Toronto Law Journal

Family Business Planning

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Asset Protection

Lessening the possibility of family conflict when faced with family business succession planning can start with proper communication. An individual who is able to clearly communicate relevant intentions with respect to a family business to business partners and family members can assist in preventing conflict in this regard. Business owners may also wish to consider a number of strategies to facilitate business succession to limit any disruption in the business that may result from their retirement, incapacity, or death.

Insurance is the most common tool in asset protection planning in Canada. Life and/or disability insurance can be used to satisfy the liabilities (including tax liabilities) of a business in the event of the incapacity or death of a business owner in a way that facilitates the succession of a business.

Inattention to asset protection planning as part of the estate planning process may frustrate a succession plan. If the tax liabilities on the deemed disposition of the business interest exceed the liquid assets available to an estate, the succession of the business may not be possible, and its dissolution may be required.

A number of factors — such as whether there is an intention for the owner's interest to be bought out in the event of his or her death, whether insurance is intended to benefit beneficiaries who are not receiving an interest in the business (and who may wish to otherwise challenge the gift of the company that has the effect of disinheriting them), and whether additional paid help will be required by the business following incapacity or death — should be considered in determining the extent of insurance required.

A number of options exist with respect to the structure of a disability or life insurance policy intended to protect the assets of a business. Any of the surviving family members, the deceased's estate, the company itself, or a surviving shareholder can be the beneficiaries of such a policy. The insurance policy can be owned by the business owner or by the corporation itself.

Succession Planning

At the very minimum, the individual managing a business should create an alternative signing authority on their business accounts in order to prevent barriers restricting the activities of the business in case of emergency. Using the example of a law firm, the managing partner should provide a licensed lawyer or paralegal signing authority for the firm's bank accounts, including its trust account, in order to ensure that client and firm resources are not rendered inaccessible

by the unexpected absence of the partner. It is important to keep clear records and files in order to make the transition easier in the case of emergency or planned succession.

With smaller businesses, one of the easiest ways to pass the business on is by orchestrating a buy-out between the incoming owner and the original owner. A buy-out that is planned over an extended period of time may have fewer tax consequences than an immediate buy-out. The use of a promissory note payable over a number of years may also assist in limiting the taxable capital gain resulting from the sale of a business in a given year.

If the family business is a partnership, the most common mechanism for succession is in accordance with the terms of a partnership agreement, which specifies how the division of the business will be conducted upon the dissolution of the partnership or the retirement, incapacity or death of one partner. If the business is operated through a corporation, a shareholders' agreement may accomplish the same objectives. Where no such agreement exists, the terms of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (or provincial equivalents) and provincial partnership legislation may apply instead.

An "estate freeze" is another option with respect to the transfer of corporate business interests to family members or the future sale of a business. Estate freezes can assist in transferring future increases in value of a business to family members, who will receive the business interest. While estate freezes can be complex and expensive, they can be utilized to facilitate business succession and avoid the issue of insufficient funds for the next generation to purchase the interest, while spreading tax liability on the disposition of the business over several years.

Inattention to one's business succession plan may result in unintended consequences, such as the failure of the business during a time when no one is authorised to effectively manage it, or the sale of the family business if liquid assets are required.

Transfer of Partial Interest

In terms of valuing interests in companies, the rights associated with different classes of shares and different proportions of shares differ and, accordingly, the value of any given share in a company may not be the same as others in respect of which the shareholder can exert more control. The fair market value of a minority interest in a corporation in Canada, even when considered on a pro-rata basis, is worth less than the same number of shares that are part of a majority interest.

The term "minority discount" is used to refer to the difference between the fair market value of shares and their pro-rata value. The reduced market value results from the inability of a minority shareholder to unilaterally elect the majority of directors, to direct the payment of dividends, and to make most major decisions affecting the corporation.

Conclusion

The importance of planning for family business succession should not be underestimated. Legal, tax and financial advisors play a key role in ensuring the smooth transition, sale and/or windup of a family business, and should be consulted as part of a global estate plan.

