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ROSSITER
BUSINESS LEGAL ADVISER

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This resource is a practice-oriented how-to-guide to business transactions. It features commentary, materials and precedents covering the buying and selling of a business; the family trust; shareholders' buy-sell agreements; Investment Canada; tax implications of a business purchase/sale; incorporation; executive compensation; and employment law. It also refers to pertinent sections of the *Income Tax Act* and Interpretation Bulletins.

This release features updates to the case law and commentary in the following Chapters: Chapter 1 (Choice of Business Form), Chapter 9 (Employment Law), and Chapter 11 (E-Business).

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Highlights:

- **Choice of Business Form—Corporation—Shareholders—Family-Run Company—Gift of Shares by Majority Shareholder to His Children—Whether Revocation of Gift—Whether Further Gift Donatio Mortis Causa Prior to His Death—**The gift of shares by the majority shareholder to his two daughters in a family-run company, as evidenced by a director's resolution, and the share register, was not revoked by an unsigned handwritten note. Moreover, there was not a gift to the son of the father's shares *donatio mortis causa* as his share certificates were not physically delivered to the son. In this case, SL claimed that his deceased father intended for him to have control over CT Inc. and its profits, supported by a handwritten document from February 2019. SL also sought to establish that his sisters, Susan and Cheryl, were not shareholders of CT Inc. and requested financial adjustments related to estate distributions and property rents. Susan and Cheryl counterclaimed for an accounting of funds of the amount of $348,811 that SL allegedly took from CT Inc. since their father's death, asserting his fiduciary duty as an estate trustee. Susan and Cheryl challenge SL's claims of directorship and ownership in CT Inc., citing a lack of formal documentation and their exclusion from corporate decisions. There was also a dispute whether Susan and Cheryl should be paying rent for the properties owned by the father that they were occupying. SL brought an action seeking declarations regarding his role and ownership in CT Inc., as well as issues with property management. SL's application was dismissed except for the claim for occupation rent payable to the father's estate, the counterclaim of Susan and Cheryl was dismissed.

  SL's position was that the father revoked the gift of shares he had previously given to Susan and Cheryl, and that his intention was to give all the shares of CT Inc. to SL. Donors were not able to retract gifts unless they had retained an express right of revocation: see *Pecore v. Pecore*, 2007 SCC 17 (S.C.C.), at para. 56; and *Berdette v. Berdette*, 1991 CarswellOnt 280, 47 O.A.C. 345 (Ont. C.A.), leave to appeal refused 1991 CarswellOnt 6202 (S.C.C.), at para. 18. SL relied on the 2019 handwritten document—specifically, the statement that "My children Cheryl and Susan are not a shareholder in Cardinal and not entitled to payout"—in support of his argument that his father revoked the shares given to Susan and Cheryl. However, the court found it was only a copy of the handwritten document was notarized, but that the document itself was not signed in front of witnesses or a Notary Public. The court accepted the argument of Susan and Cheryl that, at its highest, the handwritten document constituted a type of "power of attorney" document respecting the operation of CT Inc. in the event that the father became ill or incapacitated. It did not speak to what happened upon his death. The court found it was completely ineffective for the purpose of revoking the shares of Susan and Cheryl. The evidence supported that the father made a valid gift of one (1) common share each to Cheryl and Susan as well as SL. The gift of the shares was set out in the Directors' Resolution, dated December 23, 1996, and the Shareholders' Register was amended to reflect the gift of the shares.

The father retained the remaining 97 common shares in CT Inc. It was SL's position that he owned his father's shares on the basis that his father gifted him the shares *mortis causa*. In the case of *Brown v. Rotenberg*, 1946 CarswellOnt 48, [1946] 4 D.L.R. 139, [1946] O.R. 363 (Ont. C.A.), at para. 8, Laidlaw J.A. summarized the law on *donatio mortis causa* as follows:

> It has been said that 'for an effectual *donatio mortis causa* three things must combine: first, the gift or donation must have been made in contemplation, though not necessarily in expectation, of death; secondly, there must have been delivery to the donee of the subject-matter of the gift; and thirdly, the gift must be made under such circumstances as shew that the thing is to revert to the donor in case he should recover': *per* Lord Russell of Killowen C.J. in *Cain v. Moon*, [1896] 2 Q.B. 283 at 286

