



Torkin|Manes FOCUS

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FALL 2008

FOCUS ON TORKIN MANES

Torkin Manes celebrates 35 years



Dear Clients, Friends and Colleagues,

Next year marks the 35th anniversary of Torkin Manes. As Managing Partner, I would like to take this opportunity to

thank you for helping us reach this important milestone.

When our founders launched the firm in 1974, their business plan consisted of the naïve belief that "if we do good work, clients will come." Somehow that belief proved true. From modest beginnings, the firm has grown to nearly 75 lawyers in six departments with 14 practice groups.

Today, our clients comprise a broad range of organizations, including

small businesses, publicly-traded companies, financial institutions, developers of individual custom homes, national shopping centre developers and REITS. Many are mid-market, owner-operated businesses involved in all sectors of commerce, including manufacturing, distribution, financial services, real estate, retailing and the service industry.

We offer the breadth of expertise one would expect at a larger firm, but with the responsiveness that comes from being a mid-sized firm. We have grown our business by helping to grow yours, paying close attention to building client relationships and trust, which will always be fundamental to our firm culture.

What does the future have in store for Torkin Manes?

We believe there are many exciting opportunities. We remain on the cutting edge of both new technology

and emerging areas of legal services. Our lawyers continue to be leading members of the bar in their respective areas of practice. Through our membership in the International Alliance of Law Firms, we are able to provide legal services around the world.

Our pledge to you is to never

take your business for granted, and to recognize that there are always opportunities to improve.

Thank you for the privilege of serving your

organization, for your loyalty and for the many referrals you have provided to us over time. We truly value your business and look forward to continuing to provide the highest level of commitment for another 35 years.

Sincerely,

Jeffrey I. Cohen
Managing Partner



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FOCUS ON BUSINESS LAW

Changes to the Corporations Information Act highlight the importance of maintaining accurate corporate records



Sammy Redlick

Corporations Information Act Annual Returns are yearly information filings made by Ontario corporations and foreign

business corporations licensed to carry on business in the province. An Annual Return must include, among other things, the names, titles, dates of election/appointment and addresses of directors and officers, as well as the registered office address of the filing corporation. These filings become public record, available to anyone seeking information on the corporation.

For some time, Annual Returns have been filed as part of provincial corporate tax returns. Starting on January 1, 2009, corporate taxpayers

in Ontario will file a single integrated federal/provincial tax return with the Canada Revenue Agency, and may file their corporate Annual Returns together with this newly integrated corporate tax return.

While this tax return integration does not greatly affect the requirements under the legislation, it brings to the forefront the necessity for effective communications between accountants and lawyers with respect to changes in their clients' corporate information.

Typically, accountants prepare and file corporate tax returns on behalf of their clients, and thus are usually also responsible for the preparation and filing of Annual Returns.

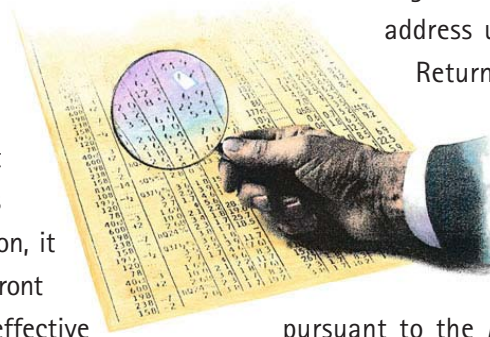
Problems arise, however, when those

Annual Returns do not correspond with the information contained in the corporate records, which are maintained, more often than not, by the corporation's law firm. For

example, an accountant might change the registered office address under an Annual

Return at the client's

request, not knowing that such a change requires a corporate resolution



pursuant to the *Business Corporations Act*. The same holds true for any changes to the officers and directors of the corporation. When the lawyers are not informed of these changes, and the Annual Return is filed, the public record is inconsistent with the corporate records.

This leads to confusion down the road, and often at the most inopportune times, such as when the shares or assets of the corporation are up for sale, and the potential buyer is conducting corporate due diligence.

The corporation then ends up paying a lot more trying to rectify the records than it would have if it had maintained them, and it may be perceived by a potential buyer as disorganized, neglectful and unprofessional.

It's also possible that one of the parties required to sign off on certain corporate documents is no

In Memory

It is with great sadness that we report that our dear friend and partner, Philip R. Christo, passed away on November 7, 2008.

Phil will be remembered for his good counsel, dedication to his clients and to our firm, and for his integrity, his kindness and his humour.

