

focus

FMC VANCOUVER
September 2006



FRASER MILNER CASGRAIN LLP

IN THIS ISSUE

BIOMETRICS IN THE WORKPLACE – WHERE TO DRAW THE LINE?	5
“FAMOUS” TRADE-MARKS.....	6
MEDIATING AND SETTLING MULTI-PARTY DISPUTES.....	8
LEAKY CONDOS – THE RIGHTS OF INDIVIDUAL OWNERS.....	9
COMMON LEGAL MISTAKES MADE BY ENTREPRENEURS	10
INNOCENT ABSENTEEISM AND THE EMPLOYER’S RIGHT TO TERMINATE EMPLOYMENT.....	12
OIL MONEY FLOWING BOTH DOWNSTREAM AND UPSTREAM	13
A NEW BUSINESS VEHICLE - LIMITED LIABILITY PARTNERSHIPS	14
THE FEDERAL ACCOUNTABILITY ACT.....	15
SECOND LIEN SUBORDINATE FINANCING.....	16

PLUS

COMPLIMENTARY SEMINARS	3
SPEAKING ENGAGEMENTS.....	3
CONGRATULATIONS	4
NEW FACES.....	4



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that the *Strata Property Act* represented a complete code that exhaustively governed strata property ownership. The B.C. Court of Appeal's decision indicates that this is obviously not the case.

In addition to the strata corporation's statutory right to bring an action, the owner also has a right in common law. Since strata owners own common property directly, in proportion to their respective unit entitlements, and since the *Strata Property Act* does not explicitly take away this right, then individual strata owners have a common law right to sue directly for injury or damage to their interests in common property.

WHAT DOES THIS MEAN?

Until this decision is clarified on appeal or by amendments to the *Strata Property Act*, strata corporations and developers must be aware of the possibility of lawsuits brought by individual strata owners for work done on common property. The strata corporation, it seems, may no longer be solely responsible for bringing legal action.

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COMMON LEGAL MISTAKES MADE BY ENTREPRENEURS

By Eric Smith, FMC Ottawa

The entrepreneur's approach to legal issues is often similar to the general population's approach to physical health. Despite consistent warnings that an ounce of prevention is worth a pound of cure, statistics show that the majority of the general population fails to take simple steps that can help avoid serious health problems.



Similarly, many entrepreneurs ignore (or are not aware of) some of the most common, but avoidable, mistakes that can adversely affect the success of their businesses. This article highlights a few of the most common mistakes made by entrepreneurs in the early stages of the planning and operation of their businesses.

MISTAKE #1 OVERLOOKING DUTIES TO PREVIOUS EMPLOYERS

In many cases, an entrepreneur first conceives of his or her

new business while an employee of another business, and in some cases will even begin operating the business while still an employee. While there are obvious reasons for doing so (most notably to continue to earn a paycheck while planning the new business) failure to recognize the duties owed to his or her current or former employer can severely hamper the entrepreneur's new business venture.

A careful review of the entrepreneur's current or previous employment relationship, including any letter of hire, employment agreement or other documents signed by the entrepreneur, should be conducted to identify any restrictions that might affect the new business venture. Such restrictions may include:

- assignments of intellectual property rights conceived of or developed by the entrepreneur during the course of employment;
- obligations of confidentiality; and
- non-compete and non-solicitation covenants.

Even where no written agreement exists between the entrepreneur and his or her current or former employer, the common law recognizes certain duties which may apply to the entrepreneur, such as those relating to confidentiality and non-solicitation.

An entrepreneur must also be mindful of these restrictions when recruiting others – such as co-founders, employees or contractors. This is especially critical if a group of employees seeks to start a new business together, particularly if the departure of the group was not welcome news to the former employer.

If an entrepreneur intends to plan the new business venture while still an employee of another business, he or she must be careful not to use the resources of his or her employer for the benefit of the new enterprise. Similarly, the entrepreneur should avoid working on the new business during the hours in which he or she is expected to be performing work duties for the current employer.

MISTAKE #2 FAILING TO IDENTIFY AND DEAL WITH FOUNDER ISSUES

It takes time to plan a new business, and during this time, it is not unusual to seek the input of others. Some of these other individuals may act as casual advisors, while others may be recruited to be co-founders who will be expected to serve a long-term role in the operation of the new business.

Unfortunately, as in all relationships, the expectations of the parties might not be the same, and even when they are, may prove to be unfounded. Failure to clearly identify co-founders and their entitlements can result in a so-called “forgotten founder” reappearing at a critical time for the new venture (e.g., on the eve of a financing) claiming to have a stake in the business or ownership in the new ventures assets (e.g., intellectual property). Even where founders are clearly identified, problems can arise when one or more founders leave the business before making the anticipated contribution to its operation, and in doing so walk away with shares in the corporation that they have not “earned”.

For these reasons, it is important for an entrepreneur and those who assist in the planning of the new business to clearly identify the nature of their relationship. If these individuals will have a role in the conception or development of key assets, such as intellectual property, proper and timely written assignments of intellectual property rights to the new business should be obtained.

If it is intended that these individuals are to receive a stake in the new business (e.g., shares of a corporation formed to operate the business), the parties should consider implementing a vesting schedule pursuant to which the corporation will be entitled to buy-back all or a portion of such shares if the individual does not continue to provide services to the corporation for a specified period of time. In addition, restrictions on the transferability of such shares to third parties, as well as rights of first refusal and drag-along rights should be considered. These type of provisions may be included in a shareholder agreement entered into by all of the shareholders, or may be included in a share restriction agreement entered into between the individual shareholder and the corporation.

