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FOCUS ON BUSINESS LAW

Important changes to Ontario corporate law



Glen Eddie

As part of an overall modernization of Ontario business law, various commercial and corporate statutes

have undergone an overhaul during the past year. These amendments have helped to bring the legislative regime in Ontario in line with federal corporate legislation, as well as legislation in other provinces.

Of particular importance to small- or medium-sized businesses are amendments to the *Business Corporations Act* (Ontario). Under the amendments, only 25 per cent of the directors of a corporation will be required to be Canadian residents. This is a departure from the old provisions, which required that residents of

Canada make up a 50 per cent majority of the directors.

The Act also clarifies some directors' liabilities. Pursuant to the Act, directors will be jointly and severally liable to the corporation if they vote for or otherwise authorize any of the following:

- declaration of dividends that result in the corporation being insolvent;
- issuance of shares for inadequate non-money consideration; or
- certain other enumerated prohibited expenditures.

Under the new regime, directors who can demonstrate that they used a level of diligence and skill that a prudent person acting reasonably would use in a comparable situation will not be held liable for their actions in these three circumstances. In addition, directors are now entitled to place good-faith reliance on the information or advice provided by officers and employees, as well as certain other enumerated professional advisers of the corporation.

The conflict of interest rules under the Act have also been revamped and

strengthened. Specifically, a director who is in a conflict of interest will now be barred from attending any portion of a meeting where the material contract or transaction that forms the basis of the conflict is being discussed or voted upon by the board. In the past, such a director was required only to abstain from voting on such matter, but could still attend the meeting. This amendment will help to alleviate any real or perceived intimidation of the remaining members of the board by the director in conflict. The amendments will also require directors or officers to disclose to the board not only any conflict of interest, but also any material changes in their interest. This continuing disclosure requirement will help to ensure that the corporation and the other members of the board of directors are continually informed of the current nature of a director's conflict of interest.

In addition, the Act includes provisions related to shareholders and the issuance of share capital. A corporation is now permitted to establish different classes (or series) of shares that have equal rights,

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Important changes... (cont'd.) conditions, restrictions and privileges. Previously, each class of shares was required to have distinct characteristics. From a practical perspective, this

Focus Highlights

Lorne Wolfson, Laurie Pawlitzka, Ron Manes, Max Shafir and Sidney Troister were all named a "Best Lawyer" in the 2008 edition of *The Best Lawyers in Canada*. They were also each named one of "Canada's 500 Leading Lawyers" in the 2007 *Expert American Lawyer Guide to Lawyers in Canada*. Lorne and Laurie were named for family law, and Ron, Max, and Sidney were named for litigation, construction and real estate law, respectively.

former requirement led to classes of shares (and series of shares) whose attributes were largely contrived. With the removal of this requirement, such artificiality can be eliminated.

In addition, only shareholders who owned shares as of a certain specified "record date" will be entitled to vote at a shareholders' meeting. Previously, shareholders that acquired shares subsequent to the record date were entitled to vote by giving the corporation ten days' notice. Many corporations may need to amend their by-laws to reflect this change.

Another important change to the Act relates to the required disclosure of information to shareholders of any financial assistance, such as loans or guarantees, provided by the corporation to related parties, such as directors or employees. Similar to federal legislation, this obligation

has now been repealed so that such disclosure is no longer required.

Corporations and their various constituents (directors, officers, shareholders) should not assume that business can be conducted as it was in the past. Contact your legal advisor to guide your company through the changing corporate law landscape.

Glen Eddie is a partner in our Business Law Group. His practice includes advising businesses and individuals on all aspects of corporate and business law, with an emphasis on mergers and acquisitions, information technology licensing and director and shareholder issues.

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FOCUS ON EMPLOYMENT LAW

American-style litigation comes north of the border: Should employers be concerned?



Matthew Tevlin

It should come as no surprise that Canadians are starting to use class actions to pursue employers who have policies or practices

that breach employment legislation. As employees in the US have discovered through their use of class actions against large employers, there is strength in numbers, and employees are bonding together to pack a bigger punch. The Canadian

Imperial Bank of Commerce recently experienced such a hit after about 10,000 current and former employees filed a \$600-million lawsuit for unpaid overtime wages. Canadian KPMG employees have launched a similar, \$20-million class action.

The potential for this type of class action lawsuit has arisen from the combination of new developments in employment law, and expanded access to the class action procedures.

