

EXPERT INSIGHTS

TIMELY INFORMATION FOR IN-HOUSE COUNSEL IN THE GLOBAL VILLAGE

In the lead-up to our major National Spring Conference in Toronto, INSIDE COUNSEL asked a number of organizations to provide the insights of their senior experts on issues facing law departments doing business beyond their borders today. The following articles are timely, relevant – and an ideal primer to attending the conference in April. PLAN TO BE THERE!

ANALYSES D'EXPERTS

LE CONSEILLER JURIDIQUE D'ENTREPRISE ET LE VILLAGE PLANÉTAIRE : DES RENSEIGNEMENTS OPPORTUNS

Dans les mois qui précèdent la Conférence nationale de printemps à Toronto, INSIDE COUNSEL a demandé à un certain nombre d'organisations de fournir des commentaires d'experts et d'expertes sur les enjeux transfrontaliers actuels des conseillers juridiques d'entreprises. Ces textes, disponibles uniquement en anglais, sont à la fois opportuns et utiles – une préparation idéale à la conférence d'avril. SOYEZ-Y !

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2005: Canada's Year Of Secondary Market Liability

William Braithwaite and John Ciardullo
Stikeman Elliott LLP*



William Braithwaite



John Ciardullo

The introduction of statutory secondary market liability into the securities legislation of Ontario and British Columbia is likely to be one of the most significant developments in Canadian business law in 2005. Once in force, these initiatives will give secondary market investors (principally those who buy and sell shares in the stock market) potential causes of action against corporations and their directors, officers, major shareholders, experts (among others) with respect to misleading statements and failures to make timely disclosure of material changes.

Successfully defending against such potential litigation will require most public companies with Canadian shareholders—no matter what their jurisdiction of incorporation—to adopt appropriate corporate governance practices. While the ability to bring an action will presumably be limited to securityholders with a connection to Ontario or British Columbia, there is no jurisdictional limitation with respect to the corporations that such plaintiff shareholders can sue. Companies will therefore want to adopt practices that comply with both the Ontario and B.C. regimes.

The new legislation can be thought of as creating *partial* liability schemes, rather than fully compensatory ones, in the sense that damages are sometimes subject to limits. But this aspect should not be overly emphasized, as (except in the case of the corporation itself) the limits are negated if the plaintiff can prove that the defendant knew of the misconduct (or, under B.C.'s legislation only, ought to have known of it). The damages cap for the corporation itself is the greater of 5% of market capitaliza-

tion or \$1 million. An expert's maximum potential liability is generally equal to its previous 12 months' compensation, though in Ontario the expert's liability cap cannot fall under \$1 million. Directors, officers and other individual defendants, other than experts, are potentially liable for the greater of \$25,000 or 50% of their previous 12 months' compensation.

Under the B.C. legislation, the calculation of damages appears to be left to the court's discretion (subject to the caps, if applicable), but in Ontario the calculation proceeds according to a set of formulas that, generally speaking, are meant to track the actual loss suffered by the investor as a consequence of trades made during the period that the misrepresentation or failure to disclose remained uncorrected. There are protections against joint and several liability for some defendants and, for those to whom caps apply, provisions for setting off damages already awarded under the comparable legislation of other provinces.

A Powerful Tool for Investors

As the scope of the potential damages suggests, the new liabilities have the potential to become a powerful tool for investors. Several other facts about the legislation support this contention. Neither statute requires plaintiffs to prove reliance: in fact, the Ontario legislation expressly excludes reliance from the court's consideration, except insofar as the defendant can prove that the defendant knew that the misrepresentation was false or of the undisclosed material change. Nor is it necessary, under either regime, to prove that the misconduct actually caused the relevant price change, though the defendant is free to try to show that it did not. There is some protection for the corporation and other potential defendants, however, in the fact that actions under the relevant provisions cannot proceed without leave of a court. The prospect of nuisance lawsuits, or of American-style 'strike suits', may therefore be reduced. Nevertheless, the legislation appears to have been designed with class actions in mind.

Actionable misrepresentations under the statutes include those in documents filed under securities or corporations law or in any other document if the misrepresentation might reasonably have been expected to appear important to an investor (B.C.) or likely to influence the

security's market price (Ontario). Misrepresentations in public oral statements are also actionable, provided that it was reasonably foreseeable that they would be generally disclosed. The precise descriptions of the types of statement that can form the subject of a lawsuit differ between the acts, so it is advisable to consider both when drawing up relevant policies.

Who can be liable?

Who can be liable in a given situation tends to depend on the circumstances of the misconduct. Where a misrepresentation is made by an issuer, for example, both regimes allow for a finding of liability against the issuer itself, its directors and officers, and experts (where the expert was the source of the information). The statutes also create potential liabilities for other parties, including major securityholders (over 20% in Ontario; over 10% of any class in B.C.), and those variously described as "insiders" (Ontario), "promoters" (Ontario) and securityholders who are able to "affect materially the control of the [issuer]" both even though their holdings fall short of the 20% or 10% thresholds just mentioned.

Directors' Liability

Under Ontario's amendments, directors generally cannot be liable for a misrepresentation or failure to disclose if they did not authorize, permit or acquiesce in the action. However, a director *can* be liable for misrepresentations in documents issued by the issuer even if he or she did not authorize, permit or acquiesce in their release. In all cases except those of certain "core" documents, a plaintiff must prove that a director knew or avoided learning of the misrepresentation (or failure to disclose) or that he or she was otherwise guilty of gross misconduct.

The British Columbia regime generally holds directors of the issuer to what appears, at least on its face, to be a significantly higher standard. First, it does not immediately require the plaintiff to prove knowledge. Second, it does not permit directors to raise non-authorization etc. in their defence. Instead, the B.C. legislation takes what might be thought of as a "carrot and stick" approach: if the issuer implements a "reasonable system" designed to ensure compliance with duties under the *Securities Act*, in addition to an appropriate procedure for monitoring its effectiveness, that action will constitute a strong defence to individual liability for its directors (and to the issuer's own liability). If such a system has been implemented, the burden will essentially shift to the plaintiff, as it must *then* be shown that the director knew of the misconduct and that it was a contravention of the B.C. *Securities Act*, or at least that the director was recklessly or wilfully ignorant of these facts.

Defences

The Ontario legislation also refers to the existence of a system designed to ensure compliance with continuous disclosure obligations, but only as one factor that courts can take into account in considering the defendant's assertion of a "due diligence" defence. In general, due diligence is among the most significant of the defences available under the Ontario and B.C. regimes. If a defendant can show that it conducted a "reasonable investigation" prior to the misconduct, and that, having done so, it did not know and could not reasonably have known that the action in question constituted misconduct, it will not generally be liable.

Other important defences include: (i) a safe harbour for forward-looking information (provided that it has a "reasonable basis" and that it is identified as forward-looking, with an accompanying statement of the material factors or assumptions on which the forecast was grounded); (ii) reliance on an expert (provided that written authorization has been received and that the statement fairly represents the expert's opinion); (iii) reliance on documents filed by other public companies; and (iv) proving that the plaintiff had knowledge of the misrepresentation or failure to disclose. Generally speaking, a defendant cannot take recourse to (i), (ii) or (iii) unless he or she reasonably or honestly believed that the statements in question were true.

Responding to the New Regimes

The new regimes will likely have a considerable effect on the corporate disclosure policies of public companies doing business in Canada. In this regard, we expect to see and are seeing the creation, enforcement and monitoring of disclosure policies as well as greater board oversight of these policies than has previously been the practice in corporate Canada. Because the liability of individual parties will often hinge on their knowledge of a given misrepresentation or failure to disclose, it will also be increasingly important for directors, officers, experts, significant shareholders and others to maintain full and accurate records of their corporate involvements. Finally, all potential defendants need to become informed of their responsibilities under the new system and should review their liability insurance options.

William Braithwaite can be reached at:

Tel: (416) 869-5654 or wbraithwaite@stikeman.com

John Ciardullo can be reached at:

Tel: (416) 869-5235 or jciardullo@stikeman.com

*Thank you to Andrew Cunningham for his assistance with this article.

U.S. Civil Jurisdiction: What Canadian Companies Should Know About Doing Business in the U.S.

Layne E. Kruse
Partner, Fulbright & Jaworski LLP



When it comes to determining personal jurisdiction over a Canadian company in U.S. courts, the outcome isn't always predictable. U.S. courts have taken a broad view of personal jurisdiction over non-U.S. companies in private damages suits for consumer injuries and commercial claims, but Canadian companies can take steps to reduce the risk of finding that personal jurisdiction

exists in all disputes thereby reducing exposure to adverse judgments in the United States.

The greatest problem for Canadian companies is that there is no clear mechanical test for determining personal jurisdiction. This problem is compounded by variations in applying the doctrine under the laws of various states and in federal courts, which often are driven by the lack of an immediate appeal, the discretion over the use of discovery, and the differences in state and federal causes of action. Nevertheless, apart from the various forms of long-arm jurisdiction statutes in every state, courts recognize that the constitutional test for jurisdiction depends on the quality and nature of the activity in relation to the fair and orderly administration of the laws.

Under the U.S. Constitution, a court may assert personal jurisdiction over a non-U.S. defendant only if:

1. the defendant has purposely established "minimum contacts" with the forum state; and
2. forcing the nonresident into court in the forum state would not violate traditional notions of fair play and substantial justice. In a suit based on a state-law cause of action, a U.S. federal court has personal jurisdiction over a nonresident or foreign defendant to the same extent as a state court in that forum. More precisely, a federal court may assert personal jurisdiction if the forum state's long-arm statute applies, as interpreted by the state's courts, and the forum state courts' procedures for asserting jurisdic-

tion comport with the due process requirements of the U.S. Constitution.