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COVID-19: The Shift to a More "Flexible" Securities Market

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It is no surprise that COVID-19 has created unprecedented challenges to companies of all sizes. This new "normal" has taught us many lessons, including the importance of being agile in the market, as well as the need for businesses and stakeholders to effectively prioritize many demands at once. Among the demands that companies have been faced with include cash flow challenges, inventory demands, customer and stakeholder relations, and continuing to meet their continuous disclosure obligations, operations and future prospects. The purpose of this article is to discuss some of the approaches that have been taken in response to COVID-19 by securities regulators and issuers. Looking at the different approaches taken in response to COVID-19 can help market participants be more prepared the next time an "unprecedented event" arises.

Guiding Securities Principles

It is important to consider regulations in light of market practice and conditions. In particular, Canadian securities laws are grounded on the following objectives:

(a) to provide protection to investors from unfair, improper, or fraudulent practices;

(b) to foster fair and efficient capital markets and confidence in capital markets; and

(c) to contribute to the stability of the financial system and the reduction of system risk.

These grounding principles have remained steady throughout COVID-19.

The Stringent Approach Does Not Work: Guidance Regarding a Management Imposed Cease Trade Order Compared to the 45-Day Blanket Relief

The Canadian Securities Administrators (the "**CSA**") first approached the pandemic with a more stringent response. This is suggested in the CSA's article dated March 16, 2020, which encouraged issuers who anticipated that they would not be able to file their annual or interim financial statements on time to apply for a management cease-trade order. The negative impact of imposing a management cease trade order on an issuer may include that it could become more difficult to attract new directors and officers, as well as it may be poorly received by current or potential investors. As such, market participants were relieved to learn that only two days later (on March 18, 2020) the CSA announced that it would provide blanket relief for a 45-day extension for periodic filings that issuers are normally required to make (including financial statements, management's discussion and analysis, management reports of fund performance, annual information forms, etc.). Issuers who chose to rely on this exemption and

that complied with the conditions would not need to file applications for management cease trade orders, as they would not be noted in default. This reflects both the ongoing impact that COVID-19 is having on businesses, as well as the adaptive and flexible approach that regulators have taken throughout the pandemic.

Although the relief was temporary, it is expected that the flexible approach taken by the securities regulators throughout COVID-19 will last. In particular, and even before COVID-19, there was significant attention being focused upon reducing the regulatory burden. It is expected that this will continue, as the marketplace continues to adapt and transition from its stringent approach to better balance the needs of securityholders and issuers.

The More Flexible Approach: Companies Adapt to Virtual Meetings

Another practice that has erupted as a result of COVID-19 is the adoption of virtual shareholder meetings. In particular, Broadridge reported that over 80% of the companies who hosted virtual shareholder meetings this year did so for the first time. Further, Broadridge reported that of the virtual shareholder meetings held in the first half of 2020, 20% were held by large-cap companies, 27% were mid-cap companies, and 53% were small-cap companies. This suggests that companies of all sizes are transitioning to virtual meetings, with a disproportionate number being small cap-entities.

It is expected that virtual meetings will become more commonplace, even after circumstances revert back from the new "normal". This can be attributed to the benefits that issuers have experienced, including that virtual meetings are generally more cost-effective, attendance has generally increased (as securityholders can login irrespective of location), and that technology can facilitate shareholder engagement (*i.e.*, demonstrations and diagrams, etc.). Despite this, there are drawbacks to virtual meetings, many of which may depend on the form of meeting (*i.e.*, whether the meeting is audio-only or hybrid), including that it may be difficult to determine who is speaking or to engage or interact with others during the meeting. It is expected that as the market continues to develop and individuals continue to work from home, the ability to attend and participate in meetings virtually will become more commonplace. The quick shift to virtual meetings in the market at large also suggests that companies are open to new alternatives and more flexible approaches when engaging with shareholders.

