prior use of the trade-mark THE ORIGINAL ARIZONA JEAN COMPANY in Canada.

Although J.C. Penney had established two individual sales of its garments in Canada under the confusing trade-mark prior to the date of filing of Gaberdine's proposed use trade-mark application, it was also necessary to overcome a prior decision of the Federal Court which held that a single use of a trade-name prior to filing a proposed use application was not sufficient to expunge a registration.

In this case, Mr. Justice Nadon was satisfied that the prior decision was incorrect, and that J.C. Penney should prevail, as prior use of a trade-mark is not synonymous with commercial success: "use of a trade-mark cannot be measured by the number of

sales or the quantity of wares sold in association with the trade-mark. The sale or sales must be examined in the light of all of the surrounding circumstances."

Aside from clarifying the law on this point, this case also serves to emphasize two practical matters.

First, if it is necessary to seek to expunge a trade-mark registration on the basis of prior use or making known in Canada, any action should be taken within five years of registration. Once more than five years have passed, mere prior use is not sufficient. Rather, it is also necessary to establish that the owner of the trade-mark registration adopted the mark with actual knowledge that the mark had been previously used or made known in Canada.

Second, to avoid the risk of brand appropriation, serious consideration should always be given to filing an application in Canada for any corresponding trade-mark application being filed in the United States or elsewhere. Not only is Canada the United States' largest trading partner, but the relatively small added cost involved in filing in Canada underscores the desirability of prompt protection.

Mark K. Evans, Toronto

Firm Tops LEXPERT Survey - Again

LEXPERT/American Lawyer Media has published *The 2002 Guide to the Leading 500 Lawyers in Canada* and the Guide has once again acknowledged the Firm and several of its partners.

In the section entitled "Who's Who in Canadian Law Firms", Smart & Biggar has again been honoured by the directory:

"...it is important to note that many intellectual property practitioners have national practices, with their work in no sense being limited to the city where the firm has its principal office. The Toronto, Ottawa, Montreal, Vancouver and Edmonton offices of the IP boutique Smart & Biggar warrant special comment, however, in that it is the only firm in this practice area with multiple offices and leading lawyers in major centers across Canada."

The survey has also identified Smart & Biggar as having more leading lawyers in the areas of intellectual property law and intellectual property litigation than any other Canadian firm. We would like to congratulate our partners who have been so recognized:

James D. Kokonis, Q.C. (Intellectual Property Law and Intellectual Property Litigation)

Nicholas H. Fyfe, Q.C. (Intellectual Property Law and Intellectual Property Litigation)

A. David Morrow (Intellectual Property Law and Intellectual Property Litigation)

John R. Morrissey (Intellectual Property Law)

Raymond Trudeau (Intellectual Property Law)

François Guay (Intellectual Property Law and Intellectual Property Litigation)

James D. Kokonis, Q.C. Appointed as Counsel to the Firms

After 43 years with the Firms, James D. Kokonis, Q.C., senior partner and former Chair of the Firms, announced his intention to retire from active practice. Effective January 1st, 2002, Jim has taken up his new position as Counsel to the Firms. In this capacity, he will continue as a non-managing partner and will provide ongoing advice and guidance to the Firms' members. He will also maintain his involvement as senior counsel in several active litigation matters.

Jim has extensive experience as lead counsel in proceedings in the Ontario and Federal Courts, at both the Trial and Appellate levels, and in the Supreme

Court of Canada. He is certified by the Advocates' Society (Ontario) in respect of mediation services and serves on the International Trademark Association's Canadian panel of neutrals for trademark disputes. Jim is listed in Euromoney's *Guide to the World's Leading Patent Law Experts* and *Guide to the World's Leading Trademark Law Practitioners*. He is the only Canadian selected as one of the 20 best patent practitioners in the world in Euromoney's *The Best of the Best*. He is also listed in the LEXPERT/American Lawyer *Guide to the Leading 500 Lawyers in Canada* in the categories of intellectual property law and intellectual property litigation and is recognized in the *International Who's Who of Patent Lawyers*.

Raymond Trudeau Retiring as an Active Partner

Raymond Trudeau, a partner in our Montreal office, has retired from active practice with the Firms. As respected counsel, Raymond has been listed in the LEXPERT/American Lawyer *Guide to the Leading 500*

Lawyers in Canada in the category of intellectual property law.

The partnerships extend their heartfelt thanks and best wishes to both Jim and Raymond.

New Partners

The partners of Smart & Biggar / Fetherstonhaugh are pleased to announce that effective January 1, 2002, *Christian Bolduc, Yoon Kang, Philip D. Lapin* and *Matthew Zischka* have become partners of the Firms.

Christian obtained a Bachelor of Science degree in Microbiology, a Master of Science degree in Microbiology/Immunology and a Law degree from Université Laval. Christian is a registered Trade-mark Agent.