He will be greatly missed.

longer in the country, has died or has become an adverse party to the corporation or its other directors and officers and simply refuses to sign.

In a worst-case scenario, individuals who have resigned from a Board of Directors may find themselves being pursued by the government for director's liabilities because they are still shown in the government's records as a director.

Under the *Corporations Information Act*, it is an offence to make a false or misleading statement with respect to a material fact or omission in an Annual Return, with penalties for such offences including significant fines and possible imprisonment. If corporate records are not consistent with an Annual Return, and a dispute arises as to the legitimacy of the information in the Annual Return, the party that certified the Annual Return, who may be an

officer or director of the corporation, or perhaps even the corporation's accountant, runs the risk of being convicted of an offence under the Act.

The harmful effects of poor corporate record-keeping can be easily avoided with some simple communication and diligence. The most important thing to remember is that the corporate paperwork that your accountants and lawyers prepare each year are significant for a number of reasons, and it is vital that the information they include be accurate and up-to-date.

Sammy Redlick is a member of our Business Law Group. His practice focuses on all aspects of business and corporate law.

He can be reached at 416 777 5198 or sredlick@torkinmanes.com

Notice

In an effort to prevent fraud and other criminal activity, The Law Society of Upper Canada has enacted new regulations that will take effect in December, and will require Ontario lawyers to collect specific information about you or your company, beyond that which may have been collected in the past. This collection of additional information will serve to identify a client and in certain circumstances, the client's related interests.

The new regulations will not in any way imperil the confidentiality of your personal information. As in the past, the use and disclosure of this information will be governed by the Torkin Manes privacy policy (www.torkinmanes.com/privacy).

FOCUS ON MEDICAL MALPRACTICE LAW

Can doctors apologize?

Barbara A. MacFarlane

In litigation matters, admitting a mistake or apologizing is often out of the question – any expression of sympathy or regret

could be interpreted in subsequent litigation as an admission of wrongdoing. This is often a problem

in medical malpractice cases, because a doctor may feel a compelling need to express sympathy or apologize to people who have sustained grievous injuries, and that apology may be fundamentally important to the victim and his or her family. New legislation that has recently passed first reading in the Ontario Legislature will prevent apologies being used in litigation against the person expressing regret.

Initially presented as a Private Member's Bill, the proposed legislation has now been introduced by the McGuinty government as the *Apology Act, 2008* (Bill 108), which passed first reading on October 7, 2008. The intent of the legislation is to make an apology inadmissible in civil proceedings, administrative proceedings or arbitrations as evidence of fault or liability. It would not apply to criminal proceedings or matters under the *Provincial Offences Act*. The legislation would also prevent insurance companies from

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Is there a topic you would like us to cover in a future issue of *Focus*?

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Can doctors apologize... (cont'd.)

denying insurance coverage when an apology is made. Similar *Apology Acts* have been enacted in British Columbia, Saskatchewan, and Manitoba. Foreign jurisdictions, including parts of the United States and Australia, also have similar legislation.

Bill 108 defines "apology" as an expression of sympathy or regret, a statement that a person is sorry or any words or actions, whether or not those words or actions imply an admission of fault. The language is very broad and includes actions, not just words.

Although this legislation would affect all litigants, it would be particularly important in the health-care sector. David Caplan, Minister of Health and Long-Term Care, has said:

"From the perspective of the Ministry of Health and Long-Term Care, it's important that Ontario patients have all the relevant information about their health care, even in circumstances where harm has occurred.... Saying 'sorry' for a medical mishap or an adverse event is simply the right thing to do."

Although there has been a growing trend to recognize the need to disclose errors, health care professionals remain reluctant to admit mistakes for fear the admission will be used against them in a malpractice suit. In some cases, that has led to further harm to patients. These actions can result in increased damages in medical negligence cases. For example:

In the Ontario case of *Vasdani v. Sehmi*, a defendant doctor operated on the wrong vertebra of a patient. Although the doctor learned of his error a year later, he did not tell the patient. Six years later the patient found out and sued the surgeon. The Court held that doctors have an ongoing "duty of disclosure" of errors and the plaintiff was entitled to damages for the delay.