Two recent employment law decisions from British Columbia have established that employees have recourse to the courts when their

rights under the applicable employment standards legislation have been violated. In *Macaraeg v. E Care Contact Centers Ltd.*, which was subsequently followed in *Holland v. Northwest Fuels Ltd.*, it was determined that overtime, in accordance with the mandatory requirements of the *Employment Standards Act*, was an implied term of the employment contract and that an employee could pursue his or her claim for overtime pay in a civil action. Both cases relied upon the Supreme Court of Canada decision in *Machtiger v. HOJ Industries Ltd.* In

that case, the Supreme Court of Canada dealt with employment contracts that provided for a shorter notice period than employees were entitled to under the *Employment Standards Act*. The Supreme Court of Canada held that since the contractual provisions were in breach of the *Employment Standards Act*, such provisions were of no force and effect.

The combination of these BC cases and the expanding use of class actions in Ontario may create a perfect storm for employers. Many observers believe that class actions in the province are becoming easier to "certify." (In Ontario, as in many jurisdictions, class actions are subject to certification by the court before they can proceed as class actions.) The result may be more class actions against employers involving greater amounts and an expanding list of employee complaints. Employers might justifiably start running for the hills – or their legal advisers.

If that is not enough to prompt employers to comply with employment standards legislation, this example from south of the border may. A jury in Pennsylvania awarded 187,000 current and former Wal-Mart employees \$78-million for having been forced to work through rest breaks and "off the clock."

The *Macaraeg* decision and the increased access to class actions by employees underscore the importance of employers ensuring that their policies and practices comply with applicable legislation. The message is clear that employers who fail to do so may be at risk.

Matthew Tevlin's practice focuses on business law. He provides counsel to a wide range of clients, including banks and other financial services firms, venture capital firms, developers, manufacturers, distributors, retailers, IT companies and many others.

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Focus Facts

This year, the Minister of National Revenue announced the creation of a Taxpayers' Ombudsman. The Ombudsman is to be an independent and impartial officer who will operate at arm's length from the Canada Revenue Agency and report to the Minister of National Revenue. The role of the Ombudsman is to deal with complaints from the public with respect to the level of service provided by the CRA and to uphold the Taxpayer Bill of Rights on service matters.

Contact any member of our Tax Law Group for more information.

FOCUS ON TAX LAW

Highlights of the new Canada-US tax treaty protocol: What you need to know



Sabina Mexis

On September 21, 2007, Canada's Minister of Finance and the US Treasury Secretary signed a new protocol to the Canada-US income

tax treaty. The protocol will have a significant impact on the way cross-border business and transactions are conducted, and will have a wide and

far-reaching impact on taxpayer migration and, estate planning.

The protocol:

- Eliminates withholding taxes on cross-border interest payments
- Extends treaty benefits to US owners of limited-liability companies
- Eliminates double taxation on emigrants' capital gains
- Recognizes mutual taxation of pension contributions
- Clarifies how stock options are taxed

- Allows taxpayers to require that certain key double-tax issues, such as transfer pricing, be settled through arbitration

The following is a brief overview of a few of the key provisions of the protocol.

Elimination of withholding tax on cross-border interest payments

Currently, interest paid by a resident of Canada to a resident of the US (or vice versa) may be subject to a

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Focus | Facts

In May, Google Inc. launched a new Internet Web photo application called Street View, that displays close-up images of streetscapes from several US cities, including images of members of the public in such detail that their faces are clearly visible. Canada's Privacy Commission warned Google in a letter: think again before launching this in Canada, as Street View in Canadian cities may violate our privacy legislation. Google has subsequently agreed to modify the service in Canada. When, and if, we are able to take a virtual stroll down Canadian streets on Street View, identifiable faces and licence plates will likely be blurred.

Treaty protocol... (cont'd.)

withholding tax at a reduced rate of ten per cent. The protocol eliminates the withholding tax on interest payments between unrelated or arm's length parties. Withholding tax on interest payments between related or non-arm's length parties will be reduced to seven per cent in the first calendar year after the Protocol is in

force, four per cent in the second year, and zero per cent thereafter.

The elimination of the withholding tax on cross-border interest payments removes a substantial barrier to cross-border financing, not only between Canada and the US but also worldwide.

Capital Gains on Emigration

Under the Treaty, capital gains of a taxpayer are generally taxable only by the country in which the taxpayer resides. Currently, when a taxpayer emigrates from Canada, the taxpayer is liable for tax on any accrued capital gains on properties owned by the taxpayer at the time of emigration (known as the "departure tax"). The protocol will allow emigrants to choose to increase the cost base of their assets to fair-market value at the time of emigration so that pre-departure gains will not be taxed again in the other country. As such, only post-emigration gains would be subject to capital gains tax in the new country of residence.

