



Blaneys on Business

“Business stands to become simpler for Ontario companies... as a result of amendments to the Ontario Business Corporations Act (OBCA)”

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, or call the head of our Corporate/Commercial group, Steve Popoff at 416.593.3972 or spopoff@blaney.com.

NEW CHANGES TO OBCA SIMPLIFY BUSINESS FOR ONTARIO COMPANIES

Laura McClennan

Business stands to become simpler for Ontario companies, and for the directors of those companies, as a result of amendments to the Ontario Business Corporations Act (OBCA) that came into effect August 1, 2007.

The amendments, which are a part of the *Ministry of Government Services Consumer Protection and Service Modernization Act*, are intended, as that name suggests, to modernize the OBCA and make it consistent with the Canada Business Corporations Act (CBCA).

The changes amend director residency requirements, director indemnification rules, conflict of interest rules, financial-assistance disclosure requirements, and proxy and record-date requirements. These amendments could be cause for some changes to corporate bylaws and companies are encouraged to take note of them.

Here are the key changes:

Directors Residency Requirements

Under the new OBCA regulations, only 25 per cent of a corporation's directors must be resident Canadian; if the board has fewer than four directors, at least one must be a resident Canadian. This is a reduction from the prior

requirement of a majority of directors being resident Canadians. In addition, no longer is the managing director required to be resident Canadian, nor do committees have any residency requirement. The amendments also remove the requirement that an annual majority of the directors' meetings and committee meetings be held in Canada.

Directors' Indemnification and Insurance

OBCA indemnification and insurance provisions have been changed to mirror those found under the CBCA. A corporation may indemnify its directors and officers and any individual who acts as a director or officer or in a similar capacity for another *entity* at the corporation's request. No longer is it necessary for the corporation to have a financial interest in the "other entity", or even for the other entity to be a corporation.

Individuals entitled to such indemnification will be glad to hear that the corporation may now advance funds to them for defence costs of such proceedings. They will have to repay to the corporation the advanced funds, however, if they have not acted honestly and in good faith with a view to the best interests of the corporation or other entity.

Furthermore, the corporation will be required to indemnify such individuals in connection with any proceeding so long as the individual was not judged to have committed any fault or omitted to do anything required to have been

“In addition to the new indemnification and insurance provisions, a general due diligence defence...has been added to the OBCA.”



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done, and so long as he or she has acted honestly and in good faith with a view to the best interests of the corporation (or “other entity”). In the case of criminal or administrative proceedings enforced by a monetary penalty, the individual will also need to have had reasonable grounds for believing his or her actions were lawful.

The types of proceedings for which the individual may be indemnified have been expanded to include *investigative* proceedings, which would include, for example, investigations by the Ontario Securities Commission.

Corporations also may now purchase insurance for any individual against any liability incurred in his or her capacity as a director or officer of the corporation (or “other entity”). Restrictions on the purchase of insurance against a breach of a director's fiduciary duty have been removed.

In addition to the new indemnification and insurance provisions, a general due diligence defence, almost identical to the one found in the CBCA, has been added to the OBCA. So long as the director has exercised the skill and diligence that a reasonably prudent person would exercise in similar circumstances, the director will not be held liable. The bad news is that the defence is limited to specific statutory duties of the director (such as decisions concerning the payment of dividends) and does not protect a director for breaches of his or her fiduciary duty and duty of care to the corporation; the good faith defence found in the CBCA has not been included in the amendments to the OBCA.

To the extent that a unanimous shareholders' agreement restricts the discretion or powers of the directors to manage the business of the corporation, shareholders who are a party to the unanimous shareholders' agreement are entitled

to the same defences to which the directors would otherwise be entitled.

Conflict of Interest Rules

Prior to the amendments, directors were restricted from voting on any resolution to approve any contract or transaction in which the director had a conflict of interest. Under the new amendments, the conflicted director is not only precluded from voting on the resolution, but from attending the part of the meeting during which the contract or transaction is discussed (with some exceptions). If necessary, the remaining directors will constitute a quorum for the purposes of approving the contract or transaction.

Proxies and Record Date

For corporations that fix a record date for determining shareholders, only those shareholders listed as of that record date are entitled to vote. Owners of shares transferred after the record date are no longer entitled to vote those shares by giving notice 10 days before the shareholders' meeting.

Financial Assistance

The amendments repeal entirely the financial assistance disclosure requirements of the Act. Previously, corporations were required to disclose to shareholders that it had provided financial assistance, for any purpose, to directors and officers and, for the purpose of buying shares, to any person.

Offering Corporations

Under the new regulations, a person soliciting proxies is not required to send a dissident's information circular if the total number of shareholders whose proxies are being solicited is less than 16.