Combining the Approaches: Forward-Looking Statements Reflect the Specific Needs of the Issuer with the Market

Securities laws require that reporting issuers who disclose forward-looking information must identify material risk factors that could cause actual results to differ materially from the forward-looking results. Such statements should not be "boilerplate" and should be presented in a user-friendly manner. Risk factors that we have seen as a result of COVID-19 include mention about how an issuer's actual results and financial condition could differ materially from the statements, including as a result of the pandemic, the impact of the pandemic on the

issuer's employees, governmental restrictions and orders, and market and liquidity risk, among others.

It is important to recognize the approach that is taken when drafting such statements to help ensure that issuers properly assess the circumstances applicable to the issuer's business. Issuers are therefore encouraged to start by focusing on the considerations that may impact upon forward-looking information, rather than the statements themselves. Such considerations include: (1) how might the issuer's day-to-day operations be impacted and by what; (2) how might disruptions and volatility in the global capital markets adversely impact the issuer's capital; (3) how might the issuer's supply chains be impacted; (4) how might customers respond and can a customer fulfill its obligations to the issuer; and (5) how the action or inaction of major customers or service providers can impact the issuer's business. By focusing on the methods used to arrive at forward-looking information, rather than the statements themselves, issuers will be able to apply these principles to other unprecedented events if and when they arise and help arrive at more meaningful disclosure.

Next Steps

Reflecting on the various approaches taken by market participants and how they were received during COVID-19 can provide insight to current and future trends. Among those anticipated trends is a more "flexible" securities environment, whereby market participants will be more likely to test out new mechanisms and techniques, while still adhering to the guiding principles of securities laws. Understanding this can also better prepare market participants for future "unprecedented" events if and when they arise.

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Mr. Sub Franchisees Meat Disappointment in Supreme Court of Canada Decision; Product Manufacturers Do Not Owe a Duty of Care to Commercial Intermediaries

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Introduction

In *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, the Supreme Court of Canada rendered its long-awaited judgement on whether a product manufacturer owes a duty of care to commercial intermediaries, in the absence of a direct contractual relationship. In this case, the Supreme Court considered the duty of care owed by Maple Leaf Foods to franchisees of the Mr. Sub franchise system in the context of the 2008 listeria outbreak involving Maple Leaf Foods meats.

In a close 5:4 decision, the Supreme Court held that a manufacturer's breach of its duty to supply products safe for human consumption does not entitle commercial intermediaries, in this case third-party Mr. Sub franchisees, to recover damages from the manufacturer for pure economic loss or reputational injury.

The Principles of the Duty of Care

The basic legal principles applicable to this case stem from the British case *Anns v. Merton London Borough Council*, 1978 A.C. 728 ("*Anns*"), which was adapted in Canada in *Cooper v. Hobart*, 2001 SCC 79 ("*Cooper*"). *Anns/Cooper* recognize that in certain relationships, there is a duty of care, including between lawyers and their clients, doctors and their patients, manufacturers and their consumers, etc.

However, if the plaintiff is alleging a novel duty of care, the *Anns/Cooper* test lays out factors to consider in determining whether a duty of care exists. The *Anns/Cooper* test is:

- Step 1 – Was the harm that occurred the reasonably foreseeable consequence of the defendant's act? Do the parties also share a proximate relationship?

- Step 2 – Are there any policy reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?

Background Facts

Mr. Sub was in a contractual relationship with Maple Leaf Foods and required all of its franchisees to purchase deli meats exclusively from Maple Leaf Foods. However, Mr. Sub franchisees did not directly purchase products from Maple Leaf Foods. Instead, franchisees placed their orders through distributors, who would provide them with Maple Leaf Foods products.

Listeria is a foodborne bacteria found in improperly processed deli meats. It can cause serious harm when consumed, including death. In August 2008, Maple Leaf Foods announced that some of their meats might have been exposed to Listeria and recalled two of its deli meat products due to Listeria. Neither of these two products were purchased by the franchisees. A few weeks later, Maple Leaf Foods expanded the scope of its recall to cover over 191 products, including two products which were purchased by the franchisees. The products recalled did not involve any confirmed cases of Listeria.