The court found that all of the essential elements required for a valid *donatio mortis causa* were not present in this case. The father was seriously ill and contemplating his death. However, with respect to the second element, the court was not satisfied that there had been sufficient delivery to SL of the subject matter of the gift, being the shares of CT Inc. In this instance, nothing was physically delivered to SL. At trial, none of the share certificates were produced. As a *donatio mortis causa* could not exist without a delivery, the gift failed. SL had no direct access to or control over the shares: *LaFrance v. LaFrance et al.*, 2025 CarswellOnt 1250, 2025 ONSC 809 (Ont. S.C.J.), additional reasons 2025 ONSC 3984 (Ont. S.C.J.).

Choice of Business Form—Corporation—Liability of Directors and Officers—Alleged Patent Infringement by Corporate Defendants—Directors of Corporations Added as Individual Defendants—Corporations Used as Cloak for Personal Acts—Whether Limitation Period Under Patent Act or Ontario Limitations Act Applying—Where the plaintiff commenced an action for the infringement of asserted patents, and later sought to amend its claim by adding the directors of the corporate defendants, its motion was granted as the pleadings disclosed that it was possible that the individuals used the corporate defendants as a cloak for their personal acts. The issue of whether the action was statute barred under the two-year limitation period under s. 4 of Ontario's *Limitations Act, 2002*, SO 2002, c 24, or the six-year limitation period under s. 55.01 of the *Patent Act*, R.S.C. 1985, c P-4, was to be left to the trial judge. In *Unilin Beheer B.V. v. 6035558 Canada Inc.*, 2025 CarswellNat 977, 2025 FC 552, [2025] F.C. 534 (F.C.), the Associate Judge (AJ) in her capacity of Case Management Judge granted the plaintiffs leave to file their second amended statement of claim, naming the directors of the corporate defendants, as defendants in this action. The defendants opposed the amendments arguing mainly that they were statute barred under s. 55.01 of the *Patent Act*, R.S.C. 1985, c P-4, or under s. 4 of Ontario's *Limitations Act, 2002,* S.O. 2002, c 24, and that, more generally, it was not in the interest of justice to allow this proposed amendment brought four years after the commencement of the action. The plaintiffs alleged that the individual defendants operated as a single common enterprise, and that they were personally liable for the infringement of the asserted patents. The AJ considered the defendants' argument that the cause of action against the individual defendants was different from the cause of action against the corporate defendants. The defendants brought a motion to appeal the AJ's decision concerning the underlying patent infringement action. The defendants' motion was dismissed.

There was no palpable and overriding error in the AJ's finding that the pleadings disclosed sufficient material facts to support that the behaviour of the individual defendants could amount to patent infringement, and/or that it was possible that they used the corporate defendants as a cloak for their personal acts. In fact, the corporate defendants filed a joint Statement of Defence, denying the infringement and asserting that the plaintiffs' patents are invalid. As for the individual defendants, as sole directors and officers of the corporate defendants, the AJ considered the plaintiffs' position, submitting that they operated as a single common enterprise, and that they were personally liable for the infringement of the asserted patents. Even if the chances of success were weak, they were not inexistent. The plaintiffs alleged sufficient facts that could lead to a finding that the individual defendants were liable for patent infringement.

The issue as to whether the claim against the individual defendants was statute barred by the limitation periods was a triable issue better left to the trial judge. The motion for leave to amend was filed in March 2023 and the act of infringement allegedly committed since March 2017, at a time where all three asserted patents were still valid. As this cause of action was arising in the Province of Ontario, s. 39 of the *Federal Courts Act* could apply and provided for the two-year provincial limitation period to apply. Had the AJ found the six-year limitation period applied under the *Patent Act*, and the claim against the individual defendants was not statute barred, the appellate court would see no palpable and overriding error in that finding either. However, and since the AJ did not rule on the limitation period argument, the appellate court would also leave it to the trial judge: *Unilin Beheer B.V. v. 6035558 Canada Inc*., 2025 CarswellNat 977, 2025 FC 552, [2025] F.C. 534 (F.C.).

