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In Brief

Spring 2009

In Brief: General comments on legal developments of concern to business and individuals

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In This Issue

LAW NOTES discuss a number of topics including the fiduciary duty of directors, shareholder approval and new Internet domains that can be used to provide customers, colleagues and family with important information. Also, a cooling-off period has worked its way into employment law; a note about acceptable tax-avoidance; another about the *Vetrovec* warning; and a judicial finding about "Java." In the labour arena, the courts have again shown themselves to be supportive of members against their unions.

The full-length articles also take us into the Internet world to discuss new generic top-level domains, besides .com, .net and .org. The new executive compensation disclosure rules are reviewed. James Musgrove canvasses co-operative bidding. There is a discussion about severance payouts that may be too generous, and an article on the importance of being earnest in insurance matters. The next great business trend from south of the border is considered, as is the U.S. ban on naked short-selling and Canadian fallout. Limitations on privilege, licences "as property," new litigation rules, and the business cost of a disabilities statute are among the other topics.

Some quirky logic and QWERTY history in *Brief Life Bites*; then your *Letters and Comments*, and a little bit about us.

The New Executive Compensation Disclosure Rules

Paul Collins

Stephen White

Amendments to rules governing disclosure of executive compensation are now in effect. The Canadian Securities Administrators' Form 51-102F6 – Statement of Executive Compensation (that we will refer to as the "New Rule") – makes extensive changes to the prior disclosure requirements.

Accordingly, here are six matters to take into consideration now when preparing the management proxy circular.

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Determination of the Highest-Paid Executive Officers

An issuer must continue to disclose all compensation paid to its CEO, CFO and its three other highest-paid executive officers (collectively referred to as "named executive officers" or "NEOs"). The current rule determines the highest-paid NEOs based solely on annual salary and bonus. Under the New Rule, all compensation, including the value of awards of shares, options and grants under other incentive plans, as well as the value of certain perquisites, must be added to salary and bonus to determine total compensation and, therefore, the highest-paid executive officers. Perquisites, including property or other personal benefits which are not made available generally to all employees and which in aggregate total either $50,000 or 10% of a particular executive officer's salary, will be included in the calculation and must be disclosed. The calculation will exclude pension plan benefits, cost-of-living payments for foreign assignments and amounts paid or payable as a result of the termination of employment. The current $150,000 minimum income threshold has been maintained for determining whether any of the highest-paid officers may be excluded from the disclosure, but will be applied to total compensation (and not be limited to salary and bonus as under the existing rule).

Under the New Rule, all compensation, including the value of awards of shares, options and grants under other incentive plans, as well as the value of certain perquisites, must be added to salary and bonus to determine total compensation.

No Restatement of Prior Compensation Disclosure

The New Rule will not require NEO compensation disclosure for financial years that ended before December 31, 2008. Accordingly, summary compensation disclosure from prior years need not be restated under the New Rule or repeated in the form previously reported under the existing rule. In each subsequent year, however, an additional year of disclosure will be added to the NEO Summary Compensation Table such that, following completion of financial years ending on or after December 31, 2010, three-year comparative information will again be included in the Summary Compensation Table.

Compensation Discussion and Analysis

Each issuer must include compensation discussion and analysis ("CD&A") in its proxy circular. While the concept of CD&A is similar to that underlying the existing rule's Report on Executive Compensation, the level of explanation in the CD&A must be significantly more detailed and specific than what has generally been the practice in the past. In the manner that management discussion and analysis is intended to explain the disclosure included in financial statements, CD&A is intended to explain the executive compensation disclosure that appears elsewhere in the proxy circular. CD&A must describe and explain all significant elements of compensation awarded, earned, paid or payable to NEOs. This will include a discussion of the compensation program's objectives, what the program is designed to reward, a description of each element of compensation and why the issuer chooses to pay each element, how the amount of each element of compensation is determined (including any formula used), and how the decisions made fit within the issuer's overall compensation objectives. Benchmarks used, including other companies used in the benchmark group and the selection criteria, must be identified. Where targets are based on objective criteria (such as, for example, share price or earnings per share), the targets must be disclosed. However, disclosure of specific quantitative or qualitative performance-related factors need not be disclosed where public disclosure of the criteria has not already occurred and where such disclosure would, in the view of a reasonable person, seriously prejudice the issuer's interests. The perceived likelihood of achieving any undisclosed goals must be disclosed. Disclosure that describes only the process of determining compensation without explaining the specifics of that actually paid or payable will not be adequate. As in the past, an issuer must include a performance graph reflecting its cumulative shareholder total return for the previous five years as compared to a broad equity market index. In addition, an issuer must now include in the CD&A a discussion of how the trend shown by the performance graph compares to the trend in the level of executive compensation paid over the same period. Certain issuers need not prepare the performance graph, including those listed only on the TSX Venture Exchange, those who have issued only debt securities or non-convertible, non-participating preferred shares, and those that have been reporting issuers in Canada for less than 12 months before the end of their most recently completed fiscal year.

Grant Date Valuation of Share and Option Awards

The New Rule will require disclosure of the dollar value of share-based and option-based awards to NEOs. The dollar value given must be based on the grant date fair value of the award. Frequently, this value may be different from the accounting fair value used for financial statement purposes, since the accounting fair value amount is amortized over the service period and adjusted at year end as required. The amount of, and the reason for, any difference in the fair values must also be disclosed. Issuers must also disclose

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the methodology (for example, the Black-Scholes-Merton or the binomial lattice model), assumptions and estimates used in the calculation and the reasons for selecting the particular methodology.

Enhanced Disclosure of Termination and Change of Control Payments and Benefits

Enhanced disclosure will be required for any contracts, plans or arrangements that provide for the possibility of an NEO receiving a payment or other benefit upon the termination of employment, retirement or change of control. The New Rule will require disclosure of the circumstances which could trigger a payment obligation, together with an estimate of the amount of incremental payments and benefits resulting from each of the triggering circumstances. For purposes of estimating uncertain amounts, an issuer must assume that the triggering event occurred on the last day of its most recently completed financial year. Disclosure of any conditions in favour of the issuer, such as non-competition, non-solicitation and confidentiality obligations of the recipient, must also be provided.

Director Compensation Disclosure to be Individualized and Expanded

The New Rule will require detailed disclosure of all compensation received by each director, other than those directors who are also NEOs and whose compensation is included in the NEO compensation disclosure. The disclosure must be included in a table similar to the NEO Summary Compensation Table and must include the amount of all fees earned, the value of awards of shares, options and grants under non-equity incentive plans, pension benefit values and the amount and nature of all other compensation earned by the director in any capacity, including as a consultant to, or as an employee of, the issuer or any subsidiary.

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Generous Severance Payouts Can Hurt Competitiveness!

Howard Levitt

"There will be blood on the streets," said Ontario Superior Court Justice Arthur Gans when addressing some 200 lawyers at last year's annual Ontario Law Society Workplace Law Conference.

In a panel discussion with Justices Colin Campbell and John Sproat on how courts should deal with employment law issues in these increasingly calamitous times, the general view was that they would likely be sensitive to employers. And, if companies act reasonably and compassionately when forced to lay off employees, they will less likely face massive severance awards that could threaten their existence.

Since then, Citigroup's layoff of 53,000 employees and massive layoffs in media, automotive, mining, finance and manufacturing worldwide has added to the human carnage. Even before the credit crunch and its debilitating impact, the Ontario manufacturing sector was experiencing the greatest downturn in its history.

Companies in virtually all sectors and countries are at risk. Since severance costs detract from the capital base required to survive, how should employers handle dismissals?

Many employers cannot afford to be as generous as they once were and those that can, no longer wish to do so. They appreciate their severance dollars must, if possible, be preserved.

Too often, severance formulas are devised by executives based on how they would wish to be treated, knowing they might be next. Generous severance may also be seen as a sign of an employer's "humanity," and others pride themselves in never having been sued, rather than analyzing the cost of consistent overpayments that not only reduce shareholder profit, but also can affect competitiveness. One client told me that while her company was not in peril, looking toward a worsening economy, she had decided to lay off some staff as a prevention. Her human resources manager, she opined, was using too generous a severance formula.

It was my view that no formula could emulate the individualistic approach courts take to determine severance. By definition, formulas over-compensate some employees and under-compensate others relative to what a court would decide. As a result, except for those that overpay everyone, the use of formulas invites, rather than ameliorates, litigation. I made myself available to review the terminations beforehand, to ensure they were defensible without overpaying.

Generally, if an employee is provided 80% of what a court would award, it makes little economic sense to sue. The odd employee may sue, but if the offer is defensible, employers should defend! A quick capitulation leaves other laid off employees believing they have little to lose in suing, creating a vicious cycle of increasingly higher severances.

Several years ago, a client that conducted a mass termination in New Brunswick offered severances slightly below what a court might provide. Six out of about 50 employees sued. We defended each one of them. Three years later, five settled for roughly the

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amount of the initial offers, leaving them worse off after legal fees. One went to trial and, because he had found work in between, did even worse than his initial offer. The national corporation then had another round of layoffs, providing even lower severances. Not a single employee sued. While it could afford to pay more, the company felt an obligation to its shareholders not to overpay severances.

To reduce severance costs, companies should consider the following:

- Do not use severance formulas.
- Offer severance at the low end of the range or just below.
- Ensure all offers are fully mitigated. Do not pay half of the balance, if employees obtain work. The courts will make you pay the difference. Since few people take jobs at half or less of their former salaries, this 50% formula pays the mitigating employee more than what a judge would. Employees, especially now, do not require incentives to take new employment.
- Don't settle with unreasonable employees. If employees know you will proceed quickly to mediation and raise your offer, you invite litigation. When I take cases to discovery, I routinely find new defenses. Take more cases there. Use lawyers who know how to litigate and are not anxious to settle.
- Don't pay excessive costs to the employee's lawyer when you do settle.
- Courts award employees what they would have earned during the period of notice. For commission and bonus-based employees, earnings may be much less now. Accordingly, the severance offer should reflect that drop.

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Ed.: *This article, essentially in this form, also appeared in Howard's weekly column on the first page of the Working section of the* National Post.

Asset-Backed Commercial Paper and Regulatory Reform

Susan Goscoe

When the Canadian asset-backed commercial paper ("ABCP") market froze in August of 2007, we learned that some investors believed that they were investing in safe, short-term investments. And so, when investors, large and small, allege that they believed they were making investments "as safe as cash" and, instead, face complete illiquidity and potential loss of principal, regulators and legislators are forced to take notice.

What went wrong? It seems that both distributors of ABCP and investors relied on the high credit rating of the ABCP and its exemption from certain securities law requirements to conclude that the product was suitable for everyone. But how could an investment that proved to be so risky have received a high credit rating? What does a high credit rating mean? It means that the risk is very low that the issuer will not pay back interest and principal. In the case of the frozen ABCP, the credit rating proved to be meaningless.

Another serious issue was the lack of information about underlying assets of ABCP issuers, making risk assessment both before and after the freeze in the ABCP market difficult. The sudden scarcity of investors willing to invest in new ABCP was apparently caused by concerns that the ABCP issuers might be holding high-risk mortgages that were beginning to default.

And at the heart of the seize-up of the ABCP market was the fact that liquidity facilities were not available, as expected, to ensure that ABCP could be redeemed at maturity. ABCP, with the type of liquidity facility in issue (referred to as a "general market disruption liquidity facility"), was rated by only one credit rating agency, DBRS Limited, due to the restrictive wording in the liquidity facility agreement. Liquidity would only be provided if there was a general market disruption which meant that commercial paper could not be issued at any price by any issuer. Certain liquidity providers took the view that there had been no general market disruption and refused to make liquidity available. Since the ABCP crisis, DBRS Limited no longer provides ratings for ABCP with a general market disruption liquidity facility.

Now what should regulators do?

Securities Law Exemptions: Securities law needs modification to ensure that ABCP and other complex products cannot be sold to everyone without a prospectus. This involves removing the availability of the short-term debt exemption from prospectus requirements for ABCP and similar complex products. (It could still be sold to institutions and high net worth individuals without a prospectus under the accredited investor exemption.)

Product Due Diligence: The due diligence procedures of investment dealers need improvement to ensure that they appropriately categorize products and provide adequate information to customers to allow them to determine if the product is suitable for the customer's particular investment objectives and circumstances.