Mutual Tax Recognition of Pension Contributions

Previously, there were no provisions to cover situations in which taxpayers reside in one country, work in another and make pension plan contributions in the country of employment. Similarly, no rules existed with respect to employees on short-term, cross-border transfers (of up to five years) who continue to contribute to pension plans in the first country.

The protocol provides that, if certain conditions are met, contributions to a pension plan in a country in which a person works may be deductible in the country in which he or she resides. In addition, those who move for work purposes may be able to deduct contributions made to a plan in their original country, in the country in which they now work.

For example, a Canadian resident who works and makes contributions to a pension plan in the US may now deduct those contributions for Canadian tax purposes. As well, a person who leaves Canada to work on a short-term basis in the US may deduct, for US tax purposes, contributions made to a Canadian pension plan.

Taxation of Employee Stock Options

The protocol has introduced measures intended to clarify the tax treatment of employee stock options in cases where the employee works in one country and is transferred by the same or a related employer to the other country before exercising or disposing of the options or shares.

The new rules provide that the income inclusion from the stock-option benefit will generally be apportioned between the two countries and will generally be considered to have been derived from the country in which the person is principally employed during the time the option is held.

Sabina Mexis is a member of our Business Law Group. Her practice focuses primarily on corporate and personal tax structuring and planning.

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Is there a topic you would like us to cover in a future issue of Focus? Visit torkinmanes.com and let us know.

FOCUS ON COMMERCIAL REAL ESTATE LAW

“Brownfield” legislation: Is your business sticking its head in the (contaminated) sand?

Patty Keroglidis

Notwithstanding the publicity generated by the federal government's position regarding the Kyoto Protocol, no one should be

under the misapprehension that environmental-protection laws in this province do not directly affect businesses or other private-property owners.

The *Brownfield Statute Law Amendment Act*, 2001 is an example. The Act changed the environmental regulatory regime in Ontario in an attempt to encourage the clean-up and redevelopment of underutilized “brownfield” properties. Brownfields are sites that are undeveloped, or are previously developed properties that may be contaminated and that may need to be cleaned up before they can be redeveloped. The Act applies to all contaminated sites in which contamination exceeds the regulatory standards for the intended use of the lands and provides clear rules and incentives for the redevelopment of brownfield sites.

The Act recognizes that some land uses are more sensitive than others, and accordingly, is of particular importance when an owner or developer wishes to change the use of the land.

Property owners are required to file a document called a “Record of Site Condition” before a property's use is changed from an industrial, commercial or community use to a more-sensitive use. Mandatory compliance is required only when a property is being redeveloped for a more sensitive use. Otherwise, compliance with the new regulatory regime is voluntary (e.g. maintaining the existing use or changing to a new use that does not require more stringent remediation standards).

The filing of a Record of Site Condition demonstrates that the property meets the province's revamped site assessment and clean-up standards appropriate for the new use. It is important to note that filing a Record of Site Condition may provide limited protection from regulatory orders, but does not provide third parties with any guarantee of site condition, and affords no protection from civil

liability. For this reason, it is important when considering the acquisition of a commercial or industrial property, that proper environmental inspections and testing be done.

If an appropriate Record of Site Condition has not been filed, a municipality's chief building official

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Focus Facts

People often ask us if couples who *live together* have the all of the same rights and obligations as couples who are *married*. Our answer: No!

For example, in the event of separation, although spouses in either situation may claim spousal and child support, only married spouses are obligated to equalize their net family property, allowing them to share in the increase in value in the property acquired over the course of the union. And, that isn't the only difference – find out what your rights and obligations are.

Contact any member of our Family Law Group for more information.



Brownfield legislation... (cont'd.) must refuse to issue a building permit where a prescribed change in property use is proposed.

In some cases, it may not be cost effective or feasible to clean up a property to standards. The Ministry of the Environment prescribes a system whereby contamination may remain on site, subject to an owner's development of site-specific standards through preparation of a

detailed and extensive "risk assessment." The risk assessment may result in restrictions on property uses and the types of buildings that may be constructed, and may require an owner to take certain risk management actions to monitor or mitigate contamination and post financial security. If the owner is required to refrain from using the site for a specified use or from constructing a specified building, the

owner *must* provide a copy of the requirements to all occupants of the building and ensure that the restrictive provisions are complied with by all.