Choice of Business Form—Franchise— Restrictive Covenant—Post Termination Non-Competition Clause—Inequality of Bargaining Power—Whether Reasonable in Time and Geographic Area—Former Franchisee Enjoined From Using Client List—Where there was a post termination non-competition contained in a franchise agreement, the only justification for such a restrictive covenant was that the covenant was reasonable in the circumstances of the particular case, and the onus was on the party seeking to enforce the restrictive covenant, by way of an injunction, to show the reasonableness of its terms. In this case, the franchisor franchised retail stores called "Fully Promoted". The stores specialized in providing branding and marketing services to customers through, among other things, the design and decoration of promotional products and branded apparel. The defendant entered a Franchise Agreement with the franchisor dated January 24, 2020 for the Halifax store. Effective June 29, 2020, the defendant assigned the Franchise Agreement to 333 NS Ltd., a company of which the defendant was a director and which was actively managed by him. The defendant was not released from the terms of the Franchise Agreement. On October 25, 2021, the defendant and the franchisor entered into a Franchise Agreement for the Dartmouth store. Both Franchise Agreements provided that the franchisee was to pay a Royalty Fee and Ad Fund Fees to the franchisor by the 10th day of each month. The post term non-competition clause contained in the franchisee agreements provided that the franchisee was not to compete with the franchisor for two years, within a 200 kilometers radius of the franchise premises, regardless of the cause of termination. The defendant was able to negotiate a reduction of the geographic scope of the non-competition clause.

On July 10, 2022, the franchisor' lawyers gave notice of default to the defendant and 333 NS Ltd. on the basis they failed to pay amounts for royalties, ad funds and other dues pursuant to the Franchise Agreements and breached the terms of the Agreements by not reporting all income and revenue in their royalty statements and not complying with the reporting provisions of the Franchise Agreements. In 2023, after both franchises fell into arrears, .by a letter from its lawyers on August 4, 2023, the franchisor proposed a resolution by which the Halifax store would be terminated, and all business would be transferred to the Dartmouth location. All outstanding fees for both franchises would have to be paid which as of the end of June 2023 totaled $28,835. The defendant and 333 NS Ltd. did not pay the outstanding fees. The franchisor, the defendant and 333 NS Ltd. then entered into a Forbearance Agreement dated October 11, 2023. The franchisor agreed to forbear taking action against them, and they were to pay the franchisor $15,000 upon execution of the agreement and the balance of $31,154 in 24 equal monthly payments. The initial payment of $15,000 was made but they failed to make any further payments. Both the Halifax and Dartmouth franchises were terminated by notice dated November 8, 2023.

By November 9, 2023, the defendant's son, AB, began pursuing establishing a new company and purchasing the assets of 333 NS Ltd. On November 10, 2023, 333 NS Ltd. sold its client list. Creative Ltd. was incorporated on November 28, 2023, and the client list was sold to it. AB and the defendants were shareholders of Creative Ltd., which operated out of the same premises as the Dartmouth franchise. The franchisor' signage continued to be displayed at the Dartmouth location. After the termination of the franchises, the defendant and AB continued to conduct business with customers of the former Dartmouth franchise. Creative Ltd. continued business at the Dartmouth location until March 2024 when the lease for the Dartmouth premises was terminated, and Creative Ltd. moved its operations to Glen Haven, Nova Scotia. In November 2024 Creative Ltd. signed a lease for premises in Lower Sackville, Nova Scotia. AB and the defendant submitted that the post term non-competition clause contained in the franchisee agreements was unenforceable as the temporal and geographic elements of the clause were unreasonable. The franchisor brought a motion for an interlocutory injunction, prohibiting the defendant, AB, and Creative Ltd. from using the client list sold by 333 NS Ltd. to Creative Ltd. The franchisor's application was granted.

Inequality of bargaining power was the rationale for treating restrictive covenants in commercial agreements and employment contracts differently. Franchise agreements usually also have an inequality of bargaining power between the parties. The only justification for a restrictive covenant was that the covenant was reasonable in the circumstances of the particular case, and the onus was on the party seeking to enforce the restrictive covenant to show the reasonableness of its terms. The court found the two year period of non-competition was reasonable. Although the franchisor refused to reduce the distance requirement to 50 