Even if a court finds that minimum contacts exist, it cannot exercise jurisdiction over a defendant if doing so would offend traditional notions of fair play and substantial justice. In other words, courts must decline to exercise jurisdiction over the non-resident defendant if prosecution of the action in the forum state would be "unreasonable and unfair". Determination of fairness and reasonableness depends on an evaluation of several factors, including:

1. the defendant's burden;
2. the forum state's interests;
3. the plaintiff's interest in convenient and effective relief;
4. the judicial system's interest in efficient resolution of controversies; and
5. the state's shared interest in furthering fundamental social policies. The burden is on the nonresident to prove that the forum's exercise of jurisdiction would not comport with "fair play and substantial justice".

The fact that a Canadian corporation is headquartered outside the U.S. may have an impact. As the Supreme Court noted and as lower courts have echoed, "the unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders". There are few cases where jurisdiction has been declined on "reasonableness" grounds, but a non-U.S. defendant should examine these issues closely since they often depend on arguments that have a practical and equitable appeal.

Resolving Objections to Personal Jurisdiction

The uncertainty over personal jurisdiction arguments is often driven by the inability to resolve these objections in an immediate appeal, coupled with the discretionary use

of jurisdictional discovery. In state courts, defendants may make a “special appearance” for the purpose of litigating the court’s jurisdiction over them without making a general appearance. The technical requirements for making a special appearance vary from state to state, as do the types of acts by the defendant that turn an attempted special appearance into a general appearance.

In federal courts, a Canadian defendant may object the court’s jurisdiction by filing a motion to dismiss at the beginning of the litigation; raising the defense to jurisdiction in the answer and moving to dismiss later; or not appearing in the action, allowing the plaintiff to obtain a judgment by default, and then collaterally attacking the default judgment for lack of jurisdiction when the plaintiff attempts to enforce the judgment in Canada.

The principal method in federal court for challenging personal jurisdiction is through a motion to dismiss at the beginning of litigation under Rule 12(b)(2) of the Federal Rules of Civil Procedure. Importantly, a defendant must raise the objection to jurisdiction in order not to waive the defect. Although jurisdictional allegations are taken as true, once they are challenged, the plaintiff has, at least, the initial burden of showing that the court has jurisdiction over the defendant through factual proof such as affidavits or other evidence. Once a plaintiff has demonstrated prima-facie evidence of jurisdiction, a defendant contesting jurisdiction must show that it is improper. Generally, courts will construe plaintiff’s uncontested factual allegations as true and resolve factual disputes in the plaintiff’s favor.

Because the plaintiff is required to prove jurisdiction, courts have held that discovery on the jurisdictional facts generally is permitted, as long as there is a good-faith belief that jurisdiction exists. Accordingly, a court may subject defendant to discovery to determine whether it is subject to specific jurisdiction or alternatively, whether subjecting it to jurisdiction comports with the notions of fair play and substantial justice. Non-U.S. defendants still have an opportunity to object to jurisdictional discovery, especially if burdensome. Some courts have recognized that a key reason that a non-U.S. defendant challenges jurisdiction is to avoid the expense of discovery in the U.S. The courts also have wide discretion in determining the venue and amount of pre-jurisdictional determination discovery.

A federal court may hold an evidentiary hearing or allow the parties to present oral argument contesting jurisdiction. As noted above, the plaintiff need only make a prima-facie showing of jurisdiction before a

defendant is required to show that the exercise of jurisdiction is unreasonable. When a court rules on a motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing, it must accept as true the uncontroverted allegations in the complaint and resolve in favor of the plaintiff any factual conflicts. If an evidentiary hearing is held, the plaintiff must establish the jurisdictional facts by a preponderance of the evidence.

Since courts recognize that a company can structure its affairs to avoid jurisdiction in the U.S., here is checklist of considerations in limiting the reach of U.S. civil jurisdiction:

Jurisdiction Issues Based on Specific Contracts or Torts

- Location of meetings to negotiate contracts
- Location for signing U.S.-related contracts
- Choice of law provisions for non-U.S. governing law
- Arbitration clauses with non-U.S. forum
- Restrictions on selling products or services into certain U.S. states

General Jurisdiction Issues

- A U.S. subsidiary for proper corporate formalities to avoid “veil-piercing” arguments
- Need for U.S. stock exchange participation and investor relations office there
- Determining the entity responsible for U.S. patent and trademark registrations
- Location of bank accounts and place for conducting financial transactions
- Location of corporate board meetings
- Need for employees of Canadian parent in the United States
- A passive Internet site (Interactive websites increase jurisdictional risk.)
- Scope of marketing or advertising in the United States

In the final analysis, the importance of eliminating or reducing the number of contacts must be considered in light of the overall business goals of the company.

Mr. Kruse is a partner in the international law firm of Fulbright & Jaworski L.L.P. He handles business litigation and arbitration, including antitrust, securities litigation, international disputes, class actions and responses to government investigations.

Managing Foreign or Trans-Border Litigation After *Morguard* and *Beals*

Malcolm N. Ruby,
Partner, Gowling Lafleur Henderson LLP



If you were one of the few who studied conflict of laws in law school, you may recall the obscure course material. The introductory lectures dealt with inscrutable concepts like “renvoi,” a process for determining applicable law, similar to finding the proverbial pea in a shell game. The leading cases dealt with whether a marriage made in one jurisdiction could be annulled in another or

whether security registered on a chattel in one place could follow it across an international boundary. The course content was always dense and often impenetrable.

In the last 20 years, however, the proliferation of international trade, travel and personal mobility has magnified the significance and importance of trans-border legal issues. The “conflict of laws” or “private international law” is no longer an obscure or esoteric topic of interest to only the legally curious. The rules for dealing with inter-jurisdictional disputes have become important, and sometimes vital, to any legal professional dealing with trans-border transactions.

Liberalization of Foreign Judgment Enforcement

By far, the most significant development over the last 15 years is the trend toward liberalization of foreign judgment enforcement. The trend began with the seminal decision of the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990], 3 S.C.R. 1077. *Morguard* held that judgments rendered in the courts of one province should be given “full faith and credit” in the courts of another if the court granting judgment met minimum standards of “real and substantial connection” for exercising jurisdiction. In late 2003, the Supreme Court confirmed, in *Beals v. Saldhana* [2003] 3 S.C.R. 416, that foreign country judgments were to be given the same “full faith and credit” treatment as the *Morguard* court had given judgments rendered in the courts of other provinces.

Not so long ago, counsel advising a client served in a Canadian province with foreign legal process could safely tell the client to ignore the foreign claim (assuming they had no assets in the foreign jurisdiction) because a default judgment would be unenforceable in their home province. In effect, the domestic resident could force the foreign plaintiff to litigate the merits of the dispute on the defendant’s home turf. Such advice is exceedingly unwise after *Morguard* and *Beals*. Those decisions virtually eliminate a defendant’s ability to re-litigate the underlying merits of a foreign judgment. Moreover, the defences to enforcement of a foreign judgment are very narrow. Apart from arguing that the foreign court did not meet the jurisdictional requirements of the “real and substantial connection” test, the defences to enforcement of a foreign judgment are generally limited to “natural justice, public policy, and fraud” (*Beals*, at paragraph 35).

Managing Foreign Litigation

The *Morguard* and *Beals* regime necessarily leads to inside counsel managing trans-border or foreign litigation because any company faced with litigation beyond provincial boundaries must retain local counsel in the foreign jurisdiction to respond to the foreign suit. Engaging competent foreign counsel who litigate in the foreign language but communicate in English is becoming easier thanks to the presence of large U.S. and U.K. firms in the capital cities of most countries. These firms either have local counsel on staff or have established consulting relationships with local advocates with whom they can communicate in the local language. They can also use the Internet to quickly transmit key documents and keep their clients informed.

Managing foreign litigation is challenging for Canadian lawyers because, for the most part, our legal training takes place in the province where we live and practice. Nothing on the law school curriculum prepares us to manage, for example, an anti-trust or securities case before the Courts of a foreign country. Engaging, and communicating with, foreign counsel for foreign litiga-

tion therefore places greater demands on inside counsel than co-ordination of domestic litigation because of the need to understand the foreign legal system and to explain the foreign process to the company management or board. Moreover, if the company is affiliated with a U.S. sibling or parent company, there will also be a need to co-ordinate with counterpart inside counsel or their U.S. outside counsel.

Minimizing the Risk of Foreign Litigation

Avoiding foreign litigation, or foreign law, in the commercial (or employment) context is possible and often advisable. The best technique is to structure contractual arrangements with “forum selection” and “applicable law” clauses that limit dispute resolution to the courts of your home province applying local law. If both sides to an international commercial contract want to favour their home jurisdiction, a compromise can sometimes be worked out to choose a “neutral” third country, or international arbitration process, as the forum for dispute resolution.

Companies often purchase goods or services without a careful review of the vendor’s standard terms and conditions. If a dispute arises, they are sometimes surprised to learn that it must be resolved in a foreign court applying foreign law. A periodic review of significant supply contracts could be the ounce of prevention that avoids the heavy costs and difficulty of litigating in a foreign jurisdiction.

Multi-Jurisdictional Litigation and Class Proceedings

The trend to liberal enforcement of foreign judgments is only one – albeit a significant – reason why inside counsel are being challenged by the need to manage international litigation. The internationalization of product liability, securities and consumer protection litigation, particularly through the mechanism of multi-jurisdictional class actions, is of equal importance.

The mass media is especially fond of reporting the publication of scientific studies linking commonly used products or processes to adverse health outcomes. In the age of the contingent fee class action, these reports invariably lead enterprising class action lawyers to link up with plaintiff groups to advance mass tort claims. The litigation against the manufacturers of fenfluramine, one of the “fen-phen” diet drugs, is a good example. Articles in the *New England Journal of Medicine* linking the drug to certain heart and lung conditions lead to commencement of a class action, and thousands of individual

claims, in the United States. Ontario lawyers affiliated with a leading U.S. plaintiff firm commenced a parallel national class proceeding in Canada. It was necessary for inside counsel to manage Canadian and U.S. defence counsel in a co-ordinated approach to the parallel claims. Complicated jurisdictional and discovery issues were presented.