Patty Keroglidis' practice crosses a broad spectrum of real estate matters, with an emphasis on commercial/industrial real estate acquisitions, dispositions, leasing and financing.

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FOCUS ON INSURANCE LAW

Jewels, art and arson: Why Chubb Insurance was ordered to pay \$500,000 in punitive damages



Christopher Valente

On December 10, 1997, Bridgette Sagl's home was destroyed by fire. Sagl owned an extensive jewellery collection and had a

passion for collecting art.

The insurer of Sagl's home and contents, Chubb Insurance Company of Canada, denied Sagl's insurance claim, alleging that she intentionally concealed or misrepresented *material facts* relating to, among other things, the value of contents, jewellery and art. Further, despite the Sagl's obvious passion for collecting art, Chubb

alleged that she or someone acting on her behalf deliberately set the fire. Essentially, Chubb accused Sagl of fraud and arson. Sagl sued Chubb.

In September 2007, an Ontario Superior Court Judge found in favour of Sagl and awarded her \$5,034,254.47, including \$500,000 in punitive damages. The decision explored two interesting issues. First, the case examines the burden of



proof in a civil action where criminal conduct is alleged.

Second, the case provides examples of grounds for awarding

punitive damages.

The burden of proof is fundamental to the trial process. Litigants must know the standard of proof required to make their case. In a civil case, the

burden of proof is usually "on a balance of probabilities." That means that a party must prove that a fact is, more likely than not, true. In a criminal case, the burden of proof is "beyond a reasonable doubt." That means something akin to relative certainty. Sagl, however, was accused of criminal conduct – fraud and arson – in a civil case. The Court held that the burden of proof fell somewhere in between the civil and criminal standard, namely, that the insurer was required to prove "to a high degree of probability" that Sagl committed the criminal acts of which she was accused.

The judge emphasized the lack of "direct evidence" linking Sagl to arson. It seems that a high degree of probability requires direct evidence linking an accused to criminal conduct. This case makes it clear that insurance companies should think very carefully before denying claims

of a suspicious nature when there is lack of direct evidence implicating the insured in a crime. It remains an open question, however, what evidence is sufficient to link an insured to a crime when the evidence is less than that of the proverbial "smoking gun." Future court decisions will likely speak to the minimum standard of proof.

The lack of direct evidence implicating Sagl opened the door for a punitive-damages award. Chubb was criticized for relying on circumstantial evidence and making early assumptions that coloured their investigation, rendering it biased. The judge stated: "...without any proof, Chubb persisted in persecuting the plaintiff with false allegations." Ultimately, Chubb was ordered to pay Sagl \$500,000 in punitive damages.

Punitive damages are awarded when the conduct of a litigant merits condemnation and when the litigant has committed an "independent actionable wrong." A breach of the contractual duty of good faith is considered an independent actionable wrong. In this case, the Court found that the mere allegation of a criminal offence without any direct evidence to prove the allegation was a breach of the duty of good faith and constituted conduct meriting condemnation. The Court went even further, stating that presupposing arson as the cause of the fire and taking steps to fortify this conclusion rather than objectively assessing the evidence, constituted bad faith.

The case was fraught with a lack of due diligence on the part of the insurer and brokers. Investigations,

appraisals, disclosure of policy terms and communication between the parties that could have ensured proper coverage, were all inadequate. The lack of due diligence contributed to the Court's findings of bad faith.

For example, the judge held that:

...Chubb failed to inspect the residence to determine whether that amount of coverage was appropriate. Having failed to determine the appropriate coverage, Chubb now maintains that the plaintiff's claims are fraudulent. In my view, Chubb has breached its duty of good faith.

The accusation that Sagl intentionally concealed or misrepresented material facts was dealt with in a similar fashion. The Court found that Chubb failed to execute a complete and proper application form that should have set out what Chubb considered "material facts." The judge held that:

It is a breach of the duty of good faith by an insurer to allege misrepresentation and concealment against an insured, when an insured has no opportunity to know or provide the facts which an insurer considers "material" to the risk it is assuming.

In this case, the insurer made very serious accusations without proper evidence and failed to exercise due diligence. Under the circumstances, the Court was persuaded that a substantial award of punitive damages was warranted.

Christopher Valente is a member of our Insurance Defence Group. His litigation practice includes property and bodily injury claims, in addition to providing opinions on insurance issues.

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Focus | Facts

Ever heard of something called the "equity of exoneration?" Most lawyers haven't either.