‘If your visual identity is a composite of a variety of elements... you will want to be especially careful to ensure that it has been registered so that you have the exclusive legal right to all of those elements...’



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In addition, offering corporations are now required to send financial statements and other documents relating to annual meetings only to shareholders who have informed the corporation that they wish to receive the information. ■

NEW PROTECTIONS FOR YOUR COMPANY'S VISUAL IDENTITY MAY BE ADVISED

Mala Joshi

The distinctive logos, word marks, typefaces and other visuals that help identify your business and that allow your customers to differentiate your products and services quickly and easily from those of your competitors are among your enterprise's most critical assets.

If your visual identity is a composite of a variety of elements, however – graphic images, words, and typefaces, for example – you will want to be especially careful to ensure that it has been registered so that you have the exclusive legal right to *all* of those elements, not only as they work together in your visual signature but as each is perceived individually.

This caution flows from the recent decision of the Trade-marks Opposition Board in *NV Sumatra Tobacco Trading Company v. Player's Company Inc.*, in which the Board addressed the concept of composite marks and held that trade-mark rights do not automatically attach to each of the components of composite marks.

Whether trade-mark rights attach will depend on whether the composite elements are considered as significant or insignificant in relation to the mark as a whole. Independent trade-mark status will only be afforded to those components

that are dominant characteristics of the larger mark. Any component considered to be insignificant will typically be denied protection.

In determining whether a component of a composite mark will be independently protected, *NV Sumatra* may be seen to offer the following practical advice:

1. Use of a composite mark will not establish use of an insignificant component;
2. Use of a composite mark *may* establish use of a dominant component; and
3. When in doubt, register and use the component as a separate mark.

1. Insignificant Components

Regardless of how long a component has been used as part of the composite mark, if it is perceived as an insignificant component, it will not be recognized as an independent mark. Whether a feature is found to be insignificant will depend largely on the circumstances of the case. Generally, however, it appears to depend on *whether the component can be perceived as a separate mark*. If it cannot, the component will not attract separate protection.

In establishing whether or not the component can be perceived as a separate mark, importance under the law is given to:

- The prominence of the component in the composite mark. In this regard, what will be assessed is whether the component stands out from the additional material, such as through the use of different lettering or sizing
- Whether or not the removal or alteration of the component would affect the overall char-

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acter of the composite mark; if its removal or alteration would not change the composite mark to such a degree as to confuse a purchaser as to the origin of the goods

NV Sumatra itself is a good example of where the small size of a component was found to be insignificant and therefore did not warrant trade-mark protection. In this case, the PLAYER’S HERO design trade-mark (the “design mark”) was under consideration. The design mark included a picture of a sailor with the word HERO inscribed on his hat surrounded in a circle by the words PLAYER’S NAVY CUT. Player’s sought to register the word mark HERO and claimed use of the mark through the logo which had been used in association with its tobacco products since the early 1900s.

The Board refused registration of the word HERO because Player’s could not establish that the word mark HERO had been ‘used’ within the meaning of the *Trade-marks Act* through its inclusion in the design mark. Since the word HERO was so small in relation to other features, the Board found it could not have been perceived to have been an independent mark. Had the word HERO been deleted or even changed to another word, it would have had no impact on the recognisability of the logo.

In another decision relating to a different design mark, use of the composite elements was not established because the elements in question were smaller than 1/10th of the rest of the mark and several of the other components out shadowed them in size and prominence.

2. Dominant Components

If insignificant components do not attract individual trade-mark status, the reverse is also true – dominant characteristics will. Those compo-

nents that can be said to be perceived as a separate mark will meet the threshold for establishing use independent of the composite mark. The same considerations discussed above will apply in determining whether or not the component can be regarded as dominant.

In a decision by the Federal Court Trial Division, *Ivy Lea Shirt Co. v. 1227624 Ontario Ltd. c.o.b. as Muskoka Fine Watercraft and Supply Co.*, the Court held that the word CHESTNUT CANOE CO. which appeared in the design logo was used so clearly that it stood out from the rest of the mark. The company was therefore allowed to claim use of the CHESTNUT CANOE CO. word component of the mark. The size and type of the lettering used to display CHESTNUT CANOE CO clearly made it one of the most prominent features of the logo.

3. When in Doubt, Register

Your trade-mark lawyer can work with you to arrive at a rational strategy for registering trade-marks. For instance, if there is a commercially valuable component of a composite mark that you would like to ensure is a protected trade-mark, you would be advised to consider registering it separately from the composite mark. Otherwise, at a later date, you might not be able to establish use of the component through use of the composite mark. ■

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