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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

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EDITORS:

Steven Jeffery, Editor
416.593.3939
sjeffery@blaney.com

Kym Stasiuk, Assist. Editor
416.593.3995
kstasiuk@blaney.com

This newsletter is designed to bring news of changes to the law, new law, interesting deals and other matters of interest to our commercial clients and friends. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, the editor, or the head of our Corporate/Commercial Group:

John C. Papadakis
416.597.3998
jpapadakis@blaney.com

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"The Competition Act prohibits... false or misleading claims… The consequences are significant – imprisonment for up to 15 years… a fine of up to $10 million for the first offence…"

COMPETITION ACT RULES ON COMPARATIVE ADVERTISING CLARIFIED BY RECENT COURT DECISION

H. Todd Greenbloom

Businesses sometimes advertise that their products and services are bigger, faster and better than their leading competitors'.

How far can they go with these comparative claims before they run afoul of the false and misleading advertising provisions of Canada's *Competition Act*?

The Ontario Superior Court has shed fresh light on this question. It illustrates that before making any advertising claims, especially comparative claims, the advertiser must:

- determine who the target might be;
- understand how the ad will be perceived, and
- ensure that the testing used to verify the ad's claims is recognized by the market research industry generally and is used commonly in the applicable industry.

While advertising can be expressive, it is not a Wild West show where anything goes. There are various sets of rules that govern comparative advertising. One set deals with trademark law (and for that reason comparisons are often made with unnamed "leading competitors"). Another set of rules emerges from the *Competition Act*, and it is with those rules that this article deals.

The *Competition Act* prohibits a person from making false or misleading claims and also from making a representation regarding "the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof."

The consequences of making a false or misleading claim are significant -- imprisonment for up to 15 years and, for corporations, a fine of up to $10 million for the first offence. Inadequate testing of claims that are made can lead to fines of up to $10 million for a corporation.

Some of the questions then become: What is adequate and proper testing? How exhaustive does the testing have to be? Under what conditions should the test be conducted? If there are several tests, which should be chosen? How large should sample sizes be? The recent case of *Canada (Competition Bureau) v. Chatr Wireless Inc.* might provide some answers.

Chatr is a brand that Rogers Communications established specifically 1) to compete with new wireless carriers in the prepaid zone/unlimited text and talk segment of the wireless industry and 2) to avoid losing significant market share, as had happened to incumbent carriers in the U.S

"Research to support a specific comparative claim against another product or service should follow published standards of the market research industry, or generally accepted industry practices..."

H. Todd Greenbloom is a partner in Blaney McMurtry's Corporate & Commercial practice group. His active general business law practice intersects with a host of competition and restrictive trade practices issues. Todd is a recognized authority on all aspects of franchising and licensing. His clients come from a wide variety of industries including advertising, trade shows, retailing, restaurants, food service, hospitality, recreation, and manufacturing.

Todd may be reached directly at 416.593.3931 or tgreenbloom@blaney.com.

who waited too long to compete for this segment after it emerged. Rogers determined that price was not going to differentiate it from its competitors. Rather, it believed that it was going to derive its competitive advantage from the quality of its service compared to such competitors as Wind Mobile, Public Mobile and Mobilicity.

Rogers had a more mature network and a frequency that penetrated indoors better than its competitors'. In addition, and of considerable significance, when a customer left Chatr's own zone, it was transferred seamlessly to Rogers' main network. By comparison, the other cellphone companies' customers would be disconnected on switching zones and would have to reconnect to continue a conversation.

In order to capitalize on its advantages, Rogers made the following two advertising claims: "Fewer dropped calls than new wireless carriers" and "no worries about dropped calls." The other carriers initiated a *Competition Act* complaint about the advertising slogans of Rogers. As support for the claims being false and misleading, the other carriers relied on "switch tests" to look at the data produced by the switches that directed calls on the various networks. Rogers, on the other hand, relied on "drive tests" where calls were made from phones from the applicable carriers in cars to fixed landlines in the same location. The car drove around the fixed route and the calls were monitored for various performance criteria over the course of the drive. Needless to say, the different tests produced different results.

To a large extent, the Chatr case was determined on the basis of how tests should be conducted to verify claims. As background, it should be noted that the Advertising Standards Canada (ASC) Guidelines provide that "Research to support a specific comparative claim against another product or service should follow published standards of the market research industry, or generally accepted industry practices" and "The assessment of comparative advertising research should be based on two principles: validity and reliability."