In the Internet age, news about legal claims travels quickly. A claim in one jurisdiction is quickly followed by claims elsewhere. In the class action arena, plaintiff’s lawyers often set up Web sites where they publish significant pleadings and other information about their cases. Canadian lawyers pick up ideas, and precedents for new claims, from the Web sites of their U.S. counterparts.

The class action “boom” presents real challenges to inside counsel tasked with managing inter-jurisdictional litigation. The high stakes, and often high profile, nature of class actions will often demand more supervision and strategic decision-making from them. For example, inside counsel will likely manage documentary discovery, supervise and assist in preparation of expert reports, provide strategic input on interlocutory issues, and transmit instructions to litigation counsel at trial. In addition, inside counsel will have a direct and important role in settlement negotiations, which can be very difficult and time-consuming. Most large class action claims are settled before trial, often during intense late into the night mediation sessions.

Conclusions

As Canadian companies conduct more international business, demands on inside counsel to understand and manage foreign and inter-jurisdictional litigation will increase. In particular, the liberalization of foreign judgment enforcement in Canada and the dramatic upsurge in multi-jurisdictional class proceedings will require inside counsel to understand foreign legal systems and how they interact with Canadian law. These trends, particularly relating to class actions, will likely mean more direct involvement and participation by inside counsel in the actual conduct and strategic planning of the litigation.

Malcolm Ruby is a partner of the law firm Gowling Lafleur Henderson LLP and practises in the area of civil litigation with a particular emphasis on class actions, securities and trans-border litigation. Mr. Ruby can be reached at (416) 862-4314 or malcolm.ruby@gowlings.com.

Managing Cross-Border Disputes

J. Brian Casey
Partner, Baker & McKenzie LLP



All project management involves the setting of defined goals, scheduling and control. Litigation, unlike other commercial projects, presents planning challenges due to the existence of an opponent who was seeking to defeat your plans at every step. As originally stated by Helmuth von Moltke¹ “no plan of operations extends with certainty beyond the first encounter with the enemy’s

main strength” Cross-border litigation is a greater challenge, as it can point out differences not only in the substantive law of another jurisdiction, but also its procedure, its culture, its language and the legal environment in which its lawyers practice.

This latter consideration may be the most important, as it touches on the manner in which things are actually done in the other jurisdiction, not what the letter of the law says ought to occur. All of these difficulties go to expand the gap between what should happen in the eyes of the client and what really does happen.

Managing cross-border litigation must then start with an appreciation of how these factors affect this gap. Eliminating or minimizing this divide between theory and reality is the real challenge of managing cross-border litigation.

Early case assessment

As with any litigation, cross-border litigation requires early case assessment. Early case assessment means a full and frank discussion respecting both the potential outcome of the litigation and the time and cost involved. This requires not only retaining local counsel, but also the willingness to listen to local counsel and not filter recommendations by reference to experiences elsewhere. Communication in any litigation is important, but in cross-border litigation, it is essential. The closer the local lawyer and lead lawyer work together, the more realistic this assessment will be.

Early case assessment in cross-border litigation should involve at least the following six considerations.

1. *Do we have to be there?*

Sometimes a party will commence proceedings in a particular jurisdiction for purely tactical reasons. The question then becomes whether or not the court has jurisdiction to hear the case. Canada and the United States will assume jurisdiction regardless of the appearance or attornment of the defendant. Other jurisdictions are more conservative. Is the jurisdiction one in which the court will assume jurisdiction or is the jurisdiction one that requires personal service in the jurisdiction?

2. *Likely legal result*

While at its base, the common law has developed more or less in a similar fashion in most common law jurisdictions, there is always the concern that a particular point or nuance, which can change the outcome of the case, will not be discovered until the legal process is well under way. In those jurisdictions based on the civil law, while general legal principles remain the same, a careful analysis of the particular civil code is essential. In either case, an opinion of local counsel is essential.

3. *Procedural and practical considerations in proving your case*

In no particular order, consider the following matters:

- a. How will service of process be carried out? Will the foreign jurisdiction permit private service or must the Hague Convention on Service Abroad be followed?
- b. Where are the witnesses? Can they be compelled to testify or will letters rogatory addressed to another court be necessary? Note Canada is not a signatory to the Hague Convention on the Taking of Evidence;
- c. Where are the relevant documents? Who will assemble, code and review them? Can this be done in a low cost jurisdiction?
- d. What computerized system is available for document management and is it compatible and accessible by all members of the team regardless of their location? Most international law firms have the capability of having their various offices review all documents and research resources, but if this is not available, websites and extranets can be leased for that purpose;

- e. Are word processing systems compatible and can a common format for materials and briefs be established?
- f. Where should the experts come from? Will the court favour experts from its own jurisdiction? How will they have access to the documents located elsewhere?

4. Cost estimates

Lawyers traditionally underestimate the cost of litigation by overestimating their own efficiency, underestimating the inefficiencies of working with a team in different jurisdictions and by underestimating the ability of their opponent to thwart their plans at every turn. This gap between expectation and reality can be measured by the increased cost necessary to get from one step to the next over the opposition of the other side. Cost estimating is an essential part of the early evaluation process even though it is likely to be underestimated. Management needs as much information as possible before fully committing the corporation to the foreign litigation. Billings should be regular, usually every 30 days. One account should be sent to the client capturing all time and expenses for all team members regardless of their location. On a regular basis, the accounts should be measured against the budget.

5. Time Estimates

Experience has shown that cross-border litigation simply takes longer. Notwithstanding the benefits of instantaneous communication by e-mail, it seems that the greater the distance, the longer the process. In some jurisdictions, a moderately complex commercial matter, moved along by both sides, can be heard within 12 months. In other jurisdictions, it will be 3 years. It also is relevant to know the relationship between local counsel and the lead attorney. If local counsel is in the same firm, the matter will tend to have a higher priority than the case in which the local attorney has only been hired for this particular case and has no real connection or continuing involvement with either the client or the lead attorney's firm.

6. Involvement of management

In cross-border litigation, there is usually more management time spent than might otherwise be the case. Strategy meetings, the review of documents, pre-trial conferences, depositions and trial may well take place outside of the jurisdiction where the company management resides. Travel time and management time can, in some cases, become not only significant but oppressive.

Selecting the right team

Determining Trial Counsel

Usually in cross-border litigation, there will be at least two counsel, one representing the client in its home jurisdiction and the second being local counsel in the jurisdiction in which the litigation is to be heard. It is important to establish at a very early stage in the proceedings who will be lead counsel at trial and who will be the overall manager of the litigation.

Team Leader

The team leader (or leaders, if the role is to be shared) has responsibility to:

- a. motivate all team members, being sensitive to cultural and social differences that may exist among them;
- b. set objectives and deadlines;
- c. monitor the progress of each team member;
- d. evaluate and manage costs on a monthly basis;
- e. continuously review the team's performance against the litigation plan; and
- f. report on the progress on a regular basis to the rest of the team.

The skills needed to carry out these tasks may well be different from the skills needed to actually argue the case.

Team Members

In choosing the team members, it is important to focus initially on the cost and location of staffing. If the wrong resources are used, or the right resources are in the wrong location, little will get done well or on time. Once the case is well under way or if a deadline is approaching, Brooks' Law applies: Adding people to a late project only makes it later.

Team work

There can be no silos. The team leader must truly know the people on the team. That means more than simply knowing their names, but includes knowing who can perform and who cannot, regardless of their location.

¹ Helmuth von Molke "On Strategy"

Mr. Casey is a Partner in the Toronto office of Baker & McKenzie LLP and is Chair of the global firm's North American Litigation Practice Group. Called to the Bar in 1976, Mr. Casey practices in all areas of international and domestic commercial litigation and arbitration; is certified by the Law Society as a specialist in civil litigation, and practices at all levels of the Courts of Ontario and Supreme Court of Canada.

Peoples v. Wise: A Turning Point for Directors' Duties

Markus Koehnen
Litigation Partner, McMillan Binch LLP



The Supreme Court of Canada recently released its decision in *Peoples' Department Stores Inc. v. Wise*, a decision that is now Canada's leading case on directors' duties. Many see the decision as welcome relief for directors because, on the facts of the case, the Court held that directors did not owe a duty to creditors. A closer look reveals a very different picture.

The case is significant for four reasons: (1) it holds that directors owe duties to more than just the corporation; (2) it establishes an objective standard of care for directors and rejects the subjective standard; (3) it appears to adopt a Delaware style business judgment rule; and (4) it provides a first comment on the relationship between corporate governance standards and director liability.

Extended Duty of Care

The immediate issue in *Peoples* was whether directors owed duties to creditors. The Supreme Court of Canada clearly said they do. *Peoples*, was argued solely on the basis of s. 122 (1) of the *Canada Business Corporations Act* (CBCA), a parallel of which is found in most provincial corporate statutes, and which imposes a duty on directors and officers to:

- (a) act honestly and in good faith with a view to the best interest of the corporation; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The court held that directors owe no duty of care to creditors under s. 122(1) (a) because it stipulates that the duty it creates is owed to the corporation. However, under s. 122(1)(b) the identity of beneficiaries was 'much more open ended' and 'obviously' included creditors. That change is significant. Until *Peoples*, it had

been black letter law that directors owed their duties to the corporation.¹

Extending the duty of care beyond the corporation is significant enough for the director-creditor relationship. Of even greater significance is the likely impact on shareholders. In the United States, directors have long owed duties to shareholders. The direct duty to shareholders has been used by American courts to justify aggressive review of board decisions, especially in take-over bid litigation. Canadian courts have tended to distinguish American cases on the basis that American law imposed a duty to shareholders while Canadian law imposed a duty to the corporation. The extension of s. 122(1)(b) to beneficiaries beyond the corporation wipes out that distinction. If the Supreme Court is prepared to extend the duty under s. 122(1) (b) to creditors, it is a much smaller step to extend it to shareholders.

