

Why the Canadian Patent Reporter stopped including “editorial comments”

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The venerable Canadian Patent Reporter recently decided to stop printing editorial comments - ending a practice that had existed since the reports were founded by the late Gordon Henderson in 1942.

This may not seem like big news. But what's interesting is how exactly this came about. It's a story that I think raises issues about the duty of counsel to the court and the proper role of topical reporting series. I should make clear that I have an axe to grind in making this story public, because I raised the ruckus that seems to have led to the change in policy.

In a nutshell, a recent unsigned “case comment” in the CPR was critical of a court decision. But the comment failed to mention that the firm that edits the CPR and presumably wrote the “comment”, Gowling Strathy & Henderson, is representing a party on the other side of the same issue in a major trial against the same defendant.

The CPR is beyond doubt Canada's leading intellectual property reporting series. For many years the CPR was edited by the late Gordon Henderson, whose eminence as a barrister brought them wide acceptance. The series is published by Canada Law Book of Aurora, Ontario.

The first time I won a case of any substance in the IP area, I remember sending my case off to Canada Law Book, and being a little thrilled when a courteous letter came back from Henderson himself, thanking me and saying the CPR was indeed going to report it.

Since 1942, the CPR has published not only intellectual property cases, but also scholarly articles and case comments. For many years, these were written by Henderson himself or

appeared with his approval, giving them a certain oracle-like authority. Case comments were usually signed with initials.

The “editorial comment” that caused the fuss appeared without initials. It was about an interlocutory injunction decision, *Procter & Gamble Pharmaceuticals v. Novopharm Inc.*, which I argued for Novopharm. At issue in the litigation is whether the size, shape and colour of pharmaceutical tablets and capsules is proprietary to the brand name manufacturer. This is a hotly contested question. There are a number of cases currently before the courts.

In *Procter & Gamble v. Novopharm*, released in July, 1996, an interlocutory injunction was denied by Mr. Justice Wetston of the Federal Court Trial Division. The reasons set out an exhaustive review of the facts, and the caselaw on passing off in pharmaceutical cases, interlocutory injunctions and misleading advertising.

The case came out in the CPRs late this fall ((1996) 68 C.P.R. (d) 461). To my surprise, an anonymous “editorial comment” had been inserted after the headnote, essentially saying the case was wrong.

In my opinion, the bashful author of the comment misrepresented both what the judge said and the law. The Federal Court of Appeal also seems to think Justice Wetston’s review of the law was right. The appeal court referred favorably to the *Procter & Gamble* decision when it overturned an interlocutory injunction in September in *Eli Lilly v. Apotex and Novopharm*, a high-profile case on a similar issue involving the well-known drug Prozac.

Of course, whether I agree or disagree with the comment is not the point. Anyone is entitled to disagree with a judge’s decision. I do it all the time myself in these very pages. The problem with the “editorial comment” to the *Procter & Gamble* case is that it is presented as impartial, scholarly commentary, when it is not.

At the very time the editorial comment appeared, Gowling’s was representing Eli Lilly, a drug company, against the same defendant, Novopharm Limited (and others) in a key five week trial involving the drug Prozac, on the same issue. The Prozac trial, which is still going on as I write, is a key one for Gowling’s, and for its client Eli Lilly, and also for the other side: Novopharm and other generic drug manufacturers. The editors surely knew the “editorial comment” would probably find its way before the judge hearing that case, and other judges hearing similar cases in future.

The danger is that judges, and future cases, may be influenced by the editorial comment, not realizing the partisanship of its author. A topical law report should not be a mouthpiece for the clients of the law firm that edits it.

I called Canada Law Book to make my concerns known. Soon afterwards, Ms. GERALYN CHRISTMAS, vice-president- Editorial, sent me a letter saying that “we have decided to end

the practice of including editorial notes [in the CPR] which comment upon decisions, effective immediately". Canada Law Book also told me it was an editorial oversight not to have included the initials of the author of the comment. A corrigenda to a future issue of the CPR will correct the oversight. Canada Law Book declined, however, to disclose in the corrigenda Gowlings' interest in the issue, apparently having concluded that it was enough to have agreed not to publish any more comments.