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Credit Ratings in Securities Law: The ABCP crisis has demonstrated that the use of credit ratings in securities law requires modification. Securities law includes many references to credit ratings, making certain exemptions and categorizations dependent on those ratings. One likely regulatory response is to restrict the use of credit ratings in securities law to plain vanilla securities of established operating businesses with assets. Credit rating agencies could continue to offer ratings for more complex products to customers, but such ratings would not be incorporated into securities law. If a credit rating agency believes that a new entity that relies entirely on short-term paper to finance long-term financial assets merits its highest credit rating, investors could choose whether or not to rely upon that rating. However, such ratings would not form the basis for an exemption from securities law requirements, such as prospectus disclosure requirements.

Scarcity of investors willing to invest in new ABCP was caused by concerns that the ABCP issuers might be holding high-risk mortgages.

Registration of Credit Rating Agencies: It appears the time may have come to require registration of credit rating agencies, as is the case in the United States, to ensure that certain standards are met. Such standards would address disclosure of conflicts and, potentially, disclosure of certain securitization information, including the nature of underlying assets of an ABCP issuer. If registration were required, Canadian regulators would be able to take action, if necessary, to enforce those standards. However, regulators will wish to avoid becoming *de facto* rating agencies themselves or becoming intensely involved in the whole rating process, for example, by regulating methodology. Instead, the restriction of the use of credit ratings in securities law and the registration of credit rating agencies appear to be appropriate compromises.

The above regulatory responses, among others, are currently being considered by Canadian regulators. In the meantime, the ABCP restructuring plan has been completed. It now remains to be seen how the replacement of ABCP by long-term notes that match the maturities of underlying assets will work out for investors. Are the underlying assets, indeed, high quality assets? Will the ABCP investors ultimately be made whole? Only time will tell.

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Is Cooperative Bidding a Crime?

James B. Musgrove

The equity market is sometimes seen as capitalism's last true home. A place where competition is red in tooth and claw, and where corporate life can be, at least for some, nasty, brutish and short. But even in the jungle of pure capitalism, a little bit of cooperation can break out and, as one example of this, bidders for companies may decide that it is better to cooperate than to compete in some instances.

The reasons for this cooperation can be varied. At one end of the spectrum, it may be that an individual bidder is simply financially, or otherwise, unable to compete without teaming up with a partner, or that they are only interested in one part of the business up for auction, so it makes sense to arrange a partner who will acquire the other portion of the business. At the other end of the spectrum, however, it may be that bidders determine that agreeing amongst one another in advance of the auction will result in a lower price being paid for the firm in play. Certainly, this logic is not unknown in more traditional auction settings.

In 2007, this issue was explored tangentially by the United States Supreme Court in the context of a clash between competition laws and securities regulation. In *Credit Suisse Securities (U.S.A.) LLC* v. *Billing*, the U.S. Supreme Court found that, at least in the context of the facts of that case, an agreement between underwriters not to sell certain shares unless buyers agreed to buy further shares later, to pay high commissions, and to buy shares of other companies, could not be an antitrust offence. This decision arose in the context of an underwriting syndicate of securities dealers handling a firm's Initial Public Offering ("IPO"). The members of the underwriting syndicate worked together to price and market the shares and spread the risk between them *via* the syndicate.

The U.S. Supreme Court found that the challenged activities were central to effectively bringing a new issue of stock to market and that the Securities and Exchange Commission ("SEC") had the power to supervise the activities in issue. The Court found that the conduct in issue was regulated by the SEC and, therefore, that the conduct was not subject to challenge under the antitrust laws.

Canada has a similar rule with respect to at least some government-authorized action not being subject to challenge under com-

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petition laws, called the Regulated Conduct Doctrine. In the same situation in Canada, a similar result might well apply to conduct in the securities markets, pursuant to the Regulated Conduct Doctrine, depending upon the specific regulatory framework which applied.

More recently, the U.S. District Court for the Western District of Washington has had occasion to revisit the issue, but not in the circumstance of an SEC rule. In the case of *Pennsylvania Avenue Funds* v. *Borey*, two bidders for a company, after having bid against one another for a time, agreed to join together to bid jointly for the company. The Court found that the conduct engaged in by the two bidders in joining forces was not specifically regulated by SEC rules and, therefore, concluded that the conduct of the bidders was not protected by SEC rules, as had been the case in *Credit Suisse*. However, the Court went on to find that the two bidders were among 35 or more potential buyers of the company for sale, and that an agreement between two of 35 or more bidders to join forces did not offend the *Sherman Act* rule respecting agreements among competitors. The court found that "price agreements between competitors in a corporate control context are not *per se* illegal" as are price fixing agreements in more traditional markets under U.S. law.

The court found that "price agreements between competitors in a corporate control context are not per se *illegal" as are price fixing agreements in more traditional markets under U.S. law.*

Since the agreement was not *per se* unlawful, the plaintiff had to prove that the agreement actually resulted in negative impact on competition. In a rule of reason analysis – that is, considering the actual economic impact of the conduct – the Court found that these two bidders did not have market power in the "enormous" private equity market. This, notwithstanding that few, if any other, bidders actually bid for the company in issue. That was because, as the court noted, many other suitors had looked at the company and were available to bid if the asset was worth more than the joint bid put in by the agreeing bidders. Therefore, the court concluded that one cannot regard the firms that did not bid as not being in the market, because the fact that they did not bid likely only meant that the asset was not worth more than the joint bidders paid for it.

In Canadian law, the equivalent rule with respect to agreements among competitors is found in Section 45 of the *Competition Act*. Section 45 provides, in part, that agreements to restrain or injure competition "unduly" are unlawful. The use of the word "unduly" provides some flexibility. In the leading case under this provision, the Supreme Court of Canada indicated that an agreement among two of many possible marketplace participants is, as is consistent with the reasoning of the *Pennsylvania Avenue Funds* case, unlikely to lead to an offence.

However, the Canadian *Competition Act* also contains a specific provision (in Section 47) with regard to bid rigging. Here, unlike the Section 45 offence, there is no use of the word "unduly," and the statute is clearly drafted so as to forbid, on a *per se* basis, any agreement between two bidders, either that one or more of them agree not to submit a bid, or that they submit bids which are arrived at by agreement – this, even if the cooperating firms are only two of 35 bidders. However, the section is quite precise in the definition of what is bid rigging. The bid or bids that result in the offence have to be made in response to a call or request for bids or tenders. If there is no such call – if offers are simply made to purchase assets and there was no call or request for bids or tenders – then the conduct cannot be bid rigging. Even in a situation in which there appears to be a call for bids, the courts have found that, in circumstances in which the person calling for the bids frequently negotiated after receiving bids and tried to obtain even lower prices than those bid, this is not a call for bids or tenders in the sense that the section envisioned. Furthermore, the courts have found that an agreement that one of the bidders will withdraw its bid after submission is not an agreement specifically prohibited by Section 47. So, to trigger the bid-rigging offence, the conduct has to be quite precise.

In addition, Section 47 of the Act provides an express exemption with respect to bid rigging. It provides that the section does not apply if the agreement or arrangement with respect to the bids is "made known" to the person calling for or requesting the bids or tenders at or before the time the bid or tender is made. Therefore, if there are good efficiency reasons for joint or club bids – as there often are – one way to avoid any risk of problems under the bid-rigging provisions of the Act is simply to advise the person calling for the bids that there is an agreement on the point, prior to the joint bid going in. This is sensible counsel for the situation of joint bidding in any context, including the context of bidding for corporate control in Canada.

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The Next Great Business Trend from South of the Border?

Stephen J. Maddex

As a result of extremely expensive lessons learned in courtroom litigation over the last few years, one of the hottest trends among informed businesses in the United States is the adoption of a formal electronic document retention policy.

Businesses that have had the unhappy experience of being ordered by a court to produce from their databases electronic documents (such as e-mails and other documents stored in electronic form) have realized in hindsight that, if they had instituted a formal policy of eliminating unnecessary data from their systems, the costs to produce the required documents would have been dramatically lower and the process immeasurably less painful. Moreover, U.S. businesses have also come to realize that, by instituting a formal document retention policy, they are better able to streamline and organize their data systems, reduce their overall storage costs, and dramatically improve access to stored data. For example, because most information used by businesses nowadays is created and/or stored electronically, when businesses are involved in lawsuits in the U.S., it is quite common for parties to demand the disclosure of a broad array of electronic documents relating to the dispute. However, given that a single e-mail is often copied and forwarded to numerous recipients, the volume of relevant electronic documents can be exponentially greater than what may have been the case in the past. As a result, being required to disclose all relevant e-mails could result in the disclosure of thousands of documents, even in a relatively minor dispute.

Litigants are becoming increasingly aware of the importance of electronic information and the strategic advantages associated with forcing an opponent to incur the costs of producing electronic data.

In a more complex case or when the business at issue has national or international operations, the volume of documents that would have to be produced could easily be hundreds of thousands or millions. More importantly, because the documents generally have to be reviewed by lawyers before they are disclosed, the cost to produce electronic documents in a typical case often generates enormous legal fees.

And, it's not just in litigation. When government agencies conduct investigations in the U.S., they always look for electronic documents. A due diligence review as part of a merger or acquisition normally will also involve electronic documents. As such, the ubiquitous nature of electronic documents can cost businesses millions of dollars for even relatively simple matters.

Therefore, at a minimum, Canadian businesses involved in litigation in the U.S. or subject to regulation by U.S. authorities could eventually be subject to this sort of procedure. Moreover, the rules are changing in Canada as well. Litigants are becoming increasingly aware of the importance of electronic information and the strategic advantages associated with forcing an opponent to incur the costs of producing electronic data from their vast storage systems. It's like forcing your opponent to search for the needle in a haystack of electronic data.

In the last decade or so, rapid developments in electronic technology have created a new environment with respect to how businesses create, manage, and store information. The number of people using electronic documents and the number of uses for electronic documents continue to grow almost on a daily basis. Improvements in storage capacity make it easier for businesses to maintain massive databases of old information and store data that is no longer necessary or that was never intended to be stored, such as personal and non-business information.

However, although businesses have a vast capacity to store information relatively inexpensively, little of the information that is created and stored is actually necessary to the operation of the companies. Moreover, taking a rational approach to eliminating data that is no longer useful or that was never intended to be kept can result in significant long-term savings in costs and increased productivity. As a result, a trend developing among informed businesses in the U.S. is the establishment of formal electronic document retention policies designed to reduce the volume of stored data and categorize the data in a more rational manner.

There is nothing particularly new or revolutionary about records management. Businesses have always had to decide what records to keep (and for how long) and what records to destroy (and when to destroy them). However, in the current technological age, with improvements in storage capacity growing almost on a daily basis, businesses nowadays are capable of maintaining massive databases of old information.

Summary and Final Remarks

The use of document retention policies is becoming increasingly important for businesses throughout North America. Technological developments over the last few years have made the volume of electronic documents sent and stored almost overwhelming.

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Moreover, companies that could potentially be involved in litigation could also benefit from developing a document retention program. In the last several years, companies in the U.S. have begun to realize that, given the incredible volume of electronic documents (including e-mails) stored on computer hard drives and servers (all of which are potentially subject to disclosure), being required to produce electronic documents to an opponent in litigation can be enormously expensive. Indeed, producing even a relatively small number of documents can cost hundreds of thousands (or more likely millions) of dollars in legal fees and lost worker production. Taking a common-sense approach to eliminating unnecessary data as part of a neutral document retention policy could result in large savings in the event a company is involved in litigation or otherwise subject to an order to produce electronic documents.

Taking a common-sense approach to eliminating unnecessary data as part of a neutral document retention policy could result in large savings.

Accordingly, a document retention policy that would mandate the destruction of old and unnecessary data under certain prescribed conditions would help reduce the volume of stored data and in turn reduce the costs of storing that data, along with the time and expense of retrieving important data if necessary in the future.

The scope of discovery in the U.S. is much broader than here, but that is soon going to change. Revisions to the rules of procedure will make more information accessible in litigation in Canada. Also, any Canadian company that does business in the U.S. could potentially be involved in litigation in the U.S. And if they are, they will be subject to the more onerous discovery rules in that country. That means that all of their electronic documents are potentially subject to disclosure. The costs of reviewing and analyzing electronic documents can be enormous.