In the end, the judge, Mr. Justice Frank N. Marrocco, Associate Chief Justice of the Ontario Superior Court, found more favour with the drive test than the switch test. It was determined that "benchmark drive testing is accepted universally as a way of comparing key performance indicators, including dropped call rates, on different networks. Drive testing does not have to be a perfect test to be an adequate and proper test." On the other hand, it was determined that the switch test, which presumably accounts for most calls, was not an appropriate test, since the way the information is collected over different systems is not the same. In other words, apples are not being compared to apples, but rather to oranges. The drive test was accepted because it was used universally to measure performance.

Other significant findings include the following:

- The proper consumer perspective to be applied to the ads in question was not any credulous and inexperienced consumer but rather a credulous and *technically inexperienced* consumer of wireless services. The target for the ads had some experience because they knew they wanted unlimited talk and text.
- The claim would be perceived to be true for each city where the services were offered vs. an average over all the cities.

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"Recent case law... illustrates that Courts are looking carefully at each case to determine if one party is responsible to pay monetary damages to the other when there are agreements to agree."

Sarah S. Subhan is a member of Blaney McMurtry's Commercial Litigation Practice Group. Her broad practice involves all forms of contract disputes including creditor-debtor issues and related enforcement measures.

Sarah may be reached directly at 416.597.4889 or ssubhan@blaney.com.

- Despite the ASC Guidelines provision that comparative performance claims should not be made when the difference is barely discernible to consumers, in this case "distinguishable" was the key vs. "discernible." This conclusion was reached because "every dropped call matters" and a "credulous and technically inexperienced consumer would choose a network that offered fewer dropped calls to avoid the possibility of an important call being dropped."
- For the reasons set out above, the difference did not have to be different statistically.
- Even though Rogers had a better network, and the logical inference is that a better network leads to fewer dropped calls, the testing still had to be conducted.
- The testing does not have to meet the standards of an academic paper.
- The test has to be done *before* making the claim. A test done after the claim is not enough, even if it supports the claim.
- The tests do not have to be validated by an independent third party.

As we indicated earlier, the primary lessons learned from the Chatr case are that before making any claims, especially in the context of a comparative claim, the advertiser must know who the target might be, understand how the ad will be perceived, and must make sure that the testing used is recognized by the market research industry generally and is commonly implemented in the applicable industry.

Finally, in the Chatr case, Rogers was helped by the large testing infrastructure that had been built to conduct drive testing in the wireless industry. ■

AGREEMENTS TO AGREE: DO THEY BIND OR NOT? COURT DECISIONS RESTING ON SPECIFIC PROVISIONS

Sarah S. Subhan

Do you have a memorandum of understanding, a letter of intent, or some other "agreement to agree" with a supplier, a customer, an adviser, a partner, a potential purchaser, or some other business party?

If you do, then you need to understand when such an agreement binds you legally because the Court is finding that some terms in some agreements to agree are "binding" while others are not.

A common principle in agreements to agree is an "agreement to negotiate in good faith." This topic was first discussed in *Deal or No Deal: Do you have a Duty to Negotiate in Good Faith?*, as published in the April 2012 issue of Blaneys *Commercial Litigation Update*.

In the past, based on prior case law, one could ordinarily expect that an agreement to agree would not be enforceable on the basis that there simply was no contract. Recent case law, however, illustrates that Courts are looking carefully at each case to determine if one party is responsible to pay monetary damages to the other when there are agreements to agree.

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"...an agreement providing for future agreement can be binding if the concept is sufficiently clear and discrete to enable enforcement of the agreement between the parties."

In the case of *Georgian Windpower Corporation et al v. Stelco Inc.*, the parties were at all times dealing with each other at arm's length in a commercial context, and were of equal bargaining power for a wind power project. They entered into two agreements to agree -- a memorandum of understanding (MOU) and an Agreement to Establish a Land Lease Easement Agreement (AELLEA). After the signing of both, Stelco (the defendant) sent a letter to Georgian (the plaintiff) terminating both agreements immediately. This led to the litigation.

The Court found that there were binding *and* non-binding terms in the MOU and the AELLEA. It also found that an agreement providing for future agreement can be binding *if* the concept is sufficiently clear and discrete to enable enforcement of the agreement between the parties. This is not always something that can be determined easily after the fact, and in the midst of litigation. In making this determination, the Court will strive to see what the parties' intent was at the time they made the agreement to agree, as well as look to the specific wording in it.