It's common for a couple to borrow money against the security of their jointly owned home. Often the purpose of the mortgage is to finance one spouse's business. In most situations, the courts have found that the mortgage benefits both spouses (since both benefit from the financing of the business) and both will be liable for the loan. In rare and exceptional circumstances, however, the court may find that one spouse obtained no benefit from the loan. Based on the principle of the "equity of exoneration," if the residence is sold to satisfy the debt, the creditor may be restricted to seeking payment from the benefiting spouse's share of the proceeds only. The spouse who gained no benefit from the loan, may be entitled to retain the full proceeds of the sale of his or her interest in the property.

Contact any member of our Financial Services and Corporate Recovery Group for more information.

Torkin|Manes Update

NEW LAWYERS

We are pleased to announce that the following lawyers have joined the firm.

Eva Melamed – *Litigation*
Sara Mintz – *Family*
Chaim Sapirman – *Business*
Sammy Redlick – *Business*
Belinda Rossi – *Family*

ANNOUNCEMENTS AND NEWS

On November 29, our Health Professionals Defence Group presented "Protecting Your Practice," a seminar on current legal issues affecting veterinarians.

At our Business Law Group's annual breakfast seminar on November 20, members of the Group presented: "Thinking Outside the 'Corporate' Box – Alternative Methods Available in Planning the Successful Sale of the Closely Held Business to an Arm's Length Buyer."

Lisa Corrente spoke on "Bill 107: *Human Rights Code Amendment Act*" at the Ontario Long Term Care Association's Fall Symposium on November 6. She also spoke on "Employee Health Privacy and its Limits" at the Ontario Bar Association's 2nd Annual Privacy Summit on November 5.

Irv Kleiner presented "Refining your Arbitration Skills through Practical Learning to Effectively Maintain Management and Union Expectations" at the Canadian Institute's Labour Relations 2007 Conference on October 30.

Neil Abramson has been appointed to the National Health Law Executive for the

Canadian Bar Association. He was also a guest speaker for the Canadian Dental Protective Association – A Legal Symposium, on October 19 at the 2007 Annual Legal Symposium *The Business of Dentistry*.

On October 15, Linda Godel spoke on "Organizational Issues" at the Ontario Bar Association program "Fairs, Festivals and Fundraisers: Planning and Risk Management Issues for Special Event Organizers." As well, Linda wrote "The How, Why, and When of Using Multiple Corporate Structures," published in *The Philanthropist*, and "Federal Government Stiffens Penalties to Increase Transparency in Lobbying" for the August/September issue of *Biofuels Canada Magazine*.

David Chaiton spoke on "The Liquidity Crunch" at the Canadian Finance & Leasing Association's National Conference in Banff, Alberta, on September 16.

On September 6, Lorne Wolfson presented a paper on "The CBV's Role in Quebec & Ontario Family Law Matters" at the 2007 Eastern Regional Conference of the Canadian Institute of Chartered Business Valuators.

Jodi Kovitz wrote "Family law arbitration update: What you really need to know," for the July issue of *The Family Way*, CBA National Family Law Section newsletter.

Valerie Edwards was appointed the Chair of the Class Proceedings Committee for a three year term. The Committee's function is to determine whether plaintiffs in class proceedings should receive financial support from the Class Proceedings Fund.

Sudevi Mukherjee has been appointed to the Board of Directors for the South Asian Bar Association.

Charity Golf Tournament

Our sincere thanks to all of our clients and friends who helped make our 9th Annual Torkin Manes Charity Golf Tournament, held on June 14, another great success. Together, we donated \$30,000 to the SickKids Foundation, making our total contribution to SickKids approximately \$270,000 since we began holding the event.

Be sure to mark your calendars for our 10th Annual Charity Golf Tournament, June 12, 2008.

Becel Ride for Heart

Torkin Manes raised \$44,025 for the Heart and Stroke Foundation in this year's Ride for Heart on June 3. We were the top fundraising team in our category for the seventh year in a row, and second overall for the entire event.

United Way Campaign

This year, we raised more than \$77,000 for the United Way. In addition to generous donations, lawyers and staff participated in events such as the CN Tower stair-climb, an online auction, e-mail bingo, and raffles.

Focus is published regularly by Torkin Manes Cohen Arbus LLP, Barristers & Solicitors. The contents are of a general nature, do not constitute legal advice, and are not intended to be a full and complete analysis of the topics. Before applying the concepts discussed in *Focus*, it is imperative that you consult your legal advisor.

If you would like to receive *Focus* by e-mail, please visit www.torkinmanes.com, or call Michelle Thompson at 416 643 8816, or e-mail mthompson@torkinmanes.com.

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