For those reasons, companies should establish document retention policies that outline what data should be kept and stored (and for how long) and what data should be permanently eliminated and when. This will reduce their storage costs, will streamline their data, and could result in massive cost savings in the event they are ever required to produce information either in litigation, in response to a government inquiry, or for some business purpose, such as effectuating a merger.

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Going Public: A Company's Expenses and Obligations

James Stranges

So, the time has come. A business has reached a sufficient level of maturity so as to access the public equity markets. While the access to large amounts of cash is enticing, such a venture, whether in good economic times or bad, must always be weighed against the ongoing costs and obligations of being a reporting issuer in Canada.

While the contents of this condensed article may seem trite to those with even a modest amount of experience in dealing with reporting issuers, we hope, nevertheless, that the information may serve as a useful guide to those that are new to the required expenditures, ongoing disclosure obligations and other responsibilities associated with running a public company. Readers must be cautioned, however, that this article only summarizes some of the primary expenses and obligations of reporting issuers in Canada. As an exhaustive listing of all expenses and obligations of reporting issuers in Canada is beyond the scope of this or any other paper, readers are invited to contact the writer should they require additional information.

This article only summarizes some of the primary expenses and obligations of reporting issuers in Canada.

Stock Exchange and Other Fees

A reporting issuer will generally list its securities for trading on the Toronto Stock Exchange ("TSX") or its junior partner, the TSX Venture Exchange ("TSXV"). Whether to list on the TSX or TSXV is a decision to be based on a number of factors, the most important of which relate to the size and resources of the issuer. A reporting issuer that lists its securities for trading on the TSX or the TSXV must pay certain fees and, for TSX fees, there is a calculator at http://www.tsx.com/en/listings/listing_with_us/costs/fee_calculator_tsx.html.

Both the TSX and TSXV also charge fees related to certain trans-

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actions undertaken by reporting issuers, including stock splits, consolidations and trading symbol and name changes as well as in connection with exchange review of certain issuer documents from time to time. A reporting issuer must also typically retain and pay a transfer agent to administer its share register and provide communication services with an issuer's registered and non-registered shareholders.

If a reporting issuer is not able to meet (or, in some cases, only narrowly meets) certain financial listing requirements of the TSX or the TSXV, as applicable, the issuer may be required to retain a sponsor in order for the issuer's securities to be listed. A TSX or TSXV "participating organization" may provide sponsorship services on behalf of such issuers. In most cases, a sponsor plays an important role in bolstering an issuer's claim for listing suitability.

Continuous Disclosure Obligations

Under National Instrument 51-102 – *Continuous Disclosure Obligations* ("NI 51-102"), obligations apply to a company that becomes a reporting issuer in Canada and some of those obligations are briefly noted below.

A reporting issuer, other than a venture issuer, must file with Canadian Securities Administrators ("CSAs") and send, to all of its shareholders that request them, interim financial statements, and do so within 45 days following the end of each of the first three quarters of its financial year. For a venture issuer, the filing deadline is 60 days following the end of the quarter. Where interim financial statements are not reviewed by an auditor, a notice must accompany the filing, indicating that such a review was not performed.

Accessing the public equity markets must always be weighed against the ongoing costs and obligations of being a reporting issuer in Canada.

A reporting issuer, other than a venture issuer, must also file with the CSAs, audited annual financial statements and send such statements to all of its shareholders that request them within 90 days following the end of its financial year. For venture issuers, the deadline is 120 days.

A reporting issuer must file its financial statements, along with a certificate signed by both the Chief Executive Officer and the Chief Financial Officer of the company stating that such statements, together with the corresponding Management's Discussion and Analysis ("MD&A") and, in the case of the annual statements, the annual information form ("AIF"), do not contain any false or misleading information and fairly present the financial condition, results of operations and cash flows of the issuer for the relevant period.

A reporting issuer, other than a venture issuer, must file an AIF within 90 days following the end of its financial year (which can be filed together with the MD&A and annual financial statements of the issuer). The AIF is a general information document intended to provide material information about the company and its business at a point in time in the context of its historical and possible future development.

Also, as soon as a material change that is not generally known to the public has occurred that would reasonably be expected to have a significant effect on the value or the market price of its securities, a reporting issuer must prepare and distribute for publication in the media a press release authorized by a member of management, disclosing the substance of the change. The reporting issuer must also immediately file with the CSAs a copy of the press release, along with a material change report.

Each reporting issuer must file with the CSAs, concurrently with its publication, a copy of any news release issued by it that discloses information regarding its operations or financial condition. A reporting issuer must also file any document that it sends to its shareholders at the time it sends such document. The issuer must also file a copy of any document setting forth the rights of the company's securityholders, or affecting them, as well as any material amendments to such documents.

In addition, a reporting issuer must also file a copy of any material contract that it has entered into other than in the ordinary course of business during the last financial year or, if still in effect, on or after January 1, 2002.

When a reporting issuer completes a significant acquisition it must file with the CSAs a business acquisition report within 75 days following the date of the acquisition, along with specified financial statements and *pro forma* financial statements of the acquired business. The financial statements of the acquired business must include the audited financial statements for the most recently completed financial year and the most recent unaudited interim financial statements. The aforementioned financial statements must be presented in comparison with the relevant periods for the immediately preceding financial year.

Annual and Special Meetings of Shareholders

Under the various corporate statutes in Canada, all companies are required to have annual shareholder proceedings. But when a company becomes a reporting issuer, the documents required to be prepared in connection with such meetings must be prepared in the form prescribed by the CSAs.

It should be noted that in the Fall of 2008, the CSAs released a new Form 51-102F6, *Statement of Executive Compensation* ("New 51-102F6"), which became effective and applies to financial years ending on or after December 31, 2008. New 51-102F6 is designed to provide an issuer's shareholders with greater disclosure of executive compensation.

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The company, among other things, must also send its shareholders a form of proxy, the requirements of which are specified in NI 51-102. The proxy form is designed so as to allow the holder to specify whether or not he or she would like his or her proxy to vote on certain issues. The form must also allow a shareholder to indicate how the proxy must vote on any other issue specified in the Notice of Meeting or the Circular.

Final Remarks

As stated at the outset, the purpose of this article is to provide an overview of some of the major obligations and expenses incurred by reporting issuers in Canada. There are certainly a number of other obligations and expenses, not alluded to in this abridged article, that may be encountered by reporting issuers at any time and from time to time.

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Ed.: *The unabridged version of this article is available without cost or obligation from James. In the preparation of this paper, James wishes to recognize the assistance of* ***Christos Gazeas****, associate, Corporate Finance/Securities Law Group.*

Licences as Property or Collateral

David E. Thring

The recent decision of the Supreme Court of Canada in *Saulnier (Receiver of)* v. *Saulnier* has changed the basis for determining whether a licence is property under a provincial *Personal Property Security Act* ("PPSA") and the federal *Bankruptcy and Insolvency Act* ("BIA").

The decision recognizes that a licence may sometimes be a highly valued commercial asset, and discusses when it may be capable of being made subject to a security interest. The *Saulnier* decision deals with a fishing licence, but its implications extend to holders of all government issued licences, from taxi drivers to telecommunications companies.

The Saulnier decision deals with a fishing licence, but its implications extend to holders of all government issued licences.

Saulnier was a fisherman in Nova Scotia who signed a general security agreement to secure borrowings from his bank. Saulnier's fishing business declined and he made an assignment in bankruptcy. The trustee in bankruptcy and bank-appointed receiver wished to sell his fishing licences to pay off his debt, but Saulnier refused on the basis that the licences were not property, and as such, were not subject to the Nova Scotia PPSA or the BIA.

On appeal, the Supreme Court of Canada recognized that the fishery was a public resource and that the federal government had unfettered discretion to issue, renew and approve transfers of Saulnier's licence. However, the Court held that the temporary nature of the licence did not affect the fact that Saulnier's interest in the licence could be considered property. The Court held that the licence gave Saulnier a right to fish coupled with a proprietary interest in the fish which he caught, and that the licence could be classified as property under the PPSA and the BIA.

Before the *Saulnier* decision, the issue of whether a licence or quota could be property was determined according to the extent to which the regulatory agency that issued the licence or quota had unfettered discretion to renew or revoke it, or approve its transfer. In 1987, the Ontario Court of Appeal in *National Trust Company* v. *Bouckhuyt* held that a valuable tobacco quota did not constitute property under the Ontario PPSA because the quota existed subject to the unfettered discretion of the issuing regulatory agency and was "transitory and ephemeral." In later cases, courts distinguished *Bouckhuyt* on the basis that some regulatory authorities were bound, by policy and practice, to renew licences and to act reasonably when considering applications for transfer. If the issuing authority was subject to "fetters" such as these on its discretion to renew and transfer, then the licence holder had a proprietary interest in the licence to which a security interest under the PPSA could attach. This line of reasoning was criticized by various academics and lower courts.

The *Saulnier* case has now decided that the prospect of renewal, whether or not subject to an "unfettered" discretion on the part of the issuing agency, is no longer determinative of whether a licence is collateral. In *Saulnier,* the Court states that the preferred approach is to look at the substance of what is conferred; namely, a licence to participate in the fishery coupled with a proprietary interest in the fish caught, at all times subject to the Minister's regulation. The licence may be for a limited period of time, and its renewal or transfer may be subject to the Minister's discretion, but a secured creditor or trustee

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in bankruptcy has the same right to seek its replacement and has the same recourse (or lack thereof) if the application for renewal or transfer is rejected. The secured creditor or trustee steps into the shoes of the licence holder and takes the licence "warts and all."

What are the implications of the *Saulnier* decision? In its simplest form, a licence is a right to do something which is otherwise illegal. In Canada many businesses hold licences. They are issued by governments at all levels – municipal, provincial and federal. Licences that are limited in number and control or limit access to a public resource have commercial value that varies depending on the market. At one extreme, liquor licences are numerous and fairly easily obtained. At the other extreme, licences to operate toll highways or airports are unique, and constitute exclusive franchises. The *Saulnier* decision states that a licence, coupled with a proprietary interest in the harvest or product derived from the licence, is property to which a security interest under the PPSA may attach. Thus, many licences in Canada's primary industries (fish, timber, agriculture, petroleum, minerals, etc.) would fall into this category.

What about a licence to a public resource coupled with a right to charge users a toll or fee? The logic of the *Saulnier* decision should apply to these licences as well. They are temporary in duration and issued at the discretion of a regulatory authority, but they have commercial value. The licence constitutes a right to own or operate a facility coupled with the right to charge users a toll or fee. Licences of this sort would include transport (taxis, ferries, container terminals, airports, etc.), telecommunications, nursing homes and other secondary industries. The concept should even apply to public private partnerships and infrastructure finance – an exclusive franchise or concession granted by the government to build and maintain a public facility (toll roads, hospitals, schools, etc.) and to collect a user fee or rent from the ministry or agency operating that facility, is property to which a security interest may attach. It is not determinative whether such licences are temporary, or may only be renewed or transferred at the sole discretion of the issuing regulatory agency. Every such licence has value as collateral for secured creditors and, if there is any doubt in the statute under which the licence is issued, the *Saulnier* decision suggests that the licence should constitute property of the licence holder if the licence holder's business ever fails or restructures.

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Ed.: *The author would like to acknowledge the research assistance provided by **Natasha Wirtanen**, an articling student in our Toronto office.*

Ban on Naked Short-Selling in the U.S.

Daniel Dex

Tom Hakemi

It appears that the ban imposed by the United States Securities and Exchange Commission on naked short-selling will be permanent. It is unlikely that Canadian regulators will alter the rules with respect to short-selling because the imperatives for further regulatory action do not appear as compelling in Canada.

> *It is unlikely that Canadian regulators will alter the rules with respect to short-selling.*

What is the Essence of Naked Short-selling?

Short-selling is the practice of selling securities the seller does not own, with the intention of acquiring the securities (or "covering" the short position) at a lower price in the future. The short-seller traditionally borrows the securities from a dealer for a fee and makes a profit based on how far the price of the security declines before he must pay for the covered securities.