In *Georgian vs. Stelco*, the plaintiff (Georgian) was entitled to damages of $75,000 in total for the wrongful termination -- $1,000 in respect of the defendant's breach of the MOU and $74,000 for the breach of the AELLEA. In making this finding, the Court also found that there was no contractual duty to negotiate in good faith in the circumstances surrounding this particular case. However, the Court distinguished between a case where there is an existing preliminary agreement between the parties and where one of the parties has agreed to use best efforts to carry out a specific term of the agreement and the case where the parties have merely agreed to use best efforts to carry out future negotiations.

Whether a specific term will be found to be enforceable will likely depend on whether there are sufficient criteria to allow the subject variable (the term in question) to be isolated and to stand on its own unambiguously, so as to constitute a true reality - something that can be performed.

The movement away from the principle that 'if there is no contract, then there is no breach of contract' is also evident in *Molson Canada 2005 v. Miller Brewing Co.* In this case, Molson was seeking injunctive relief to prevent Miller from terminating the licence Miller had with Molson. Pending the trial, scheduled for December 2013, Miller was required to continue its Canadian licensing arrangement with Molson.

In this particular matter, since 2010, Molson had failed to meet the targets set by the licencing agreement, as the volume of some Miller brews sold each year in Canada had declined. Given the changing Canadian beer market, the parties got together to negotiate.

The negotiations centered on a possible amendment to the Industry Standard Bottle Agreement (ISBA), which standardizes production of Canadian bottled beer and requires the dark brown glass bottle. One of the hallmarks of many Miller brews is that they are packaged in clear bottles, and because of the ISBA, the clear bottles must be imported from abroad, which adds costs. The parties hoped that the ISBA would be amended to allow for local production of clear bottles, and a letter of intent was drafted in anticipation of this possibility.

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"Depending on the circumstances, you may not need a will at all; one will would be sufficient, or multiple wills could be in order."

Paul L. Schnier practices corporate and personal income tax law with an emphasis on tax planning and implementation. He provides advice on the consequences of proposed transactions and the development and implementation of tax efficient corporate structures for multinational operations. He also advises individual clients on estate planning matters. Paul chairs Blaney McMurtry's tax practice.

Paul may be reached directly at 416.593.3956 or pschnier@blaney.com.

Immediately following the letter of intent, the parties signed an amendment to the licensing agreement providing that if the ISBA did not allow for local production of clear bottles, then the parties would negotiate in good faith, and specifically would negotiate about volume targets, marketing and equitable profit splitting.

A short while later it became clear that the ISBA would not likely be amended to allow local production of clear bottles, and Miller began exploring the option of selling its brand beers in Canada without Molson. Ultimately, Miller attempted to terminate the licensing agreement, which sparked the action and the request for injunctive relief.

In the written reasons for granting Molson's request to prevent Miller from terminating the licencing agreement, Mr. Justice Herman J. Wilton-Siegel of the Ontario Superior Court of Justice stated as follows:

> Ultimately, any covenant to negotiate in good faith, as any other contractual obligation, must be interpreted in accordance with the intention of the parties in the context in which the agreement was negotiated and executed. The issue is not whether a court should imply an obligation to negotiate in good faith as a matter of commercial morality, but rather whether the parties themselves understood from the circumstances which an express commitment to negotiate in good faith was given, and intended in those circumstances, that any breach of the specific commitment was to have some legal consequences.

This reasoning is understandable, as it was apparent from wording in the agreement to agree that the parties had committed to work through their issues despite the difficult market.

Parties rely on good faith provisions by revealing proprietary information, investing time and money in projects, and securing or extending credit. In the absence of the enforceability of these provisions, lawyers will have to find other provisions to assure clients who might otherwise be deterred from proceeding with preliminary agreements.

With all of this being said, an important basic lesson with respect to developing and implementing agreements to agree persists -- take care when drafting and before signing any type of negotiation agreement, as you may find yourself bound to something before you are ready or, alternatively, believing you have rights when you do not. ■

MULTIPLE WILLS MIGHT BE AN IDEA FOR YOU BUT ONE ADVANTAGE IS TO DISAPPEAR IN 2016

Paul L. Schnier

How many wills do I need?