Objective Standard of Care

At common law, a director's standard of care was subjective. That is to say, the standard of care turned on the director's individual capabilities. This often turned directors' liability cases into an unseemly effort by directors to establish their own incompetence, thereby justifying a lower standard of care. The statutory duty of care in section 122 of the CBCA requires directors to "exercise the care, diligence and skill that a reasonably prudent person would exercise *in comparable circumstances*". What this provision meant has been debated since its introduction in 1975. The debate turned on whether "comparable circumstances" referred to the individual skill set of the director or the factual circumstances surrounding the case. Until recently, the leading authority had been the decision of the Federal Court of Appeal in *Soper v. Canada*, [1998] 1 F.C. 124, which described the standard as being "objective subjective" which could take into account the lower personal skill set of certain directors. In *Peoples v. Wise* the Supreme Court of Canada rejects this approach and calls expressly for an objective test. It is likely that the objective test will be used to toughen the standards of care that apply to directors. While directors with lesser skills will be held to the higher, objective stan-

dard, directors with superior skills will not be able to take advantage of a lower objective standard of care. Where directors possess superior skills, they will be required to apply them to the issues at hand.

Two Pronged Business Judgment Rule

Most interesting is the Supreme Court's extensive *obiter* about the business judgment rule.

Historically, Canadian corporate decisions had been protected by the business judgment rule which holds that courts should not interfere with honestly made business decisions. Until recently, Canadian courts focussed on the result of the decision. If the result was reasonable, courts did not interfere. The difficulty with this approach is that board decisions rarely involve questions to which there are "right" answers. They involve judgment calls about risk taking. Focussing on results makes it easy to rationalise decisions. Almost any 'judgment call' can be justified on *some* basis, particularly in the hands of sophisticated parties and skilled counsel.

Recent decisions by courts and securities commissions demonstrate a radical shift in approach from result to process. The shift to process leads to a more aggressive review of directors' decisions. A focus on process recognises that it is almost impossible to assess whether a result is reasonable when the process influences the result. In a realm where there are no right answers, only a reasonable process ensures a reasonable result.

When addressing the business judgment rule, the Supreme Court first referred to and adopted the results oriented business judgment rule but also went on to adopt the more recent process oriented approach. In doing so, the Court appears to be adopting the business judgment rule as it is applied by American, and particularly by Delaware, courts. While Canadian courts had historically applied only the reasonable result test, Delaware courts have long applied a two-pronged test that requires directors first to establish that they followed a reasonable decision making process and second, that the result of the decision was reasonable.

The Supreme Court's apparent adoption of the Delaware business judgment rule may make Delaware case law on the issue more readily acceptable to Canadian courts than it has been in the past. Delaware courts have adopted a substantially more aggressive approach to directors' decisions than Canadian courts have. Their focus on process has involved determining, among other things, whether directors spent an adequate amount of time on the decision, whether direc-

tors understood the issue, whether they tested the information they were given or simply accepted the conclusions of others; and whether they debated the issues openly and candidly among themselves.

Director Liability and Corporate Governance Standards

The Supreme Court also referred to the plethora of rules, regulations and guidelines that have been the focus of most corporate governance analysis in recent years. The court stated:

"The establishment of good corporate governance rules should be a shield that protects directors from allegations that they have breached their duty of care. However, even with good corporate governance rules, directors' decisions can still be open to criticism from outsiders."

While worded a little cautiously, what the court appears to be signalling is that the absence of proper corporate governance structures will be held against a corporation but the presence of governance structures does not end the analysis. Put another way, corporate governance structures are a means to an end. The desired end being an effective, independent-minded board. A state of the art governance structure may encourage board independence but does not ensure it. As a result, the extensive corporate governance regulation and practice that has emerged in recent years is likely to play only secondary importance when board conduct is challenged. Before the courts the focus will be the adequacy of the board's decision making process and not their governance structure.

Markus Koehnen is the author of *Oppression and Related Remedies* (Carswell, 2004) and a litigation partner with McMillan Binch. He specializes in shareholder disputes, corporate governance litigation and directors' liability issues.

¹ Although, the Court concluded on the facts that the directors had not breached their duty because they obtained no benefit, acted in good faith and were trying to improve the financial position of the corporations involved. The Court took pains to point out that *Peoples* was argued solely under s. 122 and that under other corporate remedies (like derivative actions or oppression claims) a different analysis would apply. In oppression claims for example, motive and absence of benefit to directors do not play the same role as they do under s. 122.

No Borders on Electronic Discovery It's a Global Village

Oleh Hrycko, CA • IFA
President, H+A



The global nature of digital age business practice has given rise to transparency in how business is conducted; it has also facilitated the integration of international economies and enhanced the comity of nations. While conducting business beyond national borders has opened new markets and created great opportunity and wealth, it has also exposed organizations to the potential for

cross-border litigation and the tangled web of legal issues that surround it – jurisdiction of the courts and the taking of evidence in foreign proceedings. The global proliferation of electronic communication has enabled and enhanced business growth around the globe but it has equally lubricated the legal machinery of international litigation.

One aspect of litigation stands above the jurisdictional rules and boundaries – electronic documents and communications. E-documents and digital communications are noteworthy because they operate without the restrictions placed on more traditional forms of communication and transactional documentation.

Who's minding the store?

Electronic documents and litigation are inextricably intertwined; that fact is beyond dispute. In every country on the planet, multi nationals are busily storing digitally created business documents on servers, workstation, laptops and backup tapes. The corporate community has a voracious appetite for e-mail and other forms of electronic communication. E-communication facilitates global operations but it has also posed formidable challenges to any corporation's ability to contain and manage this data.

This management burden is true not only from the aspect of actual physical resources, but also from the more salient perspective of information control, or more specifically, the lack or loss of that control.

Spoliation – The Big Issue

The magnitude of this 'control' issue is reflected in the growing legal turmoil, particularly in the United States, surrounding electronic data discovery (EDD). The tort of spoliation – the intentional destruction of a document that eliminates its value as evidence – is one of the most pressing issues in *electronic discovery law*.

Not Knowing is Not Valid

Computer illiteracy by in-house counsel and litigators, as it relates to the discovery of electronic documents, is a functional shortcoming that can no longer be tolerated – ignorance of the law has never been an excuse and, in e-document management, ignorance is definitely not bliss! The infamous list grows weekly – Enron, Tyco, Parmalat – international business scandals on a grand scale and all of them involving the issue of electronic communication. There is simply no escaping the significance of electronic evidence in these complex, multi-jurisdictional, corporate litigations. In the final analysis, the importance of eliminating or reducing the number of contacts must be considered in light of the overall business goals of the company.

The Key to Successful Litigation

To skilled practitioners, EDD and computer forensics are the norm – they understand the pervasive and resilient nature of electronic data and appreciate that the 'smoking gun' is simply a few keystrokes away.

Corporate and outside counsel not conversant with the interplay between EDD and litigation place their corporation/client in a strategically vulnerable position. More importantly, they give an EDD-savvy adversary a distinct advantage in litigation proceedings. EDD is a critical tool of the trade and all counsel ignore it at their peril.

Failure to understand the nuances of EDD, either from the perspective of the discoverer or the discoveree, is a recipe for disaster.

What You Need to Know

Understanding EDD and being conversant with its implications does not mean corporate and outside counsel must become computer forensics/EDD experts. However, they must develop a fundamental understanding of the technological underpinnings of the digital discovery process. Unlike the laws inherent in every country, computer technology knows no borders and the principles of EDD are essentially the same regardless of the country of origin. Some of the key areas to understand:

1. Computer forensics experts can recover e-mails and files that have been intentionally or inadvertently deleted.
2. Restoration of backup tapes that preserve network activity may also preserve otherwise deleted information.
3. What is electronically discoverable? What are the chain of custody and evidentiary rules as they relate to the preservation and admissibility of electronic evidence?
4. Issues concerning cost-shifting in the context of requests for inaccessible data and the tort of spoliation, especially in the United States.
5. Handling electronic evidence in terms of an effective search review and storage protocol, as well as how to migrate the relevant documents into a litigation support database.

Hot Spots

When dealing with U.S based litigation, counsel must be aware of the two major issues in the law of EDD – one, who bears the cost and, two, spoliation. In her first decision in *Zubulake v. UBS Warburg LLC*, 2003 U.S. Dist. Lexis 18771 (S.D.N.Y. Oct. 22, 2003) (“Zubulake”), Judge Scheindlin provided a seven factor test that counsel (in-house and outside) must comply with in order to discharge their obligations to the court and opposing counsel in respect of EDD cost-shifting disputes. The court held that the test should be applied in descending order of importance:

1. The extent to which the EDD request is tailored to discover relevant electronic documents;
2. The availability of these relevant electronic documents from other digital media;
3. The total cost of EDD relative to the estimated value of the case;
4. The total cost of EDD relative to the financial resources available to each party;

5. The control of costs by each party;
6. The importance of the issues in the litigation; and
7. The relative benefits to the parties of obtaining the relevant electronic documents.

The Zubulake decision is setting the legal standard by which all EDD cost-shifting disputes are resolved. More recently, the Zubulake court issued another decision addressing the litigant’s duty to preserve back-up tapes. Judge Scheindlin stated that the duty to preserve does not extend to back-up tapes unless a corporation can determine, with reasonable certainty, which back-up tapes contain the relevant electronic documents for the persons of interest.