In a similar case *Gerula v. Flores*, a defendant doctor also discovered that he had operated on the wrong vertebra on the plaintiff's spine. Instead of advising the patient, the doctor changed the medical chart to cover up his mistake. On appeal, the Court awarded punitive damages

against the doctor. The Court stated that "the deliberate non-disclosure of the very salient fact that the respondent has operated on the wrong level of the appellant's back amounted to a misrepresentation by omission." The doctor's conduct amounted to battery and a breach of fiduciary duty. The Court also held that the doctor's insistence that he did not operate on the wrong vertebra was an attempt to frustrate the proceedings by deception, and awarded the highest scale of court costs against the doctor.

In *Shobridge v. Thomas*, the defendant surgeon discovered, three months after surgery, that a six-foot gauze roll was left inside his patient, causing significant complications and infection. The doctor attempted to conceal the error and ordered the nurses not to record the incident in the hospital chart or to file an incident report. The Court found that the doctor's concealment of his error merited aggravated and punitive damages (totaling \$45,000) for "bad faith and unprofessional behaviour deserving of punishment."

These cases, however, do little to correct medical consequences that may be caused by errors that go *unreported* due to perceived fear of reprisal for admitting mistakes (whether in a discipline proceeding or malpractice lawsuit). Our Courts can only provide compensation, which for some patients is not enough.



Focus Facts

Did you know that effective June 4, 2009 all regulatory bodies of health professionals in Ontario (e.g., the College of Physicians and Surgeons of Ontario) will likely be required to post findings of malpractice, professional negligence, professional misconduct and detailed discipline decisions on their Websites? Previously, these findings and decisions were not public information.

In February 2003, the College of Physicians and Surgeons of Ontario released a policy on disclosing "adverse events" to patients. An adverse event includes any unexpected or normally avoidable outcome that negatively affects the patient's health and/or quality of life that occurs in the course of health care treatment and is not due directly to the patient's illness. Disclosure means the

"acknowledgement and discussion of a negative outcome with the patient." This policy falls short of an actual apology for the outcome, which many patients feel is crucial.

The intention of the *Apology Act* is to increase the transparency and encourage health care professionals

and institutions to apologize for their errors. Coming clean on medical mistakes may well promote healing for patients both physically and emotionally.

Not everyone agrees, however. Some argue that this type of legislation deprives a plaintiff of the right to use an admission against interest, such as an apology or acknowledgement of an error, as proof of fault in subsequent litigation.

Barbara A. MacFarlane is a partner at Torkin Manes and practices medical negligence and personal injury litigation.

She can be reached at 416-360-4730 or bmactfarlane@torkinmanes.com.

Focus | Highlights

We are pleased to announce that Neil Abramson has been certified by The Law Society of Upper Canada as a Specialist in Health Law. This certification recognizes Neil's specialized and unique knowledge in the area of health law, and his many years of successful litigation on behalf of health professionals and health care institutions. This is a significant honour for Neil and Torkin Manes, as only a few practitioners in Ontario hold this certification, and the standards for certification are extremely rigorous.

FOCUS ON EMPLOYMENT LAW

Family Day: A holiday that's all relative



Lisa Corrente

In October 2007, the provincial government announced the creation of a new public holiday, Family Day, to take

place on the third Monday in February of each year.

Not surprisingly, the inaugural Family Day produced some difficulties for workplaces. Many employers were confused about their obligation to recognize Family Day, and employees were unsure about their entitlement to the paid holiday. Generally

speaking, most employees in Ontario are entitled to the day off work with pay. However, there are some important exceptions.

Who is Eligible for Family Day?

Full-time, part-time, permanent and fixed-term contract employees, as well as students, generally qualify for Family Day. Eligibility does not depend on how recently an employee was hired or how many days an employee has worked before the public holiday.

In general, employees are entitled to the day off work and to be paid public holiday pay unless they fail, without reasonable cause, to work their entire regularly scheduled shift before or after the public holiday.

What Employees Do Not Qualify?

Not all employees in Ontario are entitled to Family Day. For instance, federal civil servants or employees who work in federally-regulated workplaces such as banks, railways or airlines do not qualify for Family Day.

Employees in certain occupations or industries are similarly not entitled to public holidays or to receive public holiday pay. These employees include: professionals, such as doctors, lawyers, dentists and teachers; real estate salespeople; construction workers; taxi drivers; firefighters; and certain seasonal workers.

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FOCUS | Facts

Many family law clients are offended at the prospect of having to pay legal fees to obtain or to enforce an agreement or order for child or spousal support - not to mention that they are rarely fully compensated by the losing party for those legal fees. The good news is that these particular fees are tax deductible in the year they are paid, for the recipient spouse, while similar fees incurred by the payor spouse are not.