On the surface, it might seem like a simple question but the answer can be anything but.

Depending on the circumstances, you may not need a will at all; one will would be sufficient, or multiple wills could be in order. While the decision would be based largely on one's circumstances, personal preferences could come into play as well.

It may not be necessary to have a will at all if your assets are held in joint tenancy. For example, if spouses were to hold their assets (such as their home, bank accounts and investments) jointly, no will is required. By law, if one spouse dies, the

"If you wish to have greater flexibility in disposing of your assets on death, such as transferring them to others or imposing terms and conditions, a will is required."

other is entitled to full ownership of the asset. No court approvals are necessary. All that is usually required to demonstrate the transfer of ownership is proof of death.

This principle operates in the same way with a single parent who wishes to hold assets jointly with his or her children. What you gain in simplicity, however, is lost in flexibility, since the joint tenant is the only person who may inherit the assets on your death.

If you wish to have greater flexibility in disposing of your assets on death, such as transferring them to others or imposing terms and conditions, a will is required. If your assets are all held personally, a single will should suffice.

Through a will, you can dispose of your assets in any way you choose, such as transferring outright ownership or setting up trusts for minors or infirm beneficiaries. Things get more complicated with a will because you would have to appoint executors who would look after the administration of your estate. In order to transfer this power to your executors, the will would have to be submitted for Letters Probate wherein the court validates the authority given to the executors. This process takes some time and, when a will is submitted for probate in Ontario, Estate Administration Tax (often referred to as "probate fees") is levied at the rate of roughly $15,000 per $1,000,000 of assets in the estate. One reason that people often do not want to probate a will is because the probate fees can become significant quickly.

An answer to the probate fee issue lies in a second will. Probate is required where assets such as real estate and investment accounts are held personally. In order to transfer these assets, a purchaser of real estate or a financial institution will require proof of the executors' authority to act. However, if you have significant assets in a corporation such as an operating business or an investment holding company, no such authority is required. The transfer of the shares of such a company can be done privately with only the approval of the company's directors required. For this reason, clients often prepare what is known as a Primary Will to deal with their personally- held assets which require probate and a Secondary Will to deal with shares of private companies which do not require probate. Only the Primary Will is submitted for probate and is subject to probate fees. The Secondary Will is not subject to probate and the value of the shares of the private company is not subject to the Estate Administration Tax.

Another reason why you might want a Secondary Will is to generate tax savings. An estate is considered a trust for tax purposes and, like an individual, is subject to tax at graduated tax rates.

The estate would not reach the top tax rate in Ontario until it had well in excess of $100,000 of income. A Secondary Will, if appropriately drafted, can constitute a second trust with its own graduated tax rates, thus spreading out the tax burden. Careful drafting is required in order to ensure that the Canada Revenue Agency would not consider the two trusts to be one taxpayer.

In addition, although the Minister of Finance has announced a proposal to take away these graduated tax rates for estates, the proposed measure,

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"Using a particular corporation name or trade name in the forms you fill out when you register your company with the appropriate government authorities does not mean that your business acquires the automatic right to use that name."

if enacted, will not come into effect until 2016 and will give an estate the graduated tax rates for 36 months in any event.

So, the question of how many wills might be advised for you is not such a simple question after all. Your personal circumstances and choices will dictate what is right for you but, again, as always, proper planning is required. ■

Peter F. Kappel is a partner in Blaney McMurtry's Intellectual Property practice group. He is certified by the Law Society of Upper Canada as a Specialist in Intellectual Property Law (Patent, Trade-Mark & Copyright). Peter is a Registered Canadian Trademark Agent and a Registered Canadian and United States Patent Agent. An integral part of his intellectual property practice involves counseling clients on protecting, securing and enforcing trademark rights.

Peter may be reached directly at 416-593-3936 or pkappel@blaney.com.

TRADEMARKS: WHY YOU SHOULD REGISTER YOUR BRANDS

Peter F. Kappel

If you want to be sure that you, and only you, have the legal right to use your important trade-mark or brand identities such as your company's name, and the names of its goods and services, be certain that those brands are registered as trademarks.

Otherwise, you may be stopped from using them by someone who had previously registered them as a trademark, or by someone who had previously established a reputation using the same name or a very similar one.

Many – but, surprisingly, not all – established businesses register their company names (when the name is also used as a trademark), and the names of their products and services -- and even particular aspects of those products, services and operations – as trademarks.