The elements of EDD are not just confined to the litigation arena but extend to the *Sarbanes-Oxley Act* of 2002 and Bill 198. Compliance with these two pieces of legislation compel corporations to re-visit document production, retention and destruction policies in order to account for new storage and access requirements as well as ensure that they are sufficient in detail and scope to withstand any potential lawsuit.

An Ounce of Prevention

Global business inevitably leads to global litigation. Yet, despite the legal complexities involved in cross-border litigation, the successful use of leading-edge EDD technology, locally or internationally, is dependent on knowing the technological fundamentals of what is electronically discoverable, what processes should be used to capture and preserve the relevant electronic documents as well as the attendant costs, advantages and disadvantages. To achieve the winning edge, one must tailor the use of EDD to the idiosyncrasies of the specific litigation at hand by working closely with a corporation’s IT department as well as EDD/computer forensics experts. By doing so, it will better prepare any corporation to handle the EDD process – which clearly knows no borders.

Oleh Hrycko, CA • IFA is the President and Founder of H+A Computer Forensics Inc. and H+A Forensic Accounting Inc., a Preferred Supplier to the Canadian Corporate Counsel Association. With offices in Toronto and Montreal, H+A is a leader in forensic disciplines, having tackled many complex public and private sector cases over its 18-year history. H+A’s professional staff serve as court-qualified expert witnesses and act as court-appointed experts. For more information, please visit www.whenyouneedproof.com.

Canada's New Trading Regime-Acknowledging and Planning for the Realities of Trade in the Twenty First Century

Dunniela Kaufman
Associate, Fraser Milner Casgrain LLP



The Global Village, defined in part, by global interdependence and the increasing rapidity of exchange across vast distances, has been accelerated in the twenty first century by advances in technology and a greater global acceptance of free trade's precepts. The irony that globalization, an apparently progressive phenomenon, has nurtured a beast

such as global terrorism, which is inherently trans-national and threatens to thwart the free movement of people and goods across sovereign borders – cannot be disregarded.

While at first blush there appears to be an inherent contradiction between the economic need for expedient border processes and security concerns, the efforts undertaken by the current Canadian Government, in conjunction with our greatest trading partner, have proven that addressing security concerns can result in more effective commercial border processes, which businesses on both sides of the border must take advantage of or else they proceed at their own peril.

Canada is an export driven economy. Although lip service is paid to diversifying our trading relationships, the truth of the matter is, 80% of our exports are destined for the United States. As the events following September 11th highlighted, Canada had to take the initiative to ensure that low risk movement across our shared border could continue unabated by the dominant concern of our neighbour, security. In the wake of 9/11, Canada and the United States came together to sign the Smart Border Declaration, which was accompanied by an action plan for creating a secure and smart border (respectively the "Declaration" and the "Action Plan"). The Action Plan, currently comprised of thirty-two points of focus, was based on the following four pillars:

- i) the secure flow of persons;
- ii) the secure flow of goods;
- iii) investment in infrastructure; and

- iv) coordination and information sharing in enforcement of the aforementioned objectives.

While many of the resulting initiatives seem to the average importer and exporter to be mere layers of administrative red tape (such as the 24 hour notification rule), as a result of joint efforts to execute the Action Plan, commercial border consumers now have access to a plethora of programs which, once initiated, provide them with even more efficient processes than were available prior to the new security concerns. An example of one of these new initiatives is the Free and Secure Trade program (FAST). FAST allows for expedited clearance processes to those carriers that have enrolled in the U.S. Customs Trade Partnership Against Terrorism (C-TPAT) or Canada's Partner's in Protection (PIP) programs. Although companies must initially expend resources to meet the requirements of the program, once registered, the system provides for streamlined and integrated registration processes: by supporting quick movement of pre-approved eligible goods, and by allowing for verification away from the border. There is also a pre-approval program for low risk travellers, the Nexus program. This program is readily available at Highway crossings but is still in pilot stage at the Vancouver International Airport.

In addition to the initiatives undertaken pursuant to the Declaration and the Action Plan, in December of 2003, at the inception of the Paul Martin Government, Canada reorganized its Executive to more accurately reflect new realities. Concurrent with the introduction of his first Cabinet, the Prime Minister announced the creation of the Department of Public Safety and Emergency Preparedness (the "Department of PSEP").

Mirroring the direction taken by the United States in creating the Department of Homeland Security, Canada gave structural coherence to the marrying of security and economic concerns by creating the Department of PSEP, which combines the core activities of the Solicitor General, the Office of Critical Infrastructure and Emergency Preparedness and the National Crime

Prevention Centre. In addition to these roles and responsibilities, the Minister has oversight over six agencies, including the Canada Border Services Agency (the CBSA).

The CBSA is a newly created Customs agency. The transfer of Customs to the new Security Department exemplifies the modern realities that face cross-border transactions. No longer is Customs about revenue generation through the collection of duties and taxes, which for the most part, as it relates to trade between Canada and the United States, has become a zero sum game. It is now about providing a cohesive response to terrorist threats, perceived to be more prevalent at the border. In addition to the bulk of the customs functions transferred from the then Canada Customs and Revenue Agency, soon to be merely the Canada Revenue Agency, the CBSA will amalgamate, under the purview of customs administration, some of the intelligence, interdiction and enforcement functions formerly under Citizenship and Immigration Canada, as well as the initial import inspection services formerly performed by the Canadian Food Inspection Agency. In addition to the changes to Customs administration, the Government also took steps to streamline Canada's trade policy.

Another interesting result of the reorganization undertaken by the Canadian Government was the expansion of the sphere of influence of the Department of International Trade (ITCan), presumably in preparation for its extrication from the Department of Foreign Affairs and International Trade (DFAIT). Many functions previously under the mandate of the Department of Industry and DFAIT, as they relate to trade negotiation, promotion and foreign investment, were brought together in a more focused way. This is further indicative of the rising importance of marrying security and economic concerns in international relations. ITCan was ostensibly created to recognize the central importance of trade and investment in the long-term growth of the economy and to provide a coherent policy center to ensure that business is provided, and has access to, the tools and services needed to succeed in an increasingly competitive and globalized world. ITCan's focus is defined as ensuring and facilitating access for Canadian goods and services in current and emerging markets, separate and apart from foreign policy concerns. As always, this Department, in conjunction with the Department of PSEP and the Department of Finance, will provide much of the policy basis upon which the CBSA functions.

While the changes resulting from the initial reorganization have, for the most part, been in effect for over

a year, at the end of 2004, the Canadian Government tabled enabling legislation, which will actually create the Department of PSEP and the CBSA, as well as ITCan. To date these Departments have all been functioning pursuant to Orders in Council passed in December of 2003. While no change will be apparent to the users of these services, as a result of the legislation being tabled, lawyers can now rest assured knowing that there is a legislative basis to turn to for the Government's policy and a legislative framework to define rights and obligations. Further, the Ministers of these Departments have now been given full authority to pursue their mandates, all of which include an enhanced ability to negotiate international agreements and facilitate international cooperation.

As the Joint Statement made by President Bush and Prime Minister Martin following President Bush's visit to Canada at the end of 2004 underlined, while security remains the number one priority, both governments acknowledge, and are trying to facilitate, the continued progress of economic integration and cooperation, which has so readily been achieved within the framework of the North American Free Trade Agreement. While the two countries grapple with the 'New Normal', which was accelerated by the events of September 2001, creative initiatives are being undertaken to utilize the technologies that got us here in order to ensure that low risk trade and travel continues to flow unabated. For the trading community, while the barriers to trade may initially seem to be insurmountable, upon reflection, and with a little upfront effort, the effects of the new normal can actually lead a company to embrace more efficient and expeditious mechanisms for their border concerns.

Dunniela Kaufman is an associate at Fraser Milner Casgrain, specializing in international trade law and government relations. Dunniela has experience with the interpretation of the WTO agreements, NAFTA and other regional trade agreements. She also possesses in-depth knowledge of Canadian government and domestic public policy and has participated actively in Federal and Provincial politics within the Liberal Party.

Navigating Legal Challenges in an Emerging China

David Buchanan
Partner, Miller Thomson LLP



Traffic in China can be horrendous. A few years ago, in Tianjin, I marvelled at a particularly congested intersection where several major roads converged like irregular spokes on a wheel. Vehicles of all description darted and weaved without the aid of traffic lights. Yet, the flow was surprisingly smooth and without mishap. I remarked to a Chinese companion that in Canada,

under such circumstances, traffic would likely come to a complete halt or chaos would ensue. It was clear that the Chinese had found a way to deal with the situation that was much different from ours.

He explained to me that North American drivers focus on the other vehicles, viewing them as obstacles. The Chinese, on the other hand, focus on the clear spaces between with the result that the 'obstacles' are reduced to 'challenges'. By analogy, to successfully navigate through China's legal and business world, it is necessary for us to transform the obstacles we see into simple challenges on our otherwise clear path.

Know the History – and Terms of Engagement

To begin, recognize that China is open for business, and Westerners are welcome. For centuries, China did try to limit the often forced intrusions of Western business, so the 'open' policy of the last 25 years is a radical departure from the past. However, this time the doors are open at China's insistence and, more importantly, on China's terms. To ignore the latter point can lead to collision and potential failure. Hence, before venturing forward, it is critical to gain an understanding of China's complex structure and rich culture.

Currently, China comprises 30 very distinct Provinces within 'Mainland China' and two Special Administrative Regions, Hong Kong and Macao. Although there is a strong central government based in Beijing, that government is but one part of a five-tiered system that also includes provincial, municipal, county and village levels with roles and bureaucracies that sometimes overlap.

There are massive regional disparities. Generally, the degree of wealth, development and Western contact drops the further inland you move from the ocean coastal areas.

More than half of China's last century witnessed upheaval, dramatic social change and turmoil, which to a large extent explains a legal and governmental focus on stability. There was a vacuum of commercial law for almost four decades. Commercial activity in China is thus governed by statutes first enacted within the last twenty-five years. A civil law system is used, and statutes are easily accessible in the English language.