CRA has even allowed deductions for disbursements, such as accountant's and business valuator's fees.

Family Day... (cont'd.)

What About Continuous Operations?

Employees in hospitals, nursing and retirement homes, hotels, restaurants or other "continuous operations" may be required to work on Family Day. If the public holiday falls on a day that is ordinarily a working day for them and they are not on vacation, employees may have to work. In such cases, employees must receive either:

- their regular wages for the day and a substitute day off with public holiday pay; or
- public holiday pay and premium pay equal to 1½ times their regular wages for each hour worked that day.

What is the Impact of Existing Collective Agreements or Employment Contracts?

The impact of the creation of the new holiday on existing collective agreements is already being fleshed out by the courts and labour tribunals.

There are currently nine public holidays — New Year's Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Christmas Day, Boxing Day and Family Day. In at least one relevant case, it was held that if a collective agreement or employment contract provides a greater benefit to employees (i.e., 10 or more paid holidays a year), then an employer may not have to provide an extra holiday for Family Day.

To learn more about Family Day, or if you have other employment-related questions, please contact our Labour Relations and Employment Law Group.

Lisa Corrente practises in the area of civil litigation, with an emphasis on labour relations and employment law, and acts extensively for clients in wrongful dismissal litigation and human rights arbitrations, as well as professional complaints and discipline matters.

She can be reached at 416 777 8800, or lcorrente@torkinmanes.com.

FOCUS ON CIVIL LITIGATION

Think before you hit "Send": The dangers of e-mail in a litigious world



Micheal Simaan

For many of us, e-mail is our most common and frequent form of communication. We conduct our business discussions, schedule our appointments, maintain our social lives through e-mail and, every so often, we spread a little gossip. A recent case highlights the danger of

the latter, especially in the business atmosphere.

In this case, the defendant sent an e-mail to an acquaintance at a company that had recently hired the plaintiff. The plaintiff had previously been employed at the same company as the defendant. In the e-mail, the defendant suggested that the plaintiff had been fired from his previous job for "cooking the books."

While the recipient of the e-mail recognized that it was just idle

chatter, a member of his Information Technology department, who also reviewed/intercepted the e-mail, was not so enlightened. The IT recipient forwarded the "malicious" e-mail to the president of the company, who confronted the plaintiff with the allegation. The plaintiff denied the allegation and immediately forwarded the e-mail to his previous employer. The previous employer then complained to the author of the e-mail who immediately responded to the

plaintiff by apologizing for his thoughtlessness and for promoting "pure gossip."

The plaintiff was not satisfied with the apology, contacted a lawyer and issued a statement of claim seeking \$50,000 in damages. In the statement of claim, he alleged that he "suffered and continues to suffer from tremendous stress and severe panic attacks due to the contents of the e-mail."

In the settlement reached during the trial, the defendant agreed to pay \$5,000 to the plaintiff. The judge noted that no medical evidence of suffering was to be called at trial and therefore, damages would have been "modest indeed." Under the circumstances, the trial judge was of the opinion that the plaintiff had overreacted by bringing an action when the defendant had immediately apologized and the e-mail had not been widely circulated. He did, however, order the defendant to pay an additional \$2,800 to cover legal costs and disbursements.

Although there is little case law in this area, we expect to see more e-mail defamation cases of this sort in the future. The ease with which we communicate via e-mail renders it potentially dangerous when we send information impulsively or jokingly. Unlike oral gossip, once the e-mail has been sent, a permanent written record has been created and there is no control over who will see it in the future.

The lesson here may not be completely one-sided. All of us have received e-mails that outrage and disturb us. Before you head to your solicitor's office to commence a claim, however, remember that court actions are not an inexpensive proposition. In the case described, the



plaintiff had been seeking more than \$29,000 in legal costs that he had incurred in connection with the action. His recovery amounted to less than 25 per cent of his expenses. While the plaintiff received

some satisfaction from the settlement, the trial judge clearly did not believe that the e-mail in question warranted the draconian response of a lawsuit, and was unwilling to reward him financially with anything more than a small percentage of his costs.

The double-edged message of this case may well turn out to be not only to think before you hit send, but also to think before you commence legal proceedings.

Micheal Simaan is a partner in our Commercial Litigation Group. He has conducted numerous applications, trials and appeals before all levels of the Ontario courts, as well as mediations and arbitrations conducted outside of the courts.

