



AYLESWORTH LLP
BARRISTERS & SOLICITORS

The Importance of Maintaining Accurate and Up-to-Date Corporate Records

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LEGAL ALERT

PROTECTING OFFICERS AND DIRECTORS FROM PERSONAL LIABILITY FOR CORPORATE ACTS

This bulletin is to remind all senior executives and business managers of a key element of daily business conduct that is crucial for protection of the personal assets of the owners, managers and signing officers of limited liability corporations. The outcome of a recent British Columbia Supreme Court case serves as a reminder of what happens if one forgets the basics.

THE CASE

The facts of the case are common and every day (Mitchell v. Consolidated Technologies Inc., December 1, 2000). A company was incorporated under the laws of British Columbia as “430862 BC Ltd.”, but as is commonly the case, the business was carried on under a properly registered “business name”, Pacific Data Net Canada. Two contracts providing for delivery of bulk long distance telephone services were signed in the name of “Pacific Data Net Canada” followed by the signature of the president with the title “President” shown. At trial (later confirmed by the British Columbia Court of Appeal) the Court found Mr. Mitchell, the president, to be personally liable for failure to deliver on these contracts.

Why? At no point had the contract shown that “Pacific Data Net Canada” was a limited liability company.

The Court pointed out that unincorporated businesses have presidents and at no time was the other party put on notice that they were dealing with a limited liability company.

THE LESSONS

The lessons are three fold: (i) an officer or director must ensure that any contract signed in his or her corporate capacity shows on its face that he or she is signing on behalf of a limited liability company; (ii) signing as an officer or director is not sufficient to limit one’s personal liability; (iii) the use of a company’s operating name without reference to the fact of that business being a limited company is problematic.

THE LAW

Ontario’s legislation is nearly identical to that in B.C. A business corporation company here must have the words “Limited”, “Incorporated” or “Corporation” (or their short form or French equivalents) as part of its legal name (Section 10(1) of the Ontario Business Corporations Act (the “OBCA”). Section 10(5) of the OBCA further provides that the full legal name must be used on all “contracts, invoices, negotiable instruments and orders for goods or services issued or made on behalf of the corporation”.

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In modern business it is often the case that businesses dealing with the public operate under names (and in many cases, several names), other than their legal name. Such names may be registered as “Business Names” under the Ontario Business Names Act or as full registered trade names under federal Trade Mark legislation.

CONCLUSION

In short, the name of the corporation as it appears in its current Articles of Incorporation must appear on key business documents. While it is not legally necessary to have it appear on purely promotional material (cards, brochures, advertisements), we believe it is prudent to do so. In most cases, full corporate names can be displayed without diminishing the branding and marketing objectives of the business. The fundamental rules however, are clear. When one considers the overreaching objectives of legislatures to protect the public, they are also necessary. From that perspective the reasoning of the BC court is valid.

As in business generally, the explosion of the use of names and the value of the goodwill and intellectual property associated with names has produced a fast changing (and at times confusing) landscape for the busy executive.

QUESTIONS

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