The current commercial legal system in Mainland China is of similar vintage to the commercial statutes. Laws can and often are enforced differently in different provinces. Law in China has no special sanctity; culture and social norms are seen as more effective and important. While there is a gradual move toward the rule of law, which was given a sudden boost by China's entry into the WTO, it will take time before Mainland China emulates Hong Kong. In many ways the law is used for its pragmatic value by the central government, and thus should be viewed in that light.

China is a regulated economy and society, and you may only enter into business relationships using permitted structures (which include cooperative joint ventures, equity joint ventures and wholly-owned foreign enterprises) and only after having obtained the necessary permits and licences. The proposed structures must be carefully planned and the Chinese licensing requirements fully understood.

Foreign trade is likewise statute controlled. China has, subject to adjustments required by the WTO, a protectionist trade policy. The government encourages foreign trade based on domestic production rather than market forces. This is important to note if establishing a wholly-owned foreign enterprise as the licence is not likely to be given unless it shall be exporting its production.

China, in spite of its recent Communist roots, has a well-established business culture and history, evidenced by the fact that paper money was an ancient Chinese invention. A hallmark feature of Chinese business is the focus on interpersonal relationships and contacts. For this reason, experienced, capable advisors in Canada and

China are essential, both to assist in creating a careful, yet flexible, strategic plan and to facilitate the development of strong relationships to help carry that plan to fruition.

Likewise, negotiation is a way of life in China. It is not merely a process to be employed only when necessary, as is often the case in the Western world. The focus on interpersonal relationships deeply affects negotiations. The 'win win' scenario we often verbalize has a deeper meaning in China. Negotiations can be time consuming. While the Chinese negotiator wants to achieve his desired result, he will proceed on the basis that there must be no 'loss of face' for either party. Emotion can form a part of a negotiation, but ultimatums or demands are unacceptable. If you wish to achieve your goal, it is imperative that your negotiation be carried out in recognition of Chinese norms.

Understand the Role You Play

While lawyers are often looked upon in our society as leaders in a negotiation, care should be exercised in Mainland China if that position is to be taken. The involvement of lawyers in Chinese business dealings is still evolving and somewhat undefined. Subject to local advice, it is often better practice for a lawyer to assume an advisory or team role. One reason for this is that Chinese negotiations are to be conducted between perceived equals. If a lawyer takes the prominent role in the proceedings, the other party may assume your senior executive is weak.

Contracts can also be problematic. The Chinese focus on relationships and flexibility make them very reluctant to enter into formal written contracts. Culturally, verbal agreements are favoured, with default causing great loss of face. Generally, resistance to formal contracts varies inversely with the size of the Chinese enterprise. Contract law in China is codified, and the parties are generally free to enter into either oral or written agreements. Note, however, that a contract with an entity that is not properly licenced to perform the subject of the contract is not enforceable. Accordingly due diligence is required.

While we are used to drafting with precision and legal clarity, the Chinese perceive that good agreements must be flexible. Therefore, it is often wise to aim for the simplest and shortest agreement possible. For instance, I recently had the challenge of condensing the contents of what could have been a 30-page agreement into two pages. When drafting, focus on the clauses that are key to the understanding. Carefully crafted letters confirm-

ing understandings (in a non-demanding and non-confrontational tone) are important.

The maintenance of close personal relationships not only can reduce the chance of dispute, but are essential to ensure both understanding and contractual compliance. Often the Chinese view of contract is that it speaks as of the moment it is written, and thus is seen as subject to further adjustment (i.e. price of oil or shipping goes up, and it is expected that prices will change). While agreements should be drafted to address these matters, it is often more important to have the personal relationship to reduce the chance of a "surprise".

Be Prepared for Possible Disputes

There will be times when disputes cannot be resolved through relationships alone. Be aware that China's shortage of legally-trained judges and the court's inability to enforce judgments without bureaucratic help poses a real problem. A resort to the civil courts in China is to be avoided; arbitration is the favoured route. Consider negotiating Hong Kong law as the governing law (where legally permissible) with arbitrations to be held in Hong Kong in the English language.

Intellectual property continues to be a true grey area in China. Reverse engineering is the accepted norm. Outright copying is epidemic in Asia. China did agree, as part of its accession to the WTO, to curb copying. However, true progress will take years to achieve, so approach the Chinese market with a realistic acceptance of the practice. There are limited periods within which registered protection can be obtained; so, at the outset, determine whether Chinese patent or trade-mark protection is available. This will afford you at least some administrative protection. Otherwise, take all steps possible to protect the technology. For example, avoid use of your newest technology, or if components are being manufactured, have the part made by more than one supplier in China and assembled in Canada. Require the Chinese manufacturer to confirm that there shall be no reverse engineering, as a condition of doing business, but recognize that it may be difficult to enforce the covenant. So be prepared.

Remember that many things in China can and will change in the years ahead. The author of Murphy's Law may have been Irish – but he had lots of Chinese relatives. So drive carefully!

David Buchanan is enrolled as a Solicitor in Canada, Hong Kong England and Wales. He has an international commercial practice and has been dealing with matters in China and Hong Kong for more than 20 years.

Offshore IT Outsourcing in a Fine Balance

Robert W. Scott, Partner, National Leader – IT Advisory
PricewaterhouseCoopers LLP



Offshore outsourcing of IT work is not just a passing fad. And not only IT jobs are moving offshore. Any knowledge-based function that does not require direct personal interaction is a candidate. Also, not only routine jobs are being relocated. Some of the world's leading companies have set up shop in India, and China, to conduct research, development, and product innovation. The fact is we are in the

beginning of a shift that has profound implications for companies, their market offerings, competition, the careers of millions, and the competitiveness of nations.

A recent study from PricewaterhouseCoopers, *A Fine Balance: The Impact of Offshore IT Services on Canada's IT Landscape*, addressed the trend of IT work being sent offshore from Canada to low cost centres in India, China, Russia, and other emerging economies, as well as Canada's role as a nearshore provider of IT services for U.S.-based companies.

The study points out that by taking appropriate, proactive action Canada could see an increase of skilled IT jobs. The alternative is to stand by and watch IT jobs migrate offshore or be retrenched into the U.S. Canada must confidently step up and claim its share in the global marketplace for IT services.

Canadian companies have outsourced IT services for decades, but they have tended to rely on local delivery. Meanwhile, in the U.S., offshore outsourcing has been rapidly increasing over the past 10 years.

This difference is about to disappear. With higher awareness and a higher Canadian dollar, Canadian companies are waking up to the benefits of offshoring. And it's not just traditional global vendors—companies with headquarters in India, Russia, and other locations have also set up shop in Canada and are now marketing to Canadian companies.

Why Go Offshore?

Through PwC's discussions with leading Canadian companies who buy offshore services and global offshore companies who provide them, it was estimated that cost

benefits for shifting a major set of activities from the U.S. to India range between 50 and 70%. Service providers also said that U.S. customers can save 20-30% by moving certain IT activities to Canada.

Low cost is a necessary condition, but it is not the only one. There is no point in buying a cheap service if it is of poor quality. Quality is a critical driving factor for offshore outsourcing. Most of the large India-based firms have invested heavily in ensuring quality. Many have attained Capability Maturity Model (CMM) Level 5—the leading standard in software quality methodologies. They lead their North American competitors, as well as most of their customers, in meeting standards. PwC has also found that Canadian companies who have successfully offshored work believe that ready access to pools of qualified resources is just as important.

The Decision Process

PwC has found that buyers decide to invest in an outsourcing transaction because one or more events give them a reason to believe that offshore delivery can deliver a benefit. The benefits are often weighed at a high level against feasibility, cost, and risk considerations. If the balance of prospective reward versus feasibility, cost, and risk is favourable, the buyer will invest further time and money to pursue the offshore option.

While every company differs in how it sources its services the transaction cost for an offshore contract can be significantly higher due to:

- Increased complexity on legal and tax implications
- Increased travel costs for site visits and contract start-up
- Network provisioning
- Security assurance
- Severance costs redundant employees
- Retention programs for key staff who may be threatened

It is also important to ensure that anticipated cost savings from IT outsourcing are not eroded or eliminated by unintended, adverse tax consequences. When exploring the tax implications from offshore outsourcing PwC found that while the job migration to lower cost locations

may offer significant operational savings, they can lead to unplanned tax costs.

A business case should also include the consideration of investment tax programs available. While choosing India may appear to minimize costs, SR&ED incentives in Canada may reduce India's comparative advantage. When coupled with the advantages of proximity and ease of communication, the scales could easily be tipped in Canada's favour.

Risk Management

According to IDC Canada, the top five risks buyers identified in offshore IT outsourcing are:

- Security
- Quality
- Service
- Knowledge transfer
- That cost savings will not materialize

PwC's research identified additional risks and recommend that buyers consider looking beyond general service and quality risks to consider:

- Proximity
- Currency
- Regulatory compliance
- Tax issues
- Political, employee, public relations and geopolitical risk
- Immigration and work visa issues

Leading Practices Have Great Importance

Many lessons can be learned from those with experience managing an offshore IT services relationship. In the selection process, clients are increasingly weighing references and reputation as essential criteria over size of the resource pool. In addition, as buyers gain experience with offshore outsourcing, their awareness of the importance of proximity to resources goes up significantly.

Both buyers and providers have stressed to PwC the importance of strong governance practices, including building the human side of a relationship. Furthermore, experienced buyers are making site visits to their offshore providers in order to accomplish this, as well as to satisfy themselves of delivery capability.

It is common for buyers to leave the operational details of an offshore project to their services provider. However, according to PwC's research, buyers realize that accountability for the success of any project, whether in-house, onshore outsourced, or offshore, rests with their management.

What Will the Impact Be on Canada's IT Landscape?