Neither Mr. Sub, nor any of its customers, reported any confirmed Listeria cases at any time. However, due to the wide-spread publicity received by the Maple Leaf Foods recall, customers drew an association between Maple Leaf Foods and restaurants such as Mr. Sub. Moreover, as a result of the recall, Mr. Sub franchisees were left without the two recalled products for a period between six and eight weeks.

The franchisees launched a class action. The franchisees highlighted Maple Leaf's negligence, asserted that they were owed a duty of care, and claimed that the widely-publicized recall resulted in a loss of sales, profits, and goodwill for the franchisees. They alleged that the Listeria outbreak caused a negative impact on customer perception of Mr. Sub and that customers stopped frequenting Mr. Sub as a result of Maple Leaf Foods' actions. The franchisees claimed damages for economic losses arising from the reputational harm they allegedly experienced from being publicly associated with Maple Leaf Foods in the aftermath of the Listeria outbreak.

When the claim was commenced, there was no established duty of care between manufacturers and retailers. As such, the court was forced to consider whether there was an analogous duty of care, and if not, whether this was a relationship where a novel duty of care could be founded.

Motions Judge's Decision

At first instance, the motions judge found that the parties were in a proximate relationship, and that it was reasonably foreseeable that the sale of a product that could injure a consumer would harm the franchisees' reputation and cause economic harm. Maple Leaf appealed the ruling.

The Ontario Court of Appeal

In contrast to the motions judge, the Ontario Court of Appeal found that there were no analogous duties of care and, further, that that the *Anns–Cooper* test did not provide for one. The appeal was allowed, and the lower court's decision was overturned. The Ontario Court of Appeal held that the motions judge was correct to find a duty of care for manufacturers supplying safe products to customers, but was incorrect to extend its scope as covering subsequent reputational loss and damages for the retailers.

The Supreme Court's Decision

Writing on behalf of a narrow majority, Martin and Brown JJ. emphasized that it is difficult, but not impossible, to assert the protection of pure economic interests. The court questioned whether the nature of the relationship between the parties was one where it would be just and fair to impose a duty of care.

The franchisees relied on two categories of claims for economic losses in which the requisite qualities of closeness and directness were recognized by the Supreme Court: negligent misrepresentation or negligent performance of a service, and negligent supply of shoddy goods or structures.

In regards to the claim of negligent misrepresentation or performance of a service, the majority held that Maple Leaf Foods' representations were made to consumers of their food products, "with the purpose of assuring [consumers] that their interests were being kept in mind", and that the representations were not made to protect the commercial interests of intermediaries such as Mr. Sub or its franchisees. Maple Leaf Foods had warned, and the majority seemed to concur, that if there was a duty of care in this relationship, Maple Leaf Foods would be exposed to the spectre of unlimited liability.

Regarding the claim of negligent supply of shoddy goods, the majority found that the food products did not present any real danger to the franchisees. Moreover, once Maple Leaf Foods prematurely recalled the deli meats, it removed any real danger that could have been posed to consumers.

In arriving at this decision, the majority emphasized that the parties could have opted to protect themselves against this type of loss through contract. The franchisees chose to operate as a franchise, and as a result, they were not contractually linked to Maple Leaf Foods directly. The court recognized that the franchise model has strategic advantages and disadvantages, and that this was one of the potential disadvantages. If the franchisees wished to mitigate the potential losses, franchisees should have purchased commercial liability insurance that pays for unforeseen losses of business. Moreover, the majority stated that it is not the court's place to intervene in a contractual relationship that two independent actors with legal advice had

chosen to enter into, and to reconfigure that relationship. A finding of a duty of care in this case would undermine the contractual framework that the parties chose.

The Dissent

Karakatsanis J., writing for the minority, would have found that Maple Leaf Foods owed a duty of care to the franchisees, as they relied on Maple Leaf Foods to supply safe products for their businesses. The minority's analysis concluded that in this case, while there is no prior established duty of care or an analogous duty of care, it would have been appropriate to create a new category of claim.