Yoon obtained a Bachelor of Science degree in Molecular Biology, a Master of Science degree in Molecular Biology & Genetics and a Law degree

from the University of Toronto. Yoon is a registered Patent and Trade-mark Agent.

Philip obtained a Bachelor of Science degree in Computer Science from Queen's University, and both Common and Civil Law degrees from McGill University. Philip is a registered Patent and Trade-mark Agent.

Matthew obtained a Bachelor of Engineering degree in Electrical Engineering from the University of Waterloo and a Law degree from Queen's University. Matthew is a registered Patent and Trade-mark Agent.

Notes

Announcements

Congratulations to *John R. Morrissey* and *A. David Morrow*, who have been certified by the Law Society of Upper Canada as specialists in Intellectual Property (Patent, Trade-mark & Copyright) Law, and to *Keltie R. Sim* who has been certified by the Law Society of Upper Canada as a specialist in Intellectual Property (Trade-mark) Law.

Congratulations to *Robert D. Gould, James D. Kokonis, Q.C., Michael D. Manson* and *A. David Morrow*, who were recently recognized in *An International Who's Who of Trademark Lawyers, 2001*, published by Law Business Research Ltd.

Congratulations to *A. David Morrow* who has been listed in *Canadian Who's Who*, published by U of T Press.

Mark K. Evans has been asked to serve on the Editorial Board of *Managing Intellectual Property*.

Gunars A. Gaikis will be providing regular reports on pharmaceutical trade-mark developments in Canada to the European based Pharmaceutical Trade Marks Group (PTMG) for publication in the PTMG newsletter "*Law, Lore & Practice (LLP)*".

Steven B. Garland has been elected to the Executive of the Intellectual Property Institute of Canada in the position of Honorary Treasurer.

John R. Morrissey has been appointed to the Law Society Certification Board for Intellectual Property Law.

Steven B. Garland will teach the Patent Law Course at Ottawa University Law School.

J. Christopher Robinson, Timothy P. Lo and *Theodore W. Sum* will be teaching the I.P. Survey Course at the University of British Columbia Faculty of Law from January until April 2002.

We are pleased to announce that the following individuals have joined the Firms:

Jonathan N. Auerbach has joined our Ottawa office. Mr. Auerbach has a B.Sc. in Anatomy and Cell Biology and was called to the Ontario Bar in 2002.

Christian Bérubé has joined our Ottawa office as a technical consultant. Mr. Bérubé has a B.Sc. in Chemistry and an M.A.Sc. in Inorganic Chemistry.

Franc Boltezar has joined our Vancouver office. Mr. Boltezar has a B.S.E. in Civil & Environmental Engineering and an LL.M. in Intellectual Property Law. He was called to the British Columbia Bar in 1999 and the New York Bar in 2001.

Mathias Dormann has joined our Ottawa office as a technical consultant. Dr. Dormann has a B.Sc. in Agricultural Sciences, an M.Sc. in Crop Production

and Plant Pathology and a Ph.D. in Biotechnology and Plant Breeding.

Ronald Fernando has joined our Ottawa office as a technical consultant. Mr. Fernando has a B.Eng. in Electrical Engineering and a Master of Applied Science degree.

Sheema Khan has joined our Ottawa office as a technical consultant. Dr. Khan has a B.Sc. in Chemistry, an A.M. in Physics and a Ph.D. in Chemical Physics.

Denise L. Lacombe has joined our Toronto office. Ms. Lacombe has a B.Sc. in Applied Chemistry and an M.Sc. in Chemical Physics. She was called to the Ontario Bar in 2002.

Kathryn A. Lipic has joined our Ottawa office. Ms. Lipic has an Honours B.Sc. in Life Sciences and was called to the Ontario Bar in 2002.

David R. Quinn has joined our Ottawa office as a technical consultant. Dr. Quinn has a B.A. in Economics, a B.Sc. in Biochemistry, an M.Sc. in Molecular Genetics and a Ph.D. in Biochemistry.

Ido Rabinovitch has joined our Toronto office. Mr. Rabinovitch has a B.Eng. and an M.A.Sc. in Electrical Engineering and was called to the Ontario Bar in 2002.

Beth Trister has joined our Montreal office. Ms. Trister has a B.Sc. in Biochemistry and was called to the Quebec Bar in 2001.

Timothy E. Webb has joined our Edmonton office. Mr. Webb has a B.Sc. in Mechanical Engineering and was called to the Alberta Bar in 2001.

Seminars and Presentations

Joy D. Morrow spoke on the topic of "Variety Name Preservation: A Case Study" at the Canadian Seed Trade Association Semi-Annual Meeting that took place in Toronto, October 12, 2001.

Christian Bolduc spoke on the topic of "Les marques de commerce et le droit d'auteur" at l'École de design industriel de l'Université de Montréal, November 28, 2001.