All new enterprises have the unique, high-value opportunity to do the same thing from the very beginning, thereby ensuring that the revenue, profit and goodwill that their trademarks help generate will flow to them exclusively, and potentially indefinitely.

In all of this, it is necessary to be clear on what does – and does not – confer rights.

Using a particular corporation name or trade name in the forms you fill out when you register your company with the appropriate government authorities does *not* mean that your business acquires the automatic right to use that name. Nor does it provide your business with an automatic right to prevent others from using the name.

The only thing that provides such protection is a trademark registration, which should be part and parcel of every well-planned, comprehensive business start-up process.

Canadian enterprises of all sizes must conduct their business in increasingly competitive Canadian and global marketplaces. Trademarks or brands are important tools and valuable business assets in this changing world and protecting trademarks makes sound business sense. As the Supreme Court of Canada put it in a decision:

"Trade-marks in Canada are an important tool to assist consumers and businesses. In the marketplace, a business marks its wares or services as an indication of provenance. This allows consumers to know, when they are considering a purchase, who stands behind those goods or services. In this way, trade-marks provide a "shortcut to get consumers to "where they want to go."[1]

[1] The Supreme Court of Canada in *Masterpiece Inc. v. Alavida Lifestyles Inc., 2011 SCC 27 at para 1, [2011] 2 S.C.R. 387*.

"Trademarks are used by businesses to distinguish their goods or services from those of other businesses and thereby represent a company's goodwill."

What is a trademark?

Trademarks are used by businesses to distinguish their goods or services from those of other businesses and thereby represent a company's goodwill. Trademarks indicate a single source of goods or services and may also represent quality, reliability, and even prestige.

Although the registration and use of a corporation name or business or trade name does not give rise to trademark rights, a company or trade name in many instances often becomes the primary trademark or brand identity of a business. It is therefore a prudent business practice to register the business or trade name as a trademark early in the start-up period of a new business venture.

There are many forms of trademarks protectable under Canadian law. They can consist of:

- **Word(s)**

  TIM HORTONS

- **Letters, numerals, or alphanumeric characters**

  BMO

  501 [a Levi Strauss trademark for jeans]

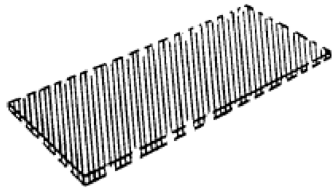
- **Designs or logos**

  Tim Hortons

- **Slogans**

  THE ULTIMATE DRIVING MACHINE

- **Colour**

  The colour pink applied to the whole of the visible surface of foam insulation.

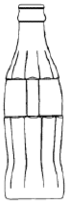
- **Product designs**

  iPhone Trade Dress Icon Screen (color) Design.

- **Product configurations**

  The Coco-Cola bottle.

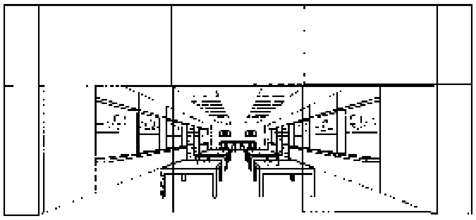
  

- **Sound**

  MGM's Roaring Lion.

In jurisdictions outside Canada, other non-traditional trademarks are registrable.

For example, in the United States, trademark protection can extend to interior and exterior store and restaurant designs. Apple's retail store layout, to take one instance, is the subject of US Trademark Registration No. 4,277,914.



"A business name registration or incorporation does not provide a business with an automatic right to prevent others from using the name as a trademark..."

The US and the UK also permit registration of a scent. US Trademark Registration No. 4,113,191 is for a trademark consisting of a coconut scent or fragrance in association with, among other things, "Retail store services featuring sandals and flip flop sandals." It is owned by Flip Flop Shops, based in Simi, California.

UK Registration No. 2001416 is for a trademark consisting of "a floral fragrance/smell reminiscent of roses as applied to tyres." It is owned by Goodyear Dunlop Tyres UK Limited.

Canada permits registration of a sound mark. By virtue of proposed amendments to the Trade-marks Act now before Parliament, other non-traditional trademarks may soon be registrable in Canada, including a hologram, a moving image, a scent, a taste, and a texture.