For those unfamiliar with it, short-selling has historically been seen as something of a black art. More recently, it has been blamed for contributing to the recent crisis in financial stocks and institutions. For example, Morgan Stanley's John Mack complained that short-sellers wrestled his company's stock to the ground. The second largest pension fund in the U.S. called short-sellers "piranhas" and refused to lend stock to them. New York's Attorney General Andrew Cuomo likened short-sellers to "looters after a hurricane."

In a "naked" short sale, the short-seller does not formally borrow the security (i.e., obtain a positive confirmation that the dealer is in a position to lend the shorted securities) before shorting. Furthermore, the short-seller does not meet the standard requirement for settlement by delivery of shares within three days of the trade ("T+3 Settlement").

The fact that the naked short-seller does not borrow the security puts downward price pressure on the security through what is, in effect, an artificial increase in the supply of that security. In a naked short sale, the short-seller is at immediate risk of a buy-in if

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delivery of the shares is insisted upon by the buyer of the securities sold short. For this reason, naked short-selling is often done with a very short-term outlook where price declines are in progress.

SEC Action Against Naked Short-Selling

On September 18, 2008, the SEC adopted temporary measures against naked short-selling. Unlike the SEC's restrictions against short sales of certain financial stocks, these measures were not allowed to lapse. On October 14, 2008, the SEC extended these measures by adopting an interim final temporary rule ("Rule 204T"), effective as of October 17, 2008.

To avoid exacerbating price declines in securities, the SEC's new rule effectively prevents naked short-selling by requiring a T+3 Settlement. The ban applies to naked short-selling in all stocks, not just financial ones.

Under the rule, short-sellers and their broker-dealers must deliver shorted securities for clearance and settlement by the close of business within three days of the date of the short sale. If they have not delivered the shares by the settlement date, they must immediately purchase or borrow securities to close out the fail to deliver position no later than the beginning of regular trading hours on the next day. A participant or broker-dealer who fails to comply with this rule may not accept further short sales in that stock, unless it has previously arranged to borrow or has borrowed the security, until the fail to deliver position is closed.

The SEC also adopted a final rule that makes options market makers subject to the T+3 Settlement requirement.

As part of these efforts, on September 18, 2008, the SEC also adopted, on a temporary basis, a new anti-fraud rule under Section 10(b) of the *Exchange Act* to address deceptive short-selling practices. On October 14, 2008, the SEC made this rule permanent, effective October 17, 2008.

New Rule 10b-21 provides that short-sellers who make misrepresentations about their intent and ability to deliver equity securities in compliance with the T+3 Settlement requirements are in violation of the law when they fail to deliver the securities as represented. This rule is intended to flush out the situation where the short-seller does not advise the broker that the shares are being sold short, but rather directs the broker to sell shares that are not in the account on the basis of an implied promise by the seller to lodge the shares before settlement is required or buy them back and cover at that time.

Canadian Restrictions to Come?

The SEC coordinated some of its recent activity to stabilize markets with the United Kingdom's Financial Services Authority, which passed some similar measures. Canada's financial sector has not been rocked as severely by sub-prime loan related market turmoil and the imperatives for action have not appeared as compelling as they have in the U.S. and perhaps the U.K. Although possible, it is unlikely that Canadian regulators will pass significant, permanent restrictions on short-selling, as the current rules appear to address the concerns that led to the restrictions in the United States.

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Reducing Litigation Abuse in Ontario: Rule Changes

Mark Wiffen

On January 1, 2010, a number of changes to the Ontario *Rules of Civil Procedure* are to come into effect, changes that are intended to make litigation more accessible and cost effective. The changes are not as fundamental as the recently proposed changes to the British Columbia rules, but they are intended to change specific troublesome aspects of litigation in Ontario to make litigation more accessible and cost effective. While some of the pending changes, primarily the increase in the upper limit for Small Claims Court lawsuits to $25,000 (from $10,000), have received wide publicity, a number of other important changes have been overlooked and are summarized briefly below.

Reduction of the Scope of the Discovery Process

The most substantial procedural change that will come into effect in 2010 is that the scope of both the documentary and oral discovery process will be narrowed. This is accomplished through three general areas of change:

- A limit on the length of examinations for discovery is being introduced, limiting parties to seven hours of examinations for discovery each, unless the parties consent to longer examinations or there is a court order. This is a substantial change from the current rules, which place no limit on the length of examinations for discovery.
- An emphasis on "proportionality" is being imported into the

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rules regarding documentary productions and examinations for discovery. The new proportionality rule provides authority for the court to limit questions and documentary productions where the cost of responding to such demands is out of proportion to the amount in dispute in the litigation. This is a change from the current system, where the rules impose identical production obligations in every case, regardless of the amount in issue (although in recent years, courts have been willing to interpret the rules in such a manner that includes some consideration of proportionality).

- The scope of examinations and documentary productions will be changed from requiring parties to answer questions and produce documents "relating to any matter in issue" to a narrower standard of being "*relevant* to any matter in issue." While, on its face, this appears to be a small semantic change, it eliminates the current "semblance of relevance" test, which is very broad, to a test which requires a party to show actual relevance.

The most important aspect of these three changes will be to provide the courts with some leeway to enforce a more common-sense approach to discovery, and reduce the opportunity to abuse the system through overly broad examinations and documentary production demands.

The most important aspect of these three changes will be to reduce the opportunity to abuse the system through overly broad examinations and documentary production demands.

While these rules will potentially reduce the amount of pre-trial discovery time in most instances, cases that fall within the Simplified Procedure rules will now change from having no examinations for discovery, to allowing each party up to two hours of examinations for discovery. This change is being made in conjunction with an expansion in the scope of the Simplified Procedure rules, which will apply to claims of up to $100,000 (an increase from the previous level of $50,000).

Summary Judgment

The current rules regarding motions for summary judgment (i.e., motions to obtain judgment without the necessity of having a trial) have been very strictly interpreted by the Court of Appeal. A party cannot currently obtain summary judgment unless it can essentially be shown that the other side lacks any possible chance of success.

Under the new rules, a judge's powers will be broadened substantially:

- A judge hearing a summary judgment motion will be permitted to make assessments of credibility (i.e., based on affidavit material, without hearing witnesses) and weigh the evidence in determining the matter, as opposed to the current system where a judge must take the evidence of the party resisting summary judgment at face value, unless it is incapable of being true.
- While summary judgment motions will still be conducted based on affidavit material, rather than based on testimony in open court, a judge hearing the motion can require a "mini-trial" involving oral evidence.
- The cost consequences for bringing an unsuccessful summary judgment motion will be less harsh, as costs will now be awarded on a "partial indemnity" basis rather than a "substantial indemnity" basis, unless the motion was brought unreasonably or in bad faith.

As a result of these changes, it is expected that summary judgment motions will become much more commonplace, given the higher likelihood of a matter being decided on such a motion, and the softening of the potential negative costs consequences.

Other Changes

The new rules also provide for a number of minor changes, such as requiring the parties to agree upon a "Discovery Plan" at the outset of a case, and requiring expert witnesses to certify, in writing, that they understand their duty to be fair, impartial and non-partisan. Timelines within litigation have also been changed, such as increasing the notice period for motions from a minimum of four days to seven days, and requiring expert reports to be delivered much earlier in a proceeding.

Ultimately, time will tell whether these various changes to the *Rules of Civil Procedure* have the desired effect of reducing the cost and time involved in litigation and increasing access to justice for litigants. Next year will likely be an active year for lawyers and the courts alike in Ontario, as everyone begins to adapt to these new rules.

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The Importance of Being Earnest in Insurance Matters

Hartley Lefton

A recent case demonstrates the importance of knowing and understanding insurance policies and ensuring that policies are appropriate to the insured's needs. In this case, a claims-made policy was in dispute. Some of the claims made by the insured were found to have been preceded by valid notifications of these claims, which then required the insurer to indemnify the insured. The court's ruling turned on the precise details of the insurance policy. The implications of this judgment illustrate the importance of knowing and understanding the insurance policy. As with many insurance cases, millions of dollars may be at stake.

Main Types of Insurance Policies

Two general types of insurance policies are available that provide coverage to insureds (e.g., guaranteeing a defence and providing partial or full indemnification).

Claims-made policies cover insureds according to when a claim is filed by a third party against the insured. If the claim is made during the policy period, the insurer is required to indemnify the insured, regardless of when the act giving rise to the claim occurred. Claims-made policies offer a degree of certainty to insurers in that after the expiration of the policy, the insurer knows that no new liabilities may be incurred and it can calculate required reserves and future premiums with extra certainty.

In contrast, occurrence-based policies cover insureds according to when the act giving rise to the claim occurred. If the act occurred during the policy period, the insurer is required to indemnify the insured. Occurrence-based policies offer insurers a different sort of predictability; that is, the insurer knows the term during which it is liable for coverage, giving it time to work with insureds on their business processes to try to mitigate risk as much as possible.

Other policies, such as those which blend elements of claims-made and occurrence-based policies, also exist. However, claims-made and occurrence-based policies are the two principal types of insurance policy.

Supreme Court Interprets "Claims-Made" Policy

The Supreme Court of Canada's ruling in *Jesuit Fathers of Upper Canada* v. *Guardian Insurance Company of Canada* (*"Jesuit Fathers"*) adds new context to the treatment of claims-made policies.

From 1913 to 1958, the Jesuit Fathers of Upper Canada operated and administered a school in Spanish, Ontario. The school was operating under the federal policy to educate and assimilate Aboriginal children in Canada. The school closed in 1958.

As early as 1988, rumours and news articles suggested that improper activities, including harsh discipline and sexual abuse, took place at the school. In January 1994, a lawyer informed the Jesuits of a claim by her client who alleged physical and sexual abuse, and offered to settle the claim. By the end of January 1994, the Jesuits knew of other general claims of abuse at the school.

Counsel for the Jesuits wrote to the Jesuits' insurer on March 18, 1994, advising the insurer of the possibility that the Jesuits may, in the near future, face claims other than those made in the January letter. After the end of the term of the insurance policy, approximately 100 additional claims were made containing allegations similar to those outlined in the March letter, including claims of abuse resulting from a lack of proper supervision. Even though the claims themselves were made after the conclusion of the Jesuits' insurance policy, the Jesuits sought indemnification against these claims, as the general facts underlying the claims were conveyed to the insurer during the policy period.

The Supreme Court held that while the general circumstances giving rise to the other claims were known prior to the expiration of the policy and communicated to the insurers, the specific claims were made only after the expiration.

The Jesuits had purchased a general liability insurance policy from two insurers that provided insurance with respect to professional services offered by the Jesuits (e.g. at the school) that expired on September 30, 1994. The policy was a claims-made policy that differentiated between a "claim" and a "circumstance or occurrence." This distinction was made in various sections of the policy.

Prior case law had established that a claim requires a clearly communicated intention by an alleged victim to hold the insured responsible for certain damages. The required communication, at minimum, is a clear intention by the third party to hold the insured responsible for the damages. This clear intention could include a demand for compensation or another form of reparation.

In *Jesuit Fathers*, the Supreme Court found that, with the exception of the January letter, the notification given to the Jesuits did not meet the standard of a claim, as those notifications did not include an intent to hold the insured responsible for specific damages. The Jesuits' general knowledge of events that may have given

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rise to potential claims did not, of itself, constitute a claim. As a result, there was no duty for the insurers to defend against any other claims against the Jesuits, as the duty to defend relates only to claims and complaints that might fall within the coverage of a policy. The Supreme Court held that while the general circumstances giving rise to the other claims were known to the Jesuits prior to the expiration of the policy and were communicated to the insurers, the specific claims were made only after the expiration of the policy. Since the policy covered claims and not circumstances, there was no coverage under the policy for the later claims.

The Supreme Court also noted that a provision known as a "notice of circumstance clause" is available in some commercial contexts. The notice of circumstance clause permits an insured to report, during the policy period, circumstances that may give rise to future claims. When this clause is in place, any claims based on circumstances brought to the attention of the insurer, but made after the expiry of the policy period, are deemed to be made during the policy period. As the policy in *Jesuit Fathers* did not include a notice of circumstance clause, even though it was commercially available upon the last renewal, the Supreme Court inferred and determined that the Jesuits did not desire this coverage to be included in the policy. In the Supreme Court's view, a refusal to take on additional coverage (e.g. the notice of circumstance clause) is an implied rejection of the terms of this coverage and bars the insured from claiming these terms at a future date.