Michael D. Manson spoke on the topic of "Damages in IP Disputes" to the IP Subsection of the Canadian Bar Association - Northern Alberta that took place in Edmonton on January 24, 2002.

Joy D. Morrow spoke on the topic of "Debunking Misconceptions about Gene Patenting" at the Insight conference entitled "Genetic Patents" that took place in Ottawa, February 18, 2002.

Gunars A. Gaikis will be speaking on "Patent term and protection issues" and *James D. Kokonis* will be speaking on "Current patented medicines (Notice of Compliance) regulations" at a conference to be held in Toronto on March 4-5, 2002, entitled "Drug Patents - New Developments, New Strategies".

Theodore W. Sum will hold a licensing workshop, and teach on related intellectual property issues as part of a technology transfer course at the University of Victoria Faculty of Law, in March 2002.

Michael D. Manson will speak on the topic of "Evidentiary Issues Relating to Affidavits in Trademark Opposition Proceedings" and will moderate a session entitled "Tips and Strategies for Effective Cross-Examination" at the IPIC Spring Meeting taking place in Ottawa on April 8, 2002.

Joy D. Morrow will be participating as a panelist in the Pharmac Conference to be held in Toronto, April 8-9, 2002. She will participate in a segment entitled "At the Cutting Edge: Tackling the Unprecedented Ethical, Legal and Business Challenges of Genomics".

Michael D. Manson will lecture on the topic of "Licensor's Warranties and Obligations" at a CLE/Law Society seminar in Vancouver on April 12, 2002.

Theodore W. Sum will hold a licensing workshop on the topic of "Drafting Software Development and License Agreements" at the Federated Press conference entitled "Negotiating and Drafting License Agreements" in Toronto, April 24-26, 2002.

Glen B. Tremblay and *Theodore W. Sum* will be participating in the first annual IT Law Spring Training Program of The Canadian IT Law Association, May 15-17, 2002 in Vancouver. Glen will speak on the topic of "Trade Secret Law for Information Technology" and Theodore will speak on the topic of "Software License Agreements". *Michael D. Manson* will serve as co-Chair of this conference and will be speaking on the topic of "The Basics of Intellectual Property Issues for Information Technology".

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Michael D. Manson will speak at the Trade-mark Comparative Course at the INTA Annual meeting in Washington D.C., May 17, 2002.

Michael D. Manson will speak on the topic of "What Are Trade Secrets And How Do They Differ From Confidential Information and Intellectual Property?" at an Osgoode Hall/CLE seminar taking place in Vancouver, May 28-30, 2002.

Marc Gagnon will speak on the topic of "Patents" at the Quebec Bar Annual Meeting to be held May 30-June 1, 2002.

Joy D. Morrow will speak on the topic of "Plant Protection in Canada" at the BIO Convention to be held in Toronto, June 9-12, 2002.

Michael D. Manson will serve as co-Chair of the Canadian Institute's "Licence Agreements Course" taking place in Vancouver, June 24-25, 2002. He will be speaking on the topic of "Parallel Imports".

Michael D. Manson will serve on the Academic Faculty, Practica Faculty, and will act as a Practica Director for the Professional Specialization Certificate in International Intellectual Property Law

during the Oxford/UVIC Summer Program for Lawyers and Other Professionals taking place in Vancouver during the months of July and August, 2002. *Mark K. Evans* will also serve on the Practica Faculty.

Mark K. Evans will be lecturing on "Enforcement of Copyright" at the McGill University-IPIC Intensive Course on Copyright, August 29, 2002.

Publications

Marc Gagnon, "La marque de commerce descriptive", *Les Cahiers de Propriété Intellectuelle*, October 2001, Vol. 14, No. 1, pp. 75-156.

A. David Morrow, "The Effect of Disclaimer on Litigation", 2001, *Intellectual Property*, Vol. VIII, No. III, p. 482.

Tokuo Hiramata, "Recent Topics Relating to Patents in Canada", October 2001, *Journal of the Japanese Group of AIPPI*, Vol. 46, No. 10 (in Japanese).

Stephen J. Ference, "Patenting Business Methods in Canada", January 2002, *World E-Commerce & IP Report (WEIC)*.

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Unless otherwise indicated, the lawyers listed are members of the Law Society of Upper Canada only.

† of the British Columbia Bar also
+ of the British Columbia Bar only

‡ of the Alberta Bar also
** of the Alberta Bar only

* of the Quebec Bar only
• of the New York Bar also

The preceding is intended as a timely update on Canadian intellectual property law. In order to request a copy of any decision, paper or legislative document, or for more detailed information or suggestions, kindly contact an author of the relevant article, or the Editor, *A. David Morrow*. The contents of our Newsletter are informational only, and do not constitute legal or professional advice. To obtain such advice, please communicate with our offices directly. To be put on the *IP Perspectives* mailing list, or to amend address information, please call (416) 593-5514 (extn. 358).