Experienced buyers have told PwC that the cost savings are real. Sure, companies may reduce costs and improve IT productivity and quality, but employees will lose jobs, and the market for IT workers may shrink. Many IT graduates already face unemployment. Some argue that this is but a phase in capitalism's cycle of creative destruction. A new generation will come along and create new industries. Be confident that we are on the eve of another wave of economic innovation.

Offshoring poses economic risks for many Canadians and the economy. It is possible that thousands of Canadian IT jobs will move offshore or be repatriated to the U.S. by 2010, along with an equal considerable number of other knowledge-based functions. The Canadian way is to face up to the social and economic risks, take steps to mitigate them, and prepare to compete in the new environment.

Companies should make choices about outsourcing that will enable them to grow and compete and work with government to address the impact on laid-off employees, and competitiveness of the Canadian economy. In addition, governments, business leaders, and the IT industry should focus on ensuring that Canada will compete and win in tomorrow's high-value IT services, research and development, and innovation.

To differentiate Canada from offshore centres Canadian IT services companies must leverage industry knowledge, emerging technologies, and expertise in business processes.

The Fine Balance

Buyers of offshore services need to balance the real benefits against the real and perceived risks. Buyers must look at their situation and assess their readiness and willingness to go offshore, and then screen project characteristics for those most suited for offshore delivery. They should systematically assess and manage risks, particularly those unique to offshore.

The worldwide shift to global sourcing of IT services is, at the same time, a great threat and an even greater opportunity for our domestic IT industry. We must define our role on the global stage by building up and marketing Canada's unique and sustainable advantage as a global supplier of IT innovation. Whether we choose to passionately pursue the opportunity, or suffer silently while departing jobs are left unfilled, we, as Canadians, are today in a fine balance.

For more information visit www.pwc.com/ca/afinebalance.

Dealing With US Technology Licensors: Beware the US LLC and Canadian Withholding Tax

Michael Wennberg
Partner, Stewart McKelvey Stirling Scales
Barristers, Solicitors and Trademark Agents
Saint John, NB Office



LLCs

If your company is a licensee (and virtually every company is – even active licensors), a clause that you will often see in technology licence agreements is something like the following:

If any amount to be paid by Licensee shall be subject to taxes or governmental charges outside the United States of America which are to be paid by Licensor or to be withheld by Licensee, Licensee shall increase such amounts so as to yield to Licensor, after payment or withholding of such taxes or charges, the full amount specified in this Agreement.

Licensors rely on this ‘gross up’ clause to pass tax obligations that arise in a foreign country (i.e.: Canada) onto the licensee. *For example:* If the agreed licence fee or royalty payment is \$100.00 per month, and there is a withholding tax obligation of 25% on that licence fee or royalty payment, then the clause above requires the licensee to (in effect) pay a licence fee of \$133.34 – an amount sufficient to ensure that when the application of the 25% tax is taken into account, the licensor still ends up with the agreed \$100.00 free and clear. For those of you with a mathematical bent, the actual formula for determining the withholding tax amount in this circumstance is:

$$[\text{Required Royalty or Fee Payment (eg: \$100)}] / [1.0 - (\text{applicable tax rate (eg: 0.25)})] - [\text{Required Royalty or Fee Payment}]$$

This clause can really come back to haunt you if you are dealing with a US licensor that also happens to be a *limited liability company*. You can usually spot this type of company by the abbreviation at the end of its name –

normally LC or LLC. Virtually every US State now allows for the creation of these hybrid limited liability companies. I won't bore you with the Internal Revenue Service rules relating to these companies, but they are treated as a hybrid corporation and partnership. They allow the underlying owners of the LLC to rely on the limited liability concept applicable to corporations while, at the same time, allowing them to treat the LLC as a partnership for purposes of flowing revenue through it to the underlying ‘partners’ or shareholders for US tax purposes.

Unfortunately, these hybrid corporations/partnerships are not recognized by *Canada Revenue Agency* for purposes of the *Canada-US Income Tax Treaty* – at least to the extent the LLC opts for partnership treatment of revenue in the US.

License Fee Shock

What does this all mean? It means that the provision in the *Canada-US Income Tax Treaty* that reduces the tax withholdings your company must otherwise make on the royalties and licence fees it pays to a US-based licensor – from (generally) 25% to 0 – does not apply. So if you are dealing with a technology licensor that is an LLC **and** the licence agreement contains a tax ‘gross up’ clause similar to what I have set out above, your company will be required to pay **one third (33%) more in licence fees** for the technology than you probably thought you had to pay. This is significant enough to often change the underlying economics of the technology deal you have negotiated.

While bargaining strength, economics and how badly you need particular licensed technology might lead you to a different result, I always try to insist (when acting for licensees) that the licence agreement remove any “gross up” clause and that the LLC licensor (if it is in the business of licensing its technology in Canada) should assume responsibility for the withholding taxes – which are, after all, withholdings paid by your company (the licensee) to Canada Revenue Agency for the credit of the believe that this credit would not have some value to the

licensor's tax obligations. That credit can be applied by the LLC licensor against its other Canadian-based revenue with respect to tax obligations that would be paid in the US. Sometimes, of course, there is no other Canadian-based or other foreign revenue of the LLC; but it is hard to believe that this credit would not have some value to the licensor. If so, the LLC should not receive a windfall. Even if not, it is my view that this is simply too bad for the licensor; and your company (the Canadian licensee) should not be penalized because of this.

On-Site Services

While we are on the topic of withholding taxes, remember that to the extent any US or other foreign technology licensor (not merely an LLC) also provides your company with services in Canada (and this can frequent-

ly happen – through software installation, training, site support, etc.), these on-site services attract a 15% withholding tax; and this tax is not reduced by the *Canada-US Income Tax Treaty*. You should make it clear in your licence agreement with any foreign licensor that these withholding tax obligations are to be separately identified (so you know what amount to withhold) and that they are borne by the licensor, not by your company.

Michael Wennberg is a member of the Ontario and New Brunswick Bars. His practice includes major business/industrial agreements, supply agreements, technology licensing agreements, and outsourcing arrangements. He is a past Bar Admission Course lecturer, Articling Committee Chair and Reviewing Officer with the Law Society of New Brunswick and Atlantic Editor of *Banking and Finance Law Review* (Carswell).



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Expand Your Brand Into the U.S.

By Kenneth D. Suzan, Esq.
Hodgson Russ LLP



This article originally appeared in the October 1, 2004, issue of *The Lawyers Weekly*.

Imagine a toy company in Toronto gearing up to globally market a mechanical marvel by Christmas. At the same time, a hotel in Montreal is readying a new Web site that is expected to be viewed by prospective American revelers planning

their New Year's Eve celebrations. Across the country, in Vancouver, a clothing manufacturer has grand plans to set a fashion trend next fall with its new line of clothing and accessories. All three Canadian companies have their eyes set on selling and advertising their goods and services in the United States and expanding their brands across international borders.

Central to brand expansion into the United States is the strategic development of a strong trademark/service mark portfolio that sufficiently protects the source identity of a company's important intellectual property assets. Building such a portfolio in the United States carries significant benefits for Canadian companies. The first step in building this portfolio is to conduct a full U.S. trademark/service mark search. With the assistance of U.S. trademark counsel, companies should assess whether a particular brand name, slogan, or logo is available for use and registration in the United States. A thorough search should include research and analysis of pending and registered federal trademarks and service marks, state trademarks and service marks, common law marks, filings made pursuant to the Madrid Protocol, Internet domain names, and Web sites.

Competitors are likely to keep a close watch on marks used (or anticipated to be used) in a particular industry. Registration of a company's marks at USPTO.GOV, the United States Patent and Trademark Office Web site, should send a strong signal to competitors to avoid choosing a similar brand name likely to cause confusion in the marketplace. Other benefits include nationwide trademark and service mark priority rights, presumption of validity and exclusive rights to use

the mark in the United States, availability of 'incontestable' status after five years of continuous use, reliance by the USPTO upon a federal registration in rejecting a third party's application that is confusingly similar, ability to use the registration symbol '®' to give nationwide notice of trademark rights, potential availability of recovering treble damages and attorneys' fees in an infringement proceeding, and the ability to block the importation of infringing goods through the assistance of the U.S. Customs Service. The benefits of registration will likely outweigh the initial costs of obtaining the registration.

Enjoying the benefits of a United States trademark or service mark registration may not be possible if a Canadian company is unable to demonstrate its priority rights in a particular mark in the United States. Use of a mark in Canada does not automatically confer priority rights in the United States – therefore timing is everything. Trademark or service mark applications should be filed early in the development of the product or service.

Canadian companies seeking to file applications to register marks in the United States may base their applications on use (shipping goods into or advertising and rendering services in the United States), intent-to-use (based upon a bona fide intent to use the mark in commerce), ownership of a Canadian or other non-U.S. registration, or ownership of a Canadian or other non-U.S. trademark application (trademark priority is accorded provided that the U.S. application is filed within six months of filing the Canadian or other non-U.S. trademark application).

It is usually the case that a Canadian company with plans to expand into the United States will already own a Canadian trademark registration or a pending Canadian application for the same goods or services. Ownership of these intellectual property assets should be communicated to counsel in the United States before filing an application in the United States. Such information is helpful in determining the availability of basing trademark rights pursuant to Section 44 of the Lanham Act. Under this section, non-U.S. nationals may identify the non-U.S. application or registration, such as a Canadian application or registration, along with a statement that the applicant has a bona fide intention to use the mark in

commerce on or in connection with the underlying goods or services. The advantage to such a Section 44 filing is that a Canadian company need not prove use of the mark in the United States in order to obtain a United States registration. Moreover, dates of use or trademark specimens are not required at the time of filing. It is important to note that the mark must be used in commerce with or in the United States after the registration issues in order to maintain the registration. Failing to do so places the registration at risk for cancellation.