A "notice of circumstance clause" permits an insured to report, during the policy period, circumstances that may give rise to future claims.

Final Remarks

In *Jesuit Fathers,* the Supreme Court's decision turned on the precise details of the insurance policy. Notification to the insurers required knowledge and receipt of a formal intention by the alleged victims to hold the insured responsible for damages. However, it was crucial for the insured that the notification given to the insurer was clear to a reasonable person and related directly to the ultimate claim.

With this case law in mind, insurance companies and insureds are advised to:

- discuss the offerings of insurance companies and clients' business needs to ensure that the most appropriate insurance is being used in each situation;
- ensure that all notifications are clear and appropriate and meet the standards set out in insurance policies;
- keep track of timelines in the policy (including policy expiry and notification dates) to verify that claims and notices are made within the prescribed limits; and
- consult with a lawyer when negotiating insurance contracts, making or reviewing notifications or claims, or if in doubt about legal rights.

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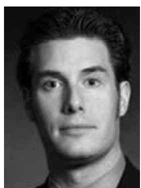
gTLD – Is Your Brand Up for a New Domain?



Peter Giddens

Following a consultation period, the Internet Corporation for Assigned Names and Numbers ("ICANN") has confirmed that it intends to introduce new generic top-level domains ("gTLDs") in 2010. Although twenty-one gTLDs are currently available (the most common being .com, .net, .org), ICANN believes that expansion is necessary to the continued success of the Internet and the desire to increase diversity, choice and competition are all cited as factors driving the decision.

Limited Application Period

On October 24, 2008 ICANN released a draft gTLD *Applicant Guidebook* for public comment and review, setting out the information for those who are considering applying for a new gTLD. The public consultation period concerning this document closed in December of last year. It is expected that the finalized *Applicant Guidebook* will be released early this year, followed within four months by the formal commencement of a limited application period. After the application evaluation process is completed, the first new gTLDs are expected to be approved and ready for use in

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the first half of 2010. It is presently intended that additional application rounds will take place after the conclusion of the initial application period.

Permitted Applicants

Two types of gTLD applications will be permitted: (1) those seeking to establish a gTLD endorsed by a particular restricted community (i.e., a particular industry (e.g., flowers), or a particular geographic region (e.g., Toronto)); and (2) those wanting to establish a gTLD that can be used for any purpose consistent with the requirements of the evaluation criteria and registry agreement. This second type of gTLD may or may not have exclusive registrants or users and may or may not employ eligibility or use restrictions. It is anticipated that the latter group will include a large number of applicants wishing to secure gTLDs that match the name of the applicant or its trade-marks (e.g., .yourpersonalname, .yourcompanyname or .yourtrademark). In addition to roman characters, applicants will be able to apply for gTLDs in languages that use other character sets, thus truly internationalizing the domain system.

Applicants must be an established corporation, organization or institution. Individuals and sole proprietorships may not apply. All applicants must demonstrate that they have the organizational, technical and financial capabilities of operating a gTLD. The cost of an application has been set at US $185,000, although applicants may be required to pay additional fees in certain cases. It is intended that the fees will be used to recover all of the costs associated with running the application process.

Naturally, the gTLD expansion process is of great interest to trade-mark owners who are concerned that other entities may apply for gTLDs that are identical or confusingly similar to the brand owner's trade-marks.

Trade-mark Owners

Naturally, the gTLD expansion process is of great interest to trade-mark owners who are concerned that other entities may apply for gTLDs that are identical or confusingly similar to the brand owner's trade-marks. Given the global nature of the Internet, and the more restricted national scope of protection afforded by trade-mark registrations, such concern is well founded.

For example, if Company A owns trade-mark X in Canada, and Company B owns the same trade-mark X in Australia, should either company be entitled over the other to secure .X as a new gTLD? Even in a single country, there may be two or more companies that can legitimately claim trade-mark rights in the same mark if no confusion would be likely to arise. Company C may have rights in Canada to trade-mark Z for use with beer and Company D may contemporaneously have rights in Canada to trade-mark Z for use with airline services, and both companies may wish to have the .Z gTLD. Accordingly, the new gTLD evaluation process will contain a mechanism by which trade-mark owners will have an opportunity to object to applications for gTLDs on the basis of existing legal rights.

Procedure

ICANN intends to post all applications for new gTLDs, and all brand owners, whether they are applying to secure a gTLD or not, should plan to monitor the applications filed by others to determine if they wish to file an objection prior to the posted deadline date. Not only should brand owners be concerned about preventing their trade-marks from ending up in use as someone else's gTLD, but they need to be aware that this is one party for which they don't want to be late. Once a TLD is allocated during the first application round, no confusingly similar TLDs will be permitted in later application rounds. This is expected to result in thousands of applications and objections alike being filed in the first round.

An application may also be denied on the basis that the proposed gTLD is offensive or is comprised of a character string that is confusing with one of the existing TLDs, or is objected to by a significant portion of the community to which the gTLD may be explicitly or implicitly targeted.

If there are multiple competing applications for the same gTLD (or for different gTLDs that contain very similar strings, as, for example, .sport *vs.* .sports) that otherwise clear any objections raised and are not resolved by other means, it is anticipated that the gTLD will be auctioned to the highest bidder.

Trade-mark owners should also note that it is expected that all new gTLDs will be subject to ICANN's existing Uniform Dispute Resolution Policy ("UDRP") for domain names or a modification thereof. Accordingly, if the successful applicant of a new gTLD permits second level domains to be registered within that TLD which are confusingly similar to a brand owner's trade-mark (e.g., <yourtrademark.newgtld>), it is expected that, at the option of a complaining trade-mark owner, the domain registrant will be required to participate in a mandatory arbitration proceeding, with the remedy for a successful complaint being the transfer or cancellation of the domain name.

Some Final Thoughts

In deciding whether to apply for a new gTLD that corresponds to its name or trade-marks, brand owners should consult with each of the areas of the company that will have a stake in the project and con-

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sider what it is they hope to accomplish. Will securing a corporate gTLD lead to increased visibility as a global brand? Will it allow a better connection with customers? Will it provide a unifying platform through which disparate corporate segments can be effectively merged? Will it enhance the company's brand protection and security/risk management strategies? Can goodwill be increased by allocating domain names to customers or affiliates? Will becoming a gTLD registry operator permit the company to eventually reduce dependency on third-party service providers? Where should the registry be located and how will it be structured? Who will maintain the registry? These are only some of the points that need to be considered.

Given the high cost, as well as the operational and technical requirements associated with securing a gTLD, it will certainly not be every company that will seek to file an application. However, the new gTLD allocation process will provide a unique opportunity for many trade-mark owners, and will require an increased level of vigilance for all trade-mark owners, both during and after the application period.

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Claiming Privilege When the Constable Comes Calling!

David Debenham

Corporate counsel is the first line of defense when a forensic accountant comes armed with a court order seeking production of documents. The battleground is the law of privilege.

Regrettably, many of the assumptions about privilege may be untrue when you are served with a court order by a bailiff accompanied by a forensic investigator. While the law varies between jurisdictions, several common misconceptions are usually evident.

First, legal advice given by patent agents or accountants is not protected. Business or strategic advice given by a business lawyer is not privileged. Only the provision of legal services or legal advice between a lawyer and his client in a confidential setting can qualify for privilege. The presence and inclusion of "outsiders" such as the auditors, extraneous employees, or directors of subsidiary corporations may destroy privilege. Privilege may also be forfeited inadvertently by a client referring to legal advice in an e-mail (or string of e-mails), in a press release, or in response to a demand letter. Business lawyers who mix business with legal advice at a meeting also invite waiver of privilege.

Transactions are acts, not privileged communications, so that all transactional documents are not covered by privilege unless they contain legal advice.

Another common misconception is that internal investigations conducted by corporate counsel are privileged. Solicitor-client privilege does not protect communications to counsel during the investigation, assessment and decision stages of an investigation. It only protects the legal opinion of the solicitor that arises from that investigation.

Business lawyers often confuse their obligation to keep their client's business affairs confidential with their client's right to claim privilege. A document that was not privileged initially or which is not *per se* a legal document does not become privileged simply because it comes into the possession of a lawyer. Transactions are acts, not privileged communications, so that all transactional documents are not covered by privilege unless they contain legal advice. This includes moving funds in and out of a lawyer's trust account. Therefore, business lawyers may be required to produce their files and give evidence with respect to transactions that they are involved in. That is, evidence as to the facts, not as to their advice.

In "without prejudice" settlement discussions, business lawyers often try to claim the impecuniosity of their clients. But admissions of client insolvency and assertions that the client may declare bankruptcy if settlement terms are not agreed upon may be admissible in bankruptcy proceedings. Settlement privilege is also not engaged where there is no dispute between the parties. Thus, for example, no privilege is attached to discussions about the terms upon which an employee might leave employment where no dispute has yet arisen. Nor is privilege engaged where no attempt at compromise or settlement is part of the communication, such as in a demand letter. On most occasions, the forensic accountant can simply ignore the use of the term "without prejudice," as counsel and clients alike often misuse this term.

There is also no privilege where a client seeks a business lawyer's assistance to either commit a wrongful act or prevent its discovery. Therefore, otherwise privileged communications may not

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be privileged if a *prima facie* case can be made that legal services were used to facilitate a fraud or other intentional tort.

While most counsel are aware that joint clients cannot claim privilege between themselves, they overlook the possibility that one of the joint clients may have a receiver appointed over its affairs, and that the receiver (acting for an outsider to the joint relationship) may ask for other privileged communications in the lawyer's file. Another tactic is to sue one of the joint clients as a conspirator in order to encourage their cooperation in sharing what otherwise would have been a privileged communication. In a related vein, many counsel forget that disclosure of otherwise privileged documents to secure a favorable plea from government prosecutors, or as part of an exchange of documents with a private party bound by a confidentiality agreement, may waive any ability to claim privilege to those documents against other parties.

Finally, and perhaps most importantly, the law of privilege is usually considered a procedural rule that depends on the *lex fori*, meaning that cross-border transactions give forensic accountants the opportunity to forum shop for a jurisdiction with a narrow view of privilege in a world where the law of privilege varies widely between provinces and countries.

What does this mean? Sometimes it means that the corporate entity has no privilege to protect itself. Sometimes it even means that corporate counsel will become a primary witness against the client. And it strongly suggests that every business lawyer must become an expert on the law of privilege and its limitations before a forensic investigator comes knocking on the door.

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Ed.: *This article, essentially in this form but with a different title, appeared previously in* The Lawyers Weekly.

Assessing the Cost of Ontario's "New" Disabilities Statute

Edward Pundyk

The role of government was once seen as simply being able to maintain public security and public order. That concept justified the existence of a standing army, police forces and the provision of infrastructure such as roads, bridges and canals. Anything beyond those basics was seen as an interference in the private lives of its citizens and a lessening of their freedoms.

It will be interesting to see how the *Accessibility for Ontarians with Disabilities Act, 2005* ("Act") will be viewed as it comes into effect over the next three years.

But most likely, businesses will be surprised when the full import of this legislation and is regulations becomes clear. Indeed, it would be prudent for businesses to begin planning and budgeting now for the required changes. For those who do business in this province, this legislation could have a significant impact on their bottom line, as it attempts to control how they interact with people with disabilities.

It would be prudent for businesses to begin planning and budgeting now for the required changes.

What is unclear from the legislation is how this law will actually change peoples' perception and treatment of the disabled and whether such changes will be for the better.

Application

In general, the Act applies to all providers of goods and services, with special provisions applying to the public sector and businesses with 20 or more employees. The Act's Customer Service Standards will come into effect by regulation between January 1, 2010 and January 1, 2012. These standards are the first of five sets of standards contemplated under the Act and are the focus of this article.

Customer Service Standards

These customer service standards apply to all organizations (public and private) that provide goods or services either directly to the public or to other organizations in Ontario and that have at least one employee in Ontario. Listed below are the standards, as listed on the relevant Ontario Government website, that are required:

1. Establish policies, practices and procedures on providing goods or services to people with disabilities.
2. Set a policy on allowing people to use their own personal assistive devices to access your goods and use your services and about any other measures your organization offers (assistive devices,

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services or methods) to enable them to access your goods and use your services.