MISTAKE #3 FAILING TO PROTECT INTELLECTUAL PROPERTY

While intellectual property is most commonly thought of in the context of the information technology and bio-tech sectors, nearly all businesses are involved, to some degree or another, in the creation and use of intellectual property. These activities may be limited in number, such as the use of a trade-mark and the protection of confidential information, or may include the conception and patenting of inventions that represent almost the entire value of the business. Unfortunately, many entrepreneurs are unaware of the importance of intellectual property until it is too late and effective remedial action can no longer be taken.

While it is not necessary for entrepreneurs to become experts in intellectual property, and it is well beyond the scope of this article to discuss each form of intellectual property, an entrepreneur should have a sufficient understanding of intellectual property, and how it is protected, so that these important assets can be fully exploited.

In addition, entrepreneurs should understand how co-development and other commercial relationships might affect the business’ right to use intellectual property. Some of the areas of concern we most often encounter when advising entrepreneurs are:

- the rights of academic institutions to inventions and works resulting from academic research performed for, or in conjunction with, the business;
- rights of government entities, or restrictions on use, resulting from financing and other government assistance;
- rights of other persons resulting from contracting or consulting services provided by individuals involved in the new business; and
- the use of inventions or works that were conceived of or developed jointly with one or more other parties.

MISTAKE #4 NOT SEEKING TIMELY AND EXPERIENCED LEGAL ADVICE

Stating that entrepreneurs should seek out experienced legal counsel in a timely manner may be self-serving, but that does not make it untrue. Many of the pitfalls that entrepreneurs fall into can be avoided if the entrepreneur seeks out information and advice before problems arise. In addition, while financial resources for startup companies are nearly always tight, the cost of proactively dealing with legal issues is often much less expensive than the cost of remedial actions needed to correct problems that could have been avoided.

The key to receiving proper information and advice is to find counsel who has experience working with entrepreneurs and, ideally, experience in the sector in which the new venture will be operating. Experienced counsel will be able to help the entrepreneur focus on those issues that should be addressed immediately, and will also be able to identify issues that should be addressed in the future. In addition, experienced counsel will often have contacts, such as sources of financing or industry contacts,

which can be of assistance to the new venture.

The above are just a few examples of common legal mistakes made by entrepreneurs when planning and operating their businesses. To read more about these topics, as well as many others, please visit www.fmc-law.com/startups where you can download a copy of FMC's publication: *Technology Startups: A Practical Legal Guide for Entrepreneurs, Executives and Investors*.

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INNOCENT ABSENTEEISM AND THE EMPLOYER'S RIGHT TO TERMINATE EMPLOYMENT

By Carman Overholt, Q.C., FMC Vancouver

The law has always recognized the right of an employer to terminate an employment relationship in the labour relations context for what is described as innocent or non-culpable absenteeism. Excessive absenteeism has been recognized as a legitimate and lawful basis for termination of the employment relationship. Arbitrators have held that an employer should have the authority to replace an employee where the employee is unable to work for reasons that are not his or her fault but are outside of his or her control, such as permanent disability.



In determining whether innocent absenteeism may be the basis for termination of employment, Arbitrators have considered whether an extended period of absence is excessive in light of the employment record and the circumstances. Secondly, Arbitrators determine based upon the evidence whether the employee is capable of regular attendance in the future. If it is determined that the absence is excessive and that the employee is unlikely to return to work, Arbitrators have upheld the Employer's decision to terminate employment.

Rod MacRae worked for Interfor for approximately 28 years. In 2002, Mr. MacRae was diagnosed with ALS, an extremely serious illness. He was in receipt of long-term disability benefits and Canada Pension Plan benefits commencing in October 2001. Interfor's Squamish Mill was experiencing severe economic problems and as a result, Interfor decided to close the Mill. It never

re-opened. Interfor entered into a voluntary severance agreement with the Union representing the Employees at the Mill. In order to limit the financial cost of closing the Mill, Interfor terminated the employment of Mr. MacRae and 17 other employees for non-culpable absenteeism just prior to entering into the Agreement with the Union under which it agreed to pay voluntary severance to the Employees at the Mill.

A grievance was filed by 18 employees of Interfor, including Mr. MacRae, all of whom were dismissed for non-culpable absenteeism 11 days prior to the Voluntary Severance Agreement being entered into with the Union. Arbitrator Stan Lanyon held that the Employer was justified in terminating the employment of the Employees in light of the fact that they had been absent for extended periods of time and would not in all likelihood return to work in light of the nature of their disabilities. As a result, the Arbitrator dismissed the Grievance.

Mr. MacRae did not accept the Arbitrator's decision and filed a complaint with the BC Human Rights Tribunal. The Tribunal in *MacRae v. International Forest Products Ltd.*, [2005] B.C.H.R.T.D. No. 462 held that the decision to terminate the employment relationship was discrimination on the basis of physical disability. The Tribunal also held that the Employer had not established a bona fide occupational requirement for the decision to terminate. The timing of the termination demonstrated that the intention of the Employer was to avoid having to pay severance costs to the disabled employees. The Tribunal found that the Employer had not acted in good faith and in the result, Mr. MacRae was awarded the severance paid to non-disabled employees, which in his case was approximately \$64,000. In addition, Mr. MacRae was awarded \$12,500 in compensation for the injury he suffered to his dignity, feelings and self-respect. Interfor did not appeal the decision of the BC Human Rights Tribunal.

Although in theory dismissal for innocent absenteeism continues to be lawful, a careful assessment of the impact of human rights legislation and the duty to accommodate prior to dismissal is necessary. The specific reasons and contributing factors leading to the decision will be subject to scrutiny in the legal proceedings that may arise in these circumstances.

The common law doctrine of "frustration of contract" is available in the non-union context where the evidence shows that the employee is permanently disabled and will not be able to perform the essential duties of the position in the future. A long period of

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