The minority wrote that the loss incurred by the franchisees was in fact a reasonably foreseeable loss, as Mr. Sub is primarily a deli meat restaurant and had an exclusive supply agreement with Maple Leaf Foods.

The minority believed that the plaintiffs were not actually able to account for this risk and enter into contractual agreements to protect themselves. The dissent emphasized a power imbalance that existed in this relationship, where franchisees could only contract with their franchisor. Moreover, franchisees generally cannot negotiate their agreements with the franchisor. As such, the franchisees were vulnerable throughout their business dealings. They were also dependent on Maple Leaf Foods, due to Maple Leaf Foods' exclusive supplier agreements with Mr. Sub, which the franchisees could not renegotiate or re-write. Moreover, there was a proximate relationship in this case, as Mr. Sub provided the franchisees with their own customer service hotline.

As such, the dissent would have held that Maple Leaf Foods owed the franchisees a duty to supply them products safe for consumption.

Implications for Franchise Systems

Overall, this decision will significantly impact product liability laws in Canada. In franchise law, this decision will be welcomed by franchisors and their suppliers, as it makes it more likely that franchisors may enter into favourable supply contracts, as there will be no direct liability by the suppliers to franchisees.

However, in many franchise systems, franchisees' suppliers may in fact be related corporations of the franchisor, and in those relationships, it is unclear whether this analysis would still apply.

Moreover, if franchisees suffer reputational or economic losses, those losses would ultimately affect the franchisor's finances and business policies as well. As such, it would be prudent for franchisors to ensure all suppliers they contract with are adequately vetted.

Franchisees, on the other hand, will likely be more cautious when entering into new agreements with a franchisor. New franchisees may seek more protections when negotiating contracts with franchisors or might have to find new insurance for unforeseen business losses. In line with a franchisor's duty of good faith, franchisees may also ask for more flexible supply arrangements, especially in situations where the franchisor's preferred supplier cannot deliver the products required in a timely manner.

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Most Accused Persons are "Special" When It Comes to Bail

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Accused persons are presumed innocent, but unless the police or the Crown consent to their release, an accused person must participate in a hearing to determine whether or not they should be allowed to reside in the community pending the determination of their charge. In the past, this bail hearing usually took place within 24 hours of the accused's arrest (as was expected by section 503 of the *Criminal Code*), unless they needed more time to prepare their plan of release. Today, bail hearings for many accused are regularly adjourned for days, if not weeks, against their wishes, for administrative reasons. These administrative reasons have resulted in an entirely new procedure for "special" bail hearings, designed entirely for the benefit of the Crown and not the accused.

The "Special" Bail Hearing Procedure

A "special" bail hearing is a label that the Crowns give contested bail hearings that they believe would take two hours or more of court time. As a result of the amount of time required, the bail hearing needs to be scheduled in advance and cannot take place within 24 hours of the arrest. Initially, any serious indictable offence involving violence or specifically those involving a firearm would fit this criterion from the perspective of the Crown. Over time, matters in which more than one surety was being proposed and those that included electronic monitoring were also being labelled "special" by the Crown.

This label of "special" by the Crown cannot be contested by the defence. It automatically results in an extensive administrative process being triggered. In general, the following process would occur:

1. A special bail hearing conference call between the Crown, defence and Justice of the Peace would need to be scheduled by e-mailing the trial coordinator.
2. During that conference call, the time estimate of the special bail hearing would be determined.
3. The defence and Crown would e-mail the trial coordinators, who would offer available dates.

More often than not, the dates offered for the special bail hearing will be days later or the following week. The hearing resembles a trial. The Crowns (in general) refuted that COVID-19 is a factor that weighs in favour of release. They collectively drafted an "Informational Note" that they tendered at almost every bail hearing in the months following the initial lockdown in

March 2020 as evidence that inmates in jails are not at a heightened risk of contracting COVID-19. In response, defence counsel collectively obtained an affidavit from Dr. Orkin, which they tendered as evidence to contradict the Crown's "Informational Note".