3. Use reasonable efforts to ensure that your policies, practices and procedures are consistent with the core principles of independence, dignity, integration and equality of opportunity.

4. Communicate with a person with a disability in a manner that takes into account his or her disability.

5. Train staff, volunteers, contractors and any other people who interact with the public or other third parties on your behalf on a number of topics as outlined in the customer service standard.

6. Train staff, volunteers, contractors and any other people who are involved in developing your policies, practices and procedures on the provision of goods or services on a number of topics as outlined in the customer service standard.

7. Allow people with disabilities to be accompanied by their guide dog or service animal in those areas of the premises you own or operate that are open to the public, unless the animal is excluded by another law. If a service animal is excluded by law, use other measures to provide services to the person with a disability.

8. Permit people with disabilities who use a support person to bring that person with them while accessing goods or services in premises open to the public or third parties.

9. Where admission fees are charged, provide notice ahead of time on what admission, if any, would be charged for a support person of a person with a disability.

10. Provide notice when facilities or services that people with disabilities rely on to access or use your goods or services are temporarily disrupted.

11. Establish a process for people to provide feedback on how you provide goods or services to people with disabilities and how you will respond to any feedback and take action on any complaints. Make the information about your feedback process readily available to the public.

Organizations that employ at least 20 employees in Ontario are subject to the following additional requirements (once again from the Ontario Government website):

1. Document in writing all your policies, practices and procedures for providing accessible customer service and meet other document requirements set out in the standard.

2. Notify customers that documents required under the customer service standard are available upon request.

3. When giving documents required under the customer service standard to a person with a disability, provide the information in a format that takes into account the person's disability.

Enforcement and Costs

How much these requirements will cost business to implement is unknown at present, but if the penalties built into the Act and its regulations for failure to comply are any indication, it certainly won't be inexpensive. Presumably, the government committee that formulated this legislation considered this very issue and set the penalties accordingly.

How much these requirements will cost business to implement is unknown but if the penalties built into the Act and its regulations for failure to comply are any indication, it certainly won't be inexpensive.

Anyone guilty of an offence under the Act faces fines on conviction of up to $50,000 per day on which an offence occurs or continues to occur. Directors and officers who fail to live up to the duty imposed by the Act to take reasonable care to prevent the corporation from committing an offence under the Act are also liable for fines of up to $50,000 per day. If the rationale is to make it more expensive to disobey this law than not, then it appears that the costs to obey the law will be significant, given the amount of the fines imposed for disobedience.

Brave New World

Some will argue that in the western world, we are currently in the throes of a period of unprecedented government intervention in the everyday lives of its citizens. Businesses that adapt to this will survive, if not prosper. Those that do not will drown in a sea of red tape, government regulation and coercion. Businesses that begin now to plan and budget for these changes will stand a better chance of being in the former, rather than the latter group. Employee training, developing a plan for compliance with the Act and setting aside funds to finance these activities are the first steps in adapting to these fast approaching changes.

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LAW NOTES

Cooling-off Period; Directors' Fiduciary Duty; Shareholder Approval; Forward-looking Information; Union Discipline; Tax-avoidance; Vetrovec Warning; Online Presence; Java.

Jennifer Ward

Christos Gazeas

Howard Levitt

Matt Thurlow

Susan Goscoe

George Waggott

Alison Hayman

Norm Fera

This section offers a brief note or comment on an area or point of law (or information source) that may be of interest.

1 Resigning Worker Entitled to Cooling-off Period

After Edward Robinson insisted he would quit, his boss, James Campbell, moved swiftly to accept his resignation – too swiftly, as it turns out.

Robinson had spent more than half his working life with Alberta-based Team Cooperheat-MQS Canada Inc. and looked forward to working to age 65 and beyond. Robinson felt secure in his job and he had never received warnings. That all changed when he was summoned to a meeting with Campbell, human resources, and other members of management, and was accused of yelling at and speaking rudely to a female employee and others. Two of his staff were then invited to join the meeting to add their views to the melee. One openly characterized him as being "a bully."

Taken aback by this unexpected barrage, Robinson stated if the accusations were not withdrawn, he would be forced to resign.

Returning to work the following day, Robinson met with Campbell and sought to retract his resignation. But Campbell refused to let him do so. Instead, Robinson was told that although his last day of employment would be formally several weeks later, he was no longer required to show up at work. Arrangements were made to transition his duties to other members of the staff who were informed Robinson had resigned. Robinson sued for wrongful dismissal, taking strong exception to this interpretation of his intentions.

Justice Donald Lee of the Alberta Court of Queen's Bench, rejected the company's defence that Robinson had resigned and was, therefore, not entitled to wrongful dismissal damages. He found Robinson's statements did not express a clear and unequivocal intention to resign. At best, he had referred to a potential decision in the future. His emotional response was understandable given that he was thrust into a meeting in which unanticipated and disturbing allegations were raised, Justice Lee said.

Even if Robinson had exclaimed he quit, the court added, such an utterance does not necessarily constitute a valid resignation, and such a resignation can always be withdrawn in the cooler light of emotional recovery. In light of Robinson's expressed interest in working past age 65 and his long service, a reasonable employer would not have concluded he had quit. It was Campbell, not Robinson, who ultimately decided that Robinson could no longer work.

Determining Robinson was wrongfully dismissed, the judge awarded him one year's salary and costs. Had Robinson more actively sought alternate employment, his damages would have been even greater.

Although the employer was spared a further award of bad faith damages, this case is instructive on the delicate approach to be taken when an employee resigns. Consideration should be given to the following:

- Has the employee unambiguously expressed an intention to resign?
- Was the employee under duress at the time of the expression?
- Was the resignation put into writing or was it a spontaneous verbal expression?
- Did the employee retract the resignation before it was accepted?
- Are there any specific circumstances (such as depression or acute personal circumstances) which suggest that the employee is not acting freely?
- Was the resignation accompanied by any behaviour that supports the desire of the employee to voluntarily leave, such as removal of personal effects and return of company property?
- If the employee attempts to resile from the resignation, has the employer already acted in reliance upon it?

—**Howard Levitt**, Lang Michener LLP (Toronto)

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2 Directors' Fiduciary Duty Owed Only to the Corporation

Ed.: *In December of last year, the Supreme Court of Canada released expansive reasons for the judgment in the BCE litigation pronounced last June and provided a number of elucidations and verifications of various legal principles. Here is one of them:*

The fact that the conduct of the directors is often at the centre of oppression actions might seem to suggest that directors are under a direct duty to individual stakeholders who may be affected by a corporate decision.

Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen.

However, the directors owe a fiduciary duty to the corporation and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincides with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.

[A]s discussed, conflicts may arise between the interests of corporate stakeholders *inter se* and between stakeholders and the corporation. Where the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen.

The cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.

Directors may find themselves in a situation where it is impossible to please all stakeholders. The fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction.

Ed.: *This case* – BCE Inc., et al. *v.* A Group of 1976 Debentureholders, et al. *and* 679508 Canada Inc. *v.* A Group of 1976 Debentureholders, et al. – *was reported extensively in Lang Michener's* S.C.C. L@wLetter, *Issue #77, edited by* ***Eugene Meehan****, Q.C. Eugene and* ***Jeffrey Beedell*** *also acted as Ottawa Agents for counsel for BCE Inc. in the Supreme Court.*

3 Shareholder Approval Required for Merger of Equals: HudBay

On January 23, 2009, the Ontario Securities Commission ("OSC") released its decision with respect to the proposed acquisition by HudBay Minerals Inc. ("HudBay") of all of the shares of Lundin Mining Corporation ("Lundin"). The OSC ordered that HudBay shareholder approval of the transaction by a simple majority is required before HudBay issues any securities in connection with the transaction. The OSC also ordered that such approval is a condition to the listing on the Toronto Stock Exchange ("TSX") of the common shares that HudBay proposes to issue to Lundin shareholders in exchange for their Lundin shares.

The transaction was structured as a plan of arrangement which, under corporate law, requires the approval of Lundin shareholders but not HudBay shareholders. The TSX decided not to exercise its discretion to require HudBay shareholder approval in spite of requests that it do so from four major HudBay shareholders holding in aggregate 16% of the HudBay shares. The OSC set aside the TSX decision.

The OSC concluded that the economic consequences of the transaction to the HudBay shareholders were extreme. In its view, the facts gave rise to serious concerns about HudBay's governance practices and the fair treatment of HudBay shareholders. The OSC found that in assessing the impact of the transaction on the quality of the marketplace, the fair treatment of HudBay shareholders was fundamentally more important than "deal certainty" in the particular circumstances. The OSC also found that to allow the transaction to proceed without HudBay shareholder approval would be contrary to the public interest.

Key considerations included: the economic impact on HudBay shareholders; the dilution of just over 100% suggesting a merger of equals, not an acquisition by HudBay of Lundin; and the timing of shareholder meetings so that the transaction would close before the meeting requisitioned by HudBay shareholders occurred.

The OSC rendered its decision in response to a request from a HudBay shareholder that the OSC set aside the TSX decision that HudBay shareholder approval was not required for the transaction. The OSC noted that it generally defers to the judgment of the TSX in its areas of expertise. However, according to the OSC, in the case at hand no evidence was provided to the OSC with

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respect to the factors considered by the TSX in assessing the impact of the transaction on the quality of the marketplace, and therefore the OSC could not defer to the TSX decision.

In considering any possible prejudice to the parties of requiring shareholder approval, the OSC observed that HudBay and Lundin, being highly sophisticated, would be familiar with the regulatory context. This context included the TSX's ability to exercise discretion and also the policy review announced by the TSX on October 12, 2007 to consider whether or not shareholder approval should automatically be required above a specified maximum level of dilution. However, the OSC emphasized that in reaching its decision, it was relying upon the existing provision in the TSX Company Manual in which a specific level of dilution alone was not determinative in exercising discretion to require shareholder approval.

Given the various factors considered, the HudBay decision by the OSC does not necessarily create a bright line dilution threshold that triggers shareholder approval requirements. Nonetheless, parties considering a "merger of equals" involving 100% dilution may be well advised to plan for shareholder meetings for both parties to the merger.

—**Susan Goscoe**, Lang Michener LLP (Toronto)

Ed.: *A version of this article previously appeared as a Lang Michener* Mergers & Acquisitions Alert. *To subscribe to this publication, please visit the Publications Request page of our website.*

4 Forward-looking Information: The Defence Against Misrepresentation

Forward-looking information is defined by Ontario securities laws to include disclosure about possible events, conditions or results of operations that is based on assumptions about future courses of action and economic conditions. The definition also includes future oriented financial information typically found in documents such as financial statements or management's discussion and analysis.

Forward-looking information can help shareholders and investors gain an understanding of a company's future prospects, yet the uncertain nature of such information can leave that same company open to potential liability for misrepresentation.

The *Securities Act* of Ontario (the "Act") provides secondary market purchasers with the right to assert a cause of action for misrepresentations in forward-looking information contained in public documents and public oral statements. Recognizing the value of forward-looking information, the Act also provides a defence from statutory civil liability where there is responsible and balanced disclosure about a company's future prospects.

On October 3, 2008, the Ontario Securities Commission ("OSC") adopted Policy 51-604 (the "Policy"), setting out how it interprets certain aspects of section 138.4 of the Act with respect to the defence against misrepresentation in forward-looking information. This LAW NOTE provides a brief summary of the OSC's views from the Policy.

A public document or oral statement containing forward-looking information will be protected from statutory civil liability if:

1. the document or statement contains:
   a) reasonable cautionary language identifying the forward-looking information and material risk factors that could cause the projection, forecast or conclusion of the forward-looking statement to differ materially; and
   b) a statement of the material factors or assumptions that were applied in making the forward-looking statement;
2. the risk factors and assumptions appear proximate to the forward-looking information; and
3. there was a reasonable basis for drawing the conclusion or making the forecast or projection.

Generally, the more closely tied a risk factor or assumption is to the forward-looking information, the more "proximate" they should be to one another. Where a closely tied risk factor or assumption does not immediately precede or follow a forward-looking statement, a cross reference or footnote should link them together. This clarification by the OSC recognizes that it is not always practical or desirable to immediately juxtapose cautionary statements with the forward-looking information.