Establishing Trademark Rights

It is important to understand the distinction between a trademark and a trade name. A trade name is simply the name a business is known by. As was mentioned earlier, registering a corporation name or trade name with the appropriate government authorities does not mean that a business acquires the automatic right to use that name. A business could be prevented from using a name by someone who had previously registered it as a trademark, or by someone who had previously established a reputation in the same area using the name or a very similar one. Even multi-national companies that did not secure a Canadian trademark registration before their entry into Canada can face litigation. Both Wal-Mart and Target encountered trademark litigation at the time of their entry into Canada.

A business name registration or incorporation does not provide a business with an automatic right to prevent others from using the name as a trademark (though others will generally be prevented from registering the name in the province as a company name).

A trademark, on the other hand, is the mark, brand or logo, or other device by which goods or services are known to the public as a result of the mark's appearance on goods, or their packaging, or in advertisements that promote services.

In order to obtain or maintain rights, a trademark should be designated as a trademark, as opposed to being mere descriptive text. In other words, it should be made clear to both customers and competitors which words, images and other features are intended to be protected as trademarks. In the case of word marks, this can also be done by simply using different style lettering, such as bold face, italics or capital letters. In addition, trademarks should be identified with the TM/MC symbol with each appearance of the trademark on a product, product container, published text (such as warranty cards and use and care booklets) and in advertising material.

A trademark, even if not registered, protects against others from using a trademark and unfairly and unjustly benefiting from the goodwill represented by that trademark. However, an unregistered trademark may only afford protection within the specific geographical area in which a business can show that it has established a substantial reputation associated with its asserted trademark.

"Five years after registration, a trademark registration becomes incontestable as against allegations of prior use by a third party."

The Benefits of Trademark Registration

A trademark registration enhances the ability of a business to protect its goodwill.

1. A trademark registration provides proof of ownership. In contrast, a business asserting unregistered trademark rights is required to prove trademark ownership by extensive use of the trademark in the marketplace.
2. A trademark registration gives its owner the exclusive right to the use of the mark in association with the registered goods or services across Canada, even if the owner's use only occurs in parts of Canada. Trademark registrations are granted for 15 years and may be renewed indefinitely.
3. Five years after registration, a trademark registration becomes incontestable as against allegations of prior use by a third party.
4. Registration gives the owner the right to sue, for trademark infringement (as well as passing off and unfair competition), any person who uses an identical or similar trademark or trade name. The owner need only show that the mark as registered is being used or, in the case of a similar trademark or trade name, that there would be a likelihood of confusion if the registered owner and the infringer were selling in the same geographical area, regardless of whether or not the registered owner actually is in the same area, or whether or not the wares or services are of the same general class.
5. An application for registration of a trademark may be filed before use of a trademark has occurred. (Registration will only occur after the trademark is used, however).
6. Under international conventions, a Canadian business may file an application for trademark registration in most other countries and claim the benefit of its Canadian trademark application filing date, provided the foreign application is filed within six months of the Canadian filing.
7. A Canadian trademark registration may be used to obtain a trademark registration in another country, such as the United States, without the requirement of use of the trademark in commerce with or in the United States. Similarly, a foreign company that owns a trademark registration in another country and has used its trademark abroad can secure a Canadian trademark registration based solely on such registration and use abroad; no use in Canada is required to perfect the trademark registration.
8. Trademarks are often top-of-mind search terms for an internet user. Just as trademarks drive repeat business in the traditional bricks and mortar world, trademarks equally drive visitors to a website and repeat business. A Canadian trademark registration can lessen the evidentiary burden in domain name dispute proceedings for securing ownership over a confusingly similar domain name held by persons in Canada or in other countries.
9. Trademarks are property which can be bought and sold (assigned), pledged (e.g. as loan security) or licensed (merchandising, sponsorship, co-branding, contests). A trademark registration may facilitate licensing of a trademark.
10. The cost of obtaining and maintaining a trademark registration is relatively low

compared to other intellectual property rights and typically represents a fraction of advertising expenditures.

Summary

The strategic management and registration of trademark rights is more important than ever in today's sharply competitive global marketplace. Trademarks are valuable business identifiers that can drive business development and enhance company value and that merit every protection that can be arranged. ■

EXPECT THE BEST

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

2 Queen St. East, Suite 1500
Toronto, Canada M5C 3G5
416.593.1221 TEL
416.593.5437 FAX
www.blaney.com