The litigation of the COVID 19 issue only prolonged the "special" bail hearing. Months into the pandemic, the COVID 19 issue has been established in the jurisprudence. The need for litigating this issue has dissipated in most cases; however, these bail hearings are still being delayed, providing time for the police to prepare extensive disclosure prior to the bail hearing. If defence counsel does not consent to an enhanced synopsis or additional summary of evidence the Crown seeks to admit, the Crown will call the police officers as witnesses, which only lengthens the hearing, at the expense of the accused's liberty.

Timely Bail — *R. v. Reilly*, 2020 SCC 27

The Supreme Court of Canada recently dealt with the issue of timely bail in *R. v. Reilly*, 2020 SCC 27. Mr. Reilly had been arrested and held in police custody in downtown Edmonton for 36 hours before being brought before a justice for a bail hearing. Prior to trial, defence filed a *Charter* application alleging breaches of sections 7, 9, 12, and 11(e), the right not to be denied reasonable bail without just cause. At the start of the application, the Crown conceded that there had been a breach of section 503 of the *Code* and that Mr. Reilly's sections 7, 9, and 11(e) *Charter* rights were violated. The Honourable Judge R.R. Cochard held that the evidence reflected a "systemic and ongoing problem" whereby "the state has abrogated its duty to its citizens" and imposed a stay of proceedings.[1]

The Crown appealed the stay of charges. On appeal, Justice Slatter set the stay aside and returned the matter to the Provincial Court for trial. Justice Slatter held that an individual remedy for the breach of Mr. Reilly's Charter rights can be crafted at the conclusion of the proceedings.[2] Mr. Reilly appealed this decision.

On October 13, 2020, the Supreme Court of Canada heard Mr. Reilly's appeal and Justice Brown delivered a unanimous oral judgment on that same day, allowing Mr. Reilly's appeal and restoring the stay of proceedings. Justice Brown specifically included paragraph 63 of the Honourable Judge R.R. Chochard's reasons in his oral judgement, citing "that the breach of s. 503 of the *Criminal Code,* R.S.C. 1985, c. C-46, was an instance of a systemic and ongoing problem that was not being satisfactorily addressed".[3]

"Special Delays" and Defence Counsel Recourse

The Supreme Court did not address "special" bail hearings specifically in *Reilly*; however, they did reinforce the fundamental nature of an accused person's right to a bail hearing within 24

[1] *R. v. Reilly,* 2018 ABPC 85 at para. 63.
[2] *R. v. Reilly,* 2019 ABCA 212 at para. 60.
[3] *R. v. Reilly,* 2020 SCC 27.

hours. An accused person superficially being brought before the court within 24 hours of their arrest does not fulfil their legal right if they are prevented from having their bail addressed for administrative reasons against their will. To solve the problem, the courts must send the message to Parliament that there are consequences to the prosecution of crime if bail is not addressed within 24 hours. Only then will resources be provided to the criminal justice system so that bail hearings can take place within 24 hours if requested.

Defence counsel's only recourse to the problem of delayed "special" bail hearings is a Habeas Corpus application. To defence counsels' misfortune, these are not normally funded by Legal Aid Ontario. They require a lot of preparation including a factum, book of authorities, and application record mirroring that of a section 11(b) application due to the correspondence that needs to be documented. When a Habeas Corpus application is brought in the Superior Court of Justice, the Crown in the past has responded by obtaining an earlier date for the special bail hearing, sometimes the very next day.

Concluding Thoughts

In this new administrative process for special bail hearings, only the Crown benefits from the delay. Duty counsel are not accustomed to running these lengthy bail hearings for multiple matters with a limited ability to properly prepare potential sureties. Private defence counsel are paid a total of two hours (on Legal Aid) no matter the length of the hearing. Many accused persons that fall into the "special" bail hearing category are prevented from running a bail hearing for days after their arrest. When they have their bail hearing, they have the vast resources of the state directed at ensuring their continued detention — they are just that special.