A determination of whether a company has a reasonable basis for making a forward-looking statement includes consideration of the reasonableness of the assumptions and factors being applied, and the inquiries made and process for preparing and reviewing the forward-looking statement.

The defence for a misrepresentation in forward-looking information under section 138.4 of the Act is not applicable to:

1. a document released in connection with an initial public offering, or
2. financial statements.

While the Policy provides guidance only and does not impose any legal requirements, historically the courts have shown great deference to specialized regulatory bodies, such as the OSC, and its guidance would likely influence the courts.

—**Christos Gazeas**, Lang Michener LLP (Toronto)

5 Courts Not Pawns in Enforcing Union Fines and Discipline

Counsel for employers often stay well away from disputes between unions and their members about employee conduct during labour disputes. A recent decision from the Ontario Court of Appeal is

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helpful, however, in confirming that the courts may not be used as a tool where the union is seeking to enforce fines or to discipline members who have crossed picket lines.

In *Birch* v. *Union Of Taxation Employees, Local 70030*, the Ontario Court of Appeal dismissed an appeal by the union which had imposed a fine on two Revenue Canada employees, Jeffrey Birch and April Luberti, because they crossed the picket line on three separate days during a labour dispute.

The union attempted to suspend each of the employees from union membership for three years and imposed a fine of $476 each (that amount being three days gross wages) for agreeing to work during three days of the 2004 strike at Revenue Canada.

The Ontario Court of Appeal's decision confirms that the union's penalty was unconscionable because it constituted a penalty clause. In finding support for this position, the Court focused on the inequality of bargaining power between the union members and the union that enforced the constitution by way of levying the fines. While this decision may only apply to a narrow range of circumstances, this must certainly be seen as yet another example of the trend towards courts reducing the latitude for membership or union remedies being upheld outside of the arbitral or labour board arenas.

—**George Waggott**, Lang Michener LLP (Toronto)

6 Tax-avoidance Mortgage Manoeuvre Found Legitimate?

In what the media labeled a "mortgage manoeuvre," the Supreme Court of Canada, in the *Lipson* case, seems to have upheld a common refinancing technique as legal, although denying the Lipsons the right to shift an interest deduction from the wife to the husband.

The appeal raised the issue of what constitutes abusive tax avoidance for the purposes of the general anti-avoidance rule ("GAAR") provided for in the *Income Tax Act* ("ITA").

The issue was whether a series of transactions beginning with a wife borrowing money to purchase shares in a family corporation and leading to the husband, who then deducted the interest on the couple's home mortgage loan, resulted in an abuse and misuse of one or more provisions of the ITA.

In the end, the Supreme Court agreed with the courts below that, in the instant case, abusive tax avoidance was established. GAAR was found to apply to one of the transactions within the series and, accordingly, was used to deny one of the tax benefits sought by the appellant.

Here are the facts in greater detail. The appellant, Earl Lipson, conducted a series of transactions whose purpose, he concedes, was to minimize his income tax.

First, Mr. Lipson and his wife, Jordanna, entered into an agreement of purchase and sale for a family residence in Toronto. The purchase price was $750,000.

Jordanna Lipson borrowed $562,500 from the bank (the "Share Loan") to finance the purchase from her husband at fair market value of shares in Lipson Family Investments Limited, a family corporation. (The bank was aware it would be paid back the following day, as Mrs. Lipson did not qualify on her own for the Share Loan). In any case, Mrs. Lipson paid the borrowed (Share Loan) money directly to her husband, who transferred the shares to her.

Mr. and Mrs. Lipson then obtained a mortgage from the Bank of Montreal for $562,500 (the "Mortgage Loan"), that was advanced on the closing date. They were joint chargers under the mortgage. That same day, they used the Mortgage Loan funds to repay the Share Loan in its entirety.

Based on the interaction of rules that attribute income/deductions of one spouse to another, and interest deduction deeming rules, Mr. Lipson reported all dividends paid on the shares of the family corporation transferred to his wife, but more importantly, deducted all interest paid on the Mortgage Loan under s. 20(3) of the Act, any net loss being used by him to offset other income. Section 20(3) of the Act allows a deduction for interest on money borrowed (the Mortgage Loan) to repay previously borrowed money (the Share Loan), if the interest on the original loan (the Share Loan) was originally deductible.

The majority of the Court found that the tax benefit of the interest deduction from the refinancing of the shares of the family corporation was not abusive in isolation, a victory for refinancing tax planning. However, the benefit of the tax attribution rules which operated to attribute Mrs. Lipson's interest deduction to Mr. Lipson was abusive. In this case, the attribution of the interest deduction to Mr. Lipson was disallowed, leaving the interest deduction in the hands of Mrs. Lipson.

While in this case Mr. Lipson clearly failed, the decision is nevertheless heralded as approval for the refinancing tax planning often suggested by experts that income-producing assets be sold and the proceeds be used to pay down the home mortgage. The home mortgage can then be refinanced and the mortgage monies be used to replace the income-producing assets and, in that case, interest on the mortgage becomes deductible.

—**Norm Fera**, Lang Michener LLP (Ottawa)
—**Jennifer Ward**, Lang Michener LLP (Ottawa)

7 The *Vetrovec* Warning in Canadian Law

Ed.: *Canadians and, certainly, Americans are very familiar with the* Miranda *warnings. Those warnings were mandated in 1966 by the U.S. Supreme Court in the case of* Miranda *v.* Arizona; *namely, "The person in custody must, prior to interrogation, be clearly informed that he or she has the right to remain silent, and that anything the person says*

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may be used against that person in court; the person must be clearly informed that he or she has the right to consult with an attorney and to have that attorney present during questioning, and that, if he or she is indigent, an attorney will be provided at no cost to represent him or her.

Less known, but extremely significant and with some application in other situations and contexts, is the Vetrovec *warning mandated by the Supreme Court of Canada in 1982, and recently reviewed by the same Court in the case of* R. *v.* Khela. *Below are the edited words of Fish J. for the majority:*

Legal systems far separated in time and place have long recognized that it is dangerous to rest a criminal conviction on the testimony of a single witness, or on a single piece of evidence. This concern is at least as old as Deuteronomy. It arises because witnesses can lie deliberately or mislead inadvertently, documents can be forged, and other items of evidence can be tampered with or planted.

[T]he evidence of a single witness is nonetheless sufficient in Canada to support a conviction for any offence other than treason, perjury or procuring a feigned marriage. Many serious crimes might otherwise go unpunished. But where the guilt of the accused is made to rest exclusively or substantially on the testimony of a single witness of doubtful credit or veracity, the danger of a wrongful conviction is particularly acute.

It is therefore of the utmost importance, in a trial by judge and jury, for the jury to understand *when* and *why* it is unsafe to find an accused guilty on the unsupported evidence of witnesses who are "unsavoury," "untrustworthy," "unreliable," or "tainted."…

[A] specific instruction [by the judge to the jury] is sometimes required in this regard not because jurors are thought to be unintelligent, but rather because they might otherwise be uninformed. It is meant to bring home to lay jurors the accumulated wisdom of the law's experience with unsavoury witnesses.

Without a cautionary instruction, however, jurors may appreciate neither the need nor the reasons for skepticism and particular scrutiny in dealing with witnesses of this sort. Essentially for that reason, trial judges may – and in some cases *must* – include in their charges "a clear and sharp warning to attract the attention of the juror[s] to the risks of adopting, without more, the evidence of the witness": (*Vetrovec* v. *The Queen*, [1982] 1 S.C.R. 811, at p. 831).

8 Secure Your Online Presence with .TEL Domains

In December of last year, applications opened for new .TEL domains. These domains can be used to provide customers, colleagues and family with contact information and website addresses for you and your business in a place that is both easy to remember and accessible using any Internet-enabled device. The information at a .TEL domain is being likened to an interactive business card on the Web that you can update and distribute to anyone. To make things easy, your contact information can be posted and managed without putting up a website.

Keeping in mind the directory-like function of .TEL, businesses should strongly consider registering .TELs corresponding to their business names and key trade-marks. Individuals whose identity is closely tied to their work should consider registering their personal names as well. Lastly, individuals may wish to register their personal names as a social networking tool.

As of December 3, 2008, trade-mark holders have an opportunity to apply for .TELs corresponding to their registered trade-marks. During the landrush period commencing February 3, 2009, the general public is able to register .TEL domains at a premium price.

After the sunrise and landrush registration periods have ended, the general public will be allowed to register remaining .TELs on a first come, first served basis at a significantly lower price of approximately $19.99 U.S. per domain for a one year term.

While the registration fee will be much lower at this time, there is a risk that key trade-names and trade-marks will have been registered by others by the time general registration opens.

If you wish to register any .TELs during the general registration period, we recommend that they be pre-booked as soon as possible.

Disputes regarding entitlement to .TELs will be governed by the Uniform Domain Name Dispute Resolution Policy ("UDRP") that currently governs .com and .net domain name disputes, among others. Under the UDRP, you will be able to seek transfer or cancellation of a .TEL domain if you can show that (1) it is confusingly similar to a trade-mark in which you have rights; (2) the registrant has no legitimate interest in the domain, and (3) the domain was registered in bad faith.

—**Alison Hayman**, Lang Michener LLP (Toronto)

Ed.: *The full version of this article appeared previously in Lang Michener* Intellectual Property Alert. *To subscribe to this publication, please visit the Publications Request page of our website.*

9 Court Says Consumers Know Their Java

On September 19, 2008, the Federal Court of Appeal ("FCA") allowed the appeal by Shell Canada Limited ("Shell") of a decision of the Federal Court that had upheld a decision of the Registrar of Trade-marks refusing Shell's opposition to an application of P.T. Sari Incofood Corporation ("P.T. Sari") for registration of the trade-mark JAVACAFE.

Before the Registrar and in the Federal Court, Shell unsuccessfully opposed P.T. Sari's trade-mark application on the basis that the trade-mark was not distinctive of P.T. Sari, and was not registrable in view of Section 12(1)(b) of the *Trade-marks Act* as being clearly descriptive or deceptively misdescriptive of some of the wares in the

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application. While P.T. Sari's application covered a wide variety of wares, Shell's opposition on this basis related only to a variety of coffee-related wares, namely coffee powder, cooked coffee beans, instant coffee, freeze-dried coffee and granular coffee.

A trade-mark does not conform to Section 12(1)(b) if, when depicted, written or sounded, as a matter of immediate impression for consumers, it is either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the wares or services in association with which it is used or proposed to be used.

While P.T. Sari's mark is not presented as two separate words – but rather a single coined word – the trial Court found this distinction to be irrelevant when the word is sounded in the French language, and the descriptiveness analysis was conducted as if the mark had been two separate words.

The FCA disagreed and held that this additional evidence demonstrated that the word "JAVA" is known to French-speaking Canadians as an Indonesian island that is known for its coffee. As such, the FCA ruled that if presented with such evidence, the Registrar would have found the trade-mark, in French, to be descriptive of the character of P.T. Sari's coffee-related wares.

The FCA came to this conclusion without the benefit of any survey evidence to link that single possible interpretation of the term "Java" with the likely immediate impression of consumers, and any association that would be made by such consumers with related wares. Instead, in allowing Shell's appeal, the FCA found that such evidence was not necessary as no other impression was likely in the context of the wares and the use of "Java" with "Café." P.T. Sari unsuccessfully argued that a particular definition or encyclopaedic description of a term does not mean a consumer would come to such an interpretation as a matter of first impression.

The FCA held the mark to be descriptive of the character, quality or place of origin of the coffee-related wares and, by extension, not to be distinctive of P.T. Sari's coffee products, and directed that the Registrar accept Shell's opposition in respect of the aforementioned coffee-related wares and thereby deny registration of the trade-mark for those wares.