Another strategic advantage offered under Section 44 of the Lanham Act is the ability to claim trademark priority rights in the United States based upon an earlier filed application in another country under Section 44(d), provided the U.S. application is filed within six months of the filing date of the non-U.S. application. This earlier date could prove to be very helpful during trademark priority disputes with third parties with respect to priority rights in the United States. An applicant under Section 44(d) of the Lanham Act must still assert a bona fide intent to use the mark in commerce on or in connection with the underlying goods or services.

In the absence of Canadian or other non-U.S. applications or registrations, Canadian companies may also base their applications upon use in commerce or upon intent-to-use. Critical to brand development and expansion into the United States is the prompt filing of an intent-to-use trademark application when applicable. Under the intent-to-use system, no use need be made or shown in the United States at the time the application is filed. However, proof of use will be required to be filed after a Notice of Allowance issues. The Notice of Allowance can be expected to issue eleven or twelve months after the application is filed provided the USPTO has not issued an Office Action and third parties have not opposed the application. In addition, the Canadian company may seek extensions of time to prove use in commerce. Filing an intent-to-use trademark application requires the Canadian company to simply have a bona fide or 'good faith' intent to use the mark in commerce in connection with its goods or services. Priority in the mark can be obtained before outlaying considerable funds for advertising, marketing, and packaging. It is helpful to keep records consisting of corporate minutes, business plans, contracts, receipts or other evidence should the company be required, for example, during litigation enforcing its trademark rights, to demonstrate that it had a bona fide intent to use the mark in the United States when it filed its application with the USPTO.

From start-ups eager to enter the American market to companies that have successfully built brands that

have spanned borders worldwide, it is critical to have a trademark strategy in place now and for the future. Making the necessary trademark filings today will likely serve pivotal roles in future opportunities for licensing and franchising, combating infringing and gray market goods at the border, and providing the best level of protection for a company's valuable intellectual property assets.

Kenneth D. Suzan, an attorney in Hodgson Russ LLP's Intellectual Property & Technology Practice Group, focuses his practice on trademark litigation, trademark prosecution, Internet and new media law, and other intellectual property areas. Hodgson Russ attorneys advise Canadian clients on U.S. legal issues affecting cross-border business operations in the United States.



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Franchising in a Global Economy

Catherine Eckenswiller
Lawyer, Smart & Biggar LLP



To the casual observer it may not seem like international trade-mark licensing is a growth industry. However, one business style that is based on trade-mark licensing is booming. The franchise business is experiencing rapid growth; by some accounts, up to 15% each year. As popular franchises expand into different provinces and countries, franchisors find themselves encountering a variety

of different legal regimes governing business operations, consumer protection, trade-mark rights and, in some cases, franchising specifically.

In a typical franchise arrangement, a franchisor grants a franchisee a license to use a trade-mark in association with a business, and the franchisee undertakes to operate the business in accordance with a standardized format. As well, the franchisee usually agrees to pay fees to the franchisor. A franchise agreement usually deals with both commercial and intellectual property aspects of the business. In some jurisdictions, however, the franchise agreement alone may not set out all the terms governing the franchise arrangement. In Canada, Alberta and Ontario have passed legislation that directly governs franchise operations. This legislation establishes presale disclosure requirements whereby franchisors must provide a prescribed set of information to prospective franchisees including financial statements and cost estimates. A failure to provide this information enables the franchisee to rescind the agreement. Franchisors from different provinces or countries who are considering expanding into Ontario or Alberta will need to be aware of the obligations imposed by this legislation. While the remaining eight provinces do not have legislation specifically directed to franchising operations, there are a variety of different federal and provincial laws that govern business practices. As well, there are judicial decisions from several different provincial courts that impose additional obligations on franchisors, including a duty to act in good faith toward franchisees.

Several countries including the U.S., Mexico, France and Australia regulate the sale of franchises. When carrying on business in a foreign country, Canadian fran-

chisors must also be mindful of the fact that their trade-marks will be used in a different jurisdiction. Canadian trade-mark registrations are not enforceable in foreign countries therefore trade-mark applications should be filed in each country where the franchisor intends to commence operations.

In the United States, franchise arrangements are regulated at both the federal and the state level. Fifteen U.S. states, including New York, Illinois and California, have enacted franchise legislation that mandates presale disclosure of information to prospective franchisees. Most of these states require that disclosure documents be filed with a state registry, and some states have established a review process that is administered by state securities regulators. In order to simplify these multiple filing requirements, U.S. states have adopted a standardized disclosure document, known as the Uniform Franchise Offering Circular (UFOC). In addition to mandatory disclosure, several U.S. states have enacted so-called "relationship laws" that address various aspects of the franchisor/franchisee relationship. Typically, these relationship laws protect franchisees from termination, or non-renewal, of their franchise agreements in the absence of good cause. Each state's laws regarding franchises and other local business practices are somewhat different. Therefore Canadian franchisors intending to expand into the United States will need to familiarize themselves with the specific laws of the individual states where they intend to carry on business.

In addition to state law, the U.S. Federal Trade Commission has adopted a Franchise Rule which establishes mandatory presale disclosure of information to franchisees and has the full force of law in all states. The Federal Trade Commission has adopted its own disclosure document however it accepts use of the UFOC. The Federal Trade Commission does not require filing of franchise disclosure documents.

While many franchisors have experienced great success expanding into global markets, as with any business arrangement, participants must be aware of and take into consideration the local laws regarding business practices.

Catherine Eckenswiller practises in the Ottawa offices of Smart & Biggar. She can be reached at ceckenswiller@smart-biggar.ca.

KPIs for the Law Department

Richard G. Stock, fcis, c.adm., cmc
Partner, Catalyst Consulting



An anonymous CEO is quoted as saying, “I want the data that shows whether the resources spent by the law department are focused on the right priorities and generate value we can measure. Until I get that data, my best option is to keep pushing for lower costs.”

For decades, corporate and support functions such as legal, human resources, accounting and IT have escaped the scrutiny to ‘demonstrate’ value. Despite the pressure to deliver smarter-better-faster service, they have been allocated comparatively fewer resources over the years. In part, this is because they have not been readily identified with the products, programs and services which make the business run. At least not until recently.

Becoming an Asset

Comprehensive performance management programs are being introduced by corporations in every economic sector. These indicators and the programs they support are comprehensive because they are much more far-ranging than budget and other financial indicators. Shareholders in the private sector and stakeholders in the public and not-for-profit sectors want programs which reduce waste and which encourage all resources to be dedicated to the top priorities set by executive leadership. A recent case is worth re-telling because it reflects the transition of the legal function from a classic position of support to one which is likelier to add value.

A seven (7) member law department had its lawyers responsibilities aligned with the primary internal ‘clients’. Most of the lawyers had an area of legal speciality (labour, litigation, capital projects, etc.), But there had been turnover in the ranks in the last two years. Four months of time-keeping by all department members were used to allocate direct legal costs to internal departments/business units with a goal of zeroing out the legal budget at the end of the year. However, outside counsel costs were not

centrally budgeted and allocated. The law department did conduct a client satisfaction survey and achieved good results, but the survey was not annual. Finally, the law department reported corporately on only two indicators: number of logged hours and cost of inside counsel (per hour) compared to cost of outside counsel.

Demonstrating Performance

Some malaise lingered about whether the law department’s contribution was truly appreciated by the company. It was agreed that new performance indicators (KPIs) were needed to better reflect the efficiency and the effectiveness of the legal function. The corporation agreed but it required that the new ‘legal’ KPIs use the quadrants of the corporate framework: customer service, service levels, impact on (external) clients, and efficiency.

Several objectives were kept in mind in choosing the new KPIs for legal services. They had to be useable by other corporate services groups and not be unique to legal services. They had to be fairly easy to administer and lend themselves to benchmarking with other corporations, even those in other economic sectors. Finally, the KPIs were to feature the strategic and leverageable value of the legal function within the organization. The following KPIs emerged:

KPIs for Service Levels

- 1 Accessibility: The extent to which customers can readily reach legal counsel when required (measured on a scale of 1-5)
- 2 Turnaround: The extent to which customers receive all forms of legal counsel in a timely fashion (measured on a scale of 1-5)
- 3 Teamwork and Morale: The expression of overall satisfaction with work-life by members of Legal Services (measured annually using a scale of 1-5 and compared to corporation-wide and department baselines)

KPIs for Customer Service

- 4 Results: The extent to which planned results are attained by legal counsel (measured using a 5-point index)
- 5 Overall Satisfaction: The extent to which customers are satisfied with legal services from inside and outside counsel.

KPIs for Impact on (External) Clients

- 6 Impact on Clients: The extent of contribution on pre-selected strategic projects (measured on a 3-point scale)

KPIs for Efficiency

- 7 Cost of Legal Services: Total legal spend per primary corporate indicator (e.g. population, revenues, etc.) before charge backs and recoveries. Inside and outside counsel costs and disbursements are included.
- 8 Budget Performance: The extent to which approved budgets for total legal spend are met. (measured on a 3-

point scale meets at 1, beats by 5% at 2 and beats by 10% or more at 3. No points for exceeds budget).

Achieving a Balance

By using the new KPIs, the law department was able to abandon activity tracking. It was able to argue in favour of centralized control of expenses for outside counsel. It became necessary to achieve a greater involvement earlier on with its internal clients, and to learn to focus on the more significant priorities rather than trying to please everyone.

Finally, it began to achieve a better balance in its choice of initiatives: internal versus external clients, growth in the lawyers' involvement in strategic initiatives, and the sound management of legal expenses.

Richard G. Stock, M.A., FCIS, C.Ad., CMC is a partner with Catalyst Consulting. The firm has been designated the Preferred Supplier for Legal Services Consulting by both the CBA and the Canadian Corporate Counsel Association. He can be contacted at (416) 367-4447 or through the website at <http://www.catalystlegal.com>.

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