He can be reached at 416 360 4732 or msimaan@torkinmanes.com

Focus Facts

The 2008 federal budget introduced the Tax-Free Savings Account ("TFSA").

Beginning January 1, 2009, Canadian residents 18 years of age or older can establish a registered savings account that allows them to earn tax-free investment income. Contributions to the account are not deductible for tax purposes, and withdrawals of contributions and earnings from the account are not taxable.

Each year you can be allocated and allowed to contribute at least \$5,000.

Any unused contribution room can be carried forward to the next year.

Excess contributions would be subject to tax of one per cent per month, for each month that the excess remains in the plan. You can withdraw any amount in the account for any reason.

Contributions to a TFSA would not be deductible in computing income for tax purposes, and no amount earned in or withdrawn from a TFSA would be included in computing income for tax purposes.

Torkin|Manes Update

NEW LAWYERS

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

Sonu Dhanju - *Civil Litigation*
Sven Mascarenhas - *Insolvency*
Stewart Thom - *Litigation*
Sonal Thomas - *Business*
Marc Weisman - *Business/Tax*

ANNOUNCEMENTS AND NEWS

On December 4, Lisa Corrente will be speaking at an Ontario Bar Association Continuing Legal Education Seminar titled "When Health Law and Labour/Employment Law Collide."

Our Family Law Group featured a series of six-minute presentations on "Wealth Advisers and Family Law: The Essentials," for financial advisers on November 26.

At our Business Law Group's annual breakfast seminar on November 20, members of the Group presented: "The Big Ds: Divorce, Death, Downsizing, Disabilities and Debt," for accountants, bankers and financial advisers.

On November 6, our Health Law Group presented "Protecting and Strengthening Your Pharmacy Business," a seminar on current legal issues and challenges affecting pharmacists.

Rosemary Grenside spoke on "Powers of Attorney for Property" on October 23 at the Law Society's 7th Annual Real Estate for Law Clerks.

Neil Abramson spoke on "Regulatory Affairs: Changes to upcoming legislation

that you should know about" at the Canadian Dental Protective Association 2008 Legal Symposium on October 24.

Loretta Merritt was invited by the Chief Justice of Ontario to speak on October 24 at the Eleventh Colloquium on the Legal Profession: Professionalism and Serving Communities. Loretta presented, "Survivors of Sexual Abuse: Who Represents Them?"

On October 22 and 29, our Labour Relations and Employment Law Group hosted a breakfast seminar on "The Best And The Worst Of 2008: The Most Important Employment Law Decisions Of The Year," for employers and managers.

Howard Burshtein was quoted extensively in the July '08 edition of Canadian Consulting Engineer in an article entitled "After the Acquisition." The article examined some of the issues and challenges of mergers and acquisitions of consulting engineering firms.

Lorne Wolfson spoke on "Drafter Beware: Common Mistakes in Drafting Separation Agreements" at the Osgoode Professional Development Program on September 17.

On June 9, Gregory Hersen presented a paper at The Law Society of Upper Canada's program titled "The New Canadian Standard Construction Contract (CCDC2-2008) What You Need to Know." Greg was also elected to both the OBA's Construction Law Section executive, and to the CBA's Construction Law Section executive.

In June, Jennifer Wilson became a member of the Ontario Bar Association's Family Law Subsection Executive.

Torkin Manes Charity Golf Tournament

Our sincere gratitude to all of our clients and friends who helped make our 10th Annual Torkin Manes Charity Golf Tournament, held on June 12, another tremendous success. Together, we donated \$32,500 to SickKids Foundation, bringing the total amount contributed to the Foundation from our 10 years of hosting this event to more than \$300,000.

Be sure to mark your calendars for our 11th Annual Charity Golf Tournament, June 11, 2009.

Becel Ride for Heart

Torkin Manes raised \$32,551 for the Heart and Stroke Foundation in this year's Ride for Heart on June 1. We were the top fundraising team in our category for the eighth year in a row, and second overall for the entire event.

Wheelchair Relay

On September 21, the Torkin Manes Tornados raised \$2,175 in the Legal Challenge Wheelchair Relay for the Canadian Paraplegic Association Ontario.

We Ran for the Cure

On Sunday, October 5, the Torkin Manes Team raised more than \$6,500 at the 2008 CIBC Run for the Cure in support of a cure for breast cancer.

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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Design: Michelle Thompson