—**Matt Thurlow**, Lang Michener LLP (Toronto)

Ed.: *The full version of this article appeared previously in the Lang Michener* Intellectual Property Brief. *To subscribe to that publication, please visit the Publications Request page of our website.*

Brief Life Bites

CrackBerries & QWERTY Boards; The Logic Suit; Replace 'em

Editor: *This segment offers colleagues and readers an opportunity to briefly comment or read about a life experience, an accomplishment, an acknowledgement, a powerful image, an incredible experience or a simple "slice of life." I would be most pleased to consider publishing one of yours or one that pertains to a friend, family member or colleague. (I am always open to suggestion.)*

1 CrackBerries & QWERTY Boards

Ed.: *The following is an edited version of what appeared in Lang Michener's* S.C.C. L@wletter, *Issue No. 21, edited by* ***Eugene Meehan****, Q.C.*

I'm a pretty techie guy, and I got a holstered-on-my-belt BlackBerry when they first came out, but the thing constantly accepted all these e-mails (of course that's the idea) and I could never get it properly "synch'd" with my office computer, so whenever I would delete something or reply to something, particularly over the weekend, I could never remember by Monday, and when I got to the office and looked at my computer, that didn't help much either, so oftentimes I ended up sending people the same or similar e-mail twice, or not at all. I could only solve the problem by writing down everything that I did. I eventually solved the problem for good by dumping the noisy wee thing altogether. I figured I'm not really that important anyway. And I didn't particularly like walking around like a techno-geek gadget gunslinger with my CrackBerry in my holster, ready for instant action.

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Once I got rid of it, not surprisingly, life went on quite normally. The sun rose in the morning, and set at night.

As an aside, one of my grade-school classmates from Scotland asked my dad after church for my e-mail address. My dad said sure and handed over my street address. But dad now has a computer – installed a couple of years ago by my engineer brother, Aidan. Dad now knows how to send e-mails but he frequently asks why the letters on the keyboard "are all jumbled up" and not in alphabetical order.

Ed.: *Indeed, the first typewriters did have an alphabetical key arrangement. The QWERTY keyboard, as we know it, was created in the early 1870s and was designed to avoid typewriter key clashes. For those who do touch-typing (as opposed to hunt-and-peck), it is interesting to note that more words can be spelled using just the left hand than the right. Indeed, only a few hundred words can be typed using only the right hand. On the other hand, George C. Blickensderfer's "Ideal" keyboard, circa 1890, used the sequence "DHIATENSOR" in the top most row of letters (not QWERTYUIP). The 10 letters used by Blickensderfer purportedly could spell 70% of the words in the English language. So, what's the ideal key arrangement for thumb-typists? Quirky or not, the search apparently continues for an intuitive thumb-arrangement that will allow users a highly regular and efficient layout.*

Now, I wonder if ambidexterity, or the lack of it, extends all the way to the thumbs. That is, does handedness determine thumbness or are thumbs independent and equally deft (or daft, as the case might be)? This inquisitiveness may seem excessive, but it is not unique or, apparently, frivolous. Indeed, a man in Colorado gave up his BlackBerry because of his fascination with the iPhone, and underwent a surgical procedure called "whittling" to improve his ability to use it. In each thumb, he had his bones shaved down and the muscles and fingernails adjusted accordingly. All went well and he now has less difficulty hitting the right buttons, but hopefully, the "face" of iPhone won't be changed any time soon. At the risk of having this idea stolen, here is one final remark. Especially with touch-screen technology, shouldn't we be able to have a cellphone that accommodates our physical aptitudes or attributes rather than the other way around?

2 The Logic Suit

Just in case you missed it, let us tell you about the logic lawsuit. In Duluth Minnesota, the driver of a car that ran over and killed a miniature pinscher dog – Fester – is suing the dog owner for damage to his vehicle. The driver, a dog lover himself, feels pet owners have to be held responsible. He claims damage to his car of $1,100, loss from taking take time off from his two jobs to get the car repaired and court fees. Of course, the owner of the pinscher has counterclaimed for $2,400. Looks like the late Fester was a costly acquisition.

3 Replace 'em

As the transit strike reached its 30th day in Ottawa and frustration peaked at about 100%, **Howard Levitt** (from our Toronto office) caused a bit of a stir when interviewed on one of the most popular radio talk shows in Ottawa. Howard mentioned hiring replacement workers and inviting unionized bus drivers to return to work as options the Municipality could explore. Around the time of the interview, a Harris/Decima poll had indicated strong support among Ottawans for City Council's refusal to better its offer and insistence on reducing drivers' control over work schedules and routes. But in a supervised vote ordered by the federal Minister of Labour, union workers voted overwhelmingly in favour of continuing the strike and keeping control over routes and schedules, concessions won in 1999.

In Ottawa, transit includes some interprovincial service into Quebec and, accordingly, comes under federal jurisdiction. The first transit strike occurred in Ottawa some 90 years ago when the national capital had streetcars operated by a private company and workers made about 45 cents an hour. In 1919, the strike lasted only a few weeks but during that period some 135 replacement workers were hired by the Ottawa Electric Railway Company, and those workers kept their jobs even after the strike ended. During the current transit strike, many Ottawans recalled the actions of President Ronald Reagan some 28 years ago when he fired and replaced some 11,000 striking air traffic controllers. Tragedy was predicted, but safe air service continued, even initially, at about 80% of normal capacity. Supervisors, nonrated personnel, transferred and military controllers were used until a full contingency of replacements could be trained. The union (Professional Air Traffic Controllers Organization) was decertified shortly thereafter. At that time, strikes by U.S. government unions were not permitted. Reagan declared the strike a "peril to national safety" and used a 1947 statute to order the controllers back to work. The small number of controllers that did return were soon joined by a large contingency of replacement workers.

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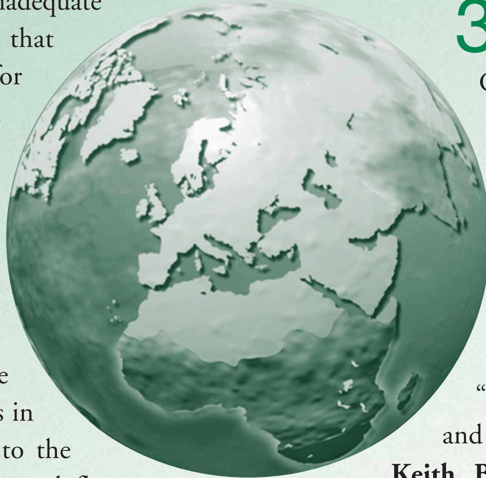
Letters & Comments

1 Following publication of his article in ***In Brief*** entitled, "Asset Backed Commercial Paper: Alerts for Directors and Officers," **Frank Palmay** was interviewed by one of KPMG's international publications and was asked to comment on Canadian regulators and companies trying to determine the fair value of such commercial paper in an illiquid market. Frank said: "Essentially, it is the same problem posed by the sub-prime meltdown in the United States. Inadequate disclosure has been a major criticism that would have been leveled in the lawsuits (for which there has been a court-approved settlement) that have come out of this debacle." And with reference to audit committees, Frank noted that they should have a clear understanding of how management is handling fair value disclosure: "This has become a daunting challenge for audit committees here. The lion's share of [the $32 billion market] is in the process of being restructured due to the liquidity crisis…and the mismatch between cash flows from the underlying assets and the funds needed to make payments."



Also, an updated version of Frank's article that appeared in ***In Brief*** was published by Lexis Nexis in its *National Insolvency Review.*

2 LexisNexis Canada, which also publishes the *National Banking Law Review,* was also granted permission to re-publish the article written by **John Conway** that appeared in the last issue of ***In Brief*** entitled "XBRL – Tag, You're It: Revolutionizing Financial Reporting." The *National Banking Law Review* provides institutional lenders, their clients and their legal counsel with information regarding current legal trends affecting the banking industry and covers issues ranging from perfection and attachment under the PPSA, bankers' liens and set-off, to debit cards and stored value cards, legal regulation and privacy concerns.

3 Permission was granted to CCH Canadian Limited to publish in its monthly newsletter, *Management Matters*, the article that appeared in the last ***In Brief*** written by **Keith Cameron** and entitled: "The Small Business: Planning and Financing."

With reference to the articles (Parts 1 and 2) in previous issues of ***In Brief***, "Significant Differences Between Canadian and American Patent Law," co-authored by **Keith Bird**, **Orin Del Vecchio** and **Donald MacOdrum**, there are continuing requests for the unabridged versions, and we have been pleased to oblige.

4 To one of our partners, **Bob Glass**, from a colleague at a Milwaukee law firm, these kind comments about ***In Brief***: "I don't think I've ever told you how good the Lang Michener newsletter is. I receive numerous newsletters from firms around the globe and yours is the only one worth regularly reading."

Lang Michener, In Brief…

News

Desmond Balakrishnan Recognized as a Lexpert Rising Star

We are pleased to announce that **Desmond Balakrishnan** has been listed among Lexpert's Rising Stars which recognize Canada's top lawyers under 40. Desmond is a member of the firm's Corporate Finance/Securities Law Group, and has been a partner with the firm since 2004.

Lang Michener Welcomes Eight New Partners

Effective January 1, 2009, **Karen Carteri** (litigation), **David Dahlgren** (commercial litigation and insurance/litigation law), **Sandra M. Knowler** (technology, intellectual property and business law), **Janine MacNeil** (competition and marketing law), **Patrick Murray** (corporate law), **Daniel Rowntree** (business law), **Martin Thompson** (commercial litigation and municipal law), and **Grant Y. Wong** (corporate and securities law) have each been admitted to the partnership.

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Lang Michener's IP Group Welcomes Two Patent Agents

Marco Clementoni and **Yasin Bismilla** have joined the Intellectual Property Group as Patent Agents in our Toronto office. Marco practices in the area of patent drafting and prosecution focusing primarily in the areas of telecommunications, electronics and software. As a Patent Examiner, Yasin was responsible for examining and analyzing patent applications in accordance with the *Patent Act*.

Pradeep Chand Selected as the Young Practitioner of the Year at the South Asian Bar Association Awards

Ottawa Associate, **Pradeep Chand** has been selected as the Young Practitioner of the Year at the 1st SABA Legal Awards. The South Asian Bar Association of Toronto developed the SABA Legal Awards to recognize and promote outstanding contributions of South Asian members of the legal profession to the profession and the community at large.

New Law Society Client Identification Requirements

The Law Society of Upper Canada, which governs lawyers in Ontario, together with other law societies across Canada, has introduced new requirements designed to enhance public protection and to reduce the risk of lawyers' trust accounts being unwittingly used in money laundering, terrorist financing and other fraudulent or criminal activities. The requirements were adopted from rules developed by the Federation of Law Societies of Canada and became effective December 31, 2008.

The new requirements apply to all new clients and to all new matters that Lang Michener LLP takes on for existing clients after December 31, 2008. Lang Michener LLP, along with all other law firms, will now be obligated to obtain certain basic information about you. In certain circumstances involving the movement of funds through our trust accounts, or where we provide instructions in connection with the movement of funds on your behalf, we may also be required to ask you to provide us with valid identification and to retain a copy.

For further information, please visit our website at www.langmichener.com or speak directly with your lawyer.

This is a new requirement for everyone and we appreciate your patience and understanding.

Robert Standerwick Appointed Queen's Counsel

We are pleased to announce that on January 29, 2009 Robert (Bob) Standerwick was appointed Queen's Counsel. Bob is a partner in the Real Estate and Banking Law Group in the Vancouver office.

Events

American Bar Association Section of Business Law 34th Annual Spring Meeting

April 16–18, 2009, Vancouver, BC
Presented by the ABA and several sponsors including Lang Michener LLP

Lang Michener is proud to be a 2009 Host Circle Member Firm for the ABA Section of Business Law 34th Annual Spring Meeting being held in Vancouver, BC.

2nd Managing Privacy Compliance: Enforcing Sound Practices, Reducing Vulnerabilities and Mitigating Risks

March 30 & 31, 2009, Toronto, ON
Presented by Federated Press

David M.W. Young, Co-Chair, Privacy Group, will be presenting on "Privacy Practices to Prevent ID Theft" at the 2nd Managing Privacy Compliance: Enforcing sound practices, reducing vulnerabilities and mitigating risks. This seminar will feature best practices for implementing a privacy compliance program, the latest regulatory developments and enforcement priorities relating to privacy, and much more.

In Brief

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InBrief offers general comments on legal developments of concern to business and individuals. The articles in *InBrief* are not intended to provide legal opinions and readers should, therefore, seek professional legal advice on the particular issues which concern them. We would be pleased to elaborate on any article and discuss how it might apply to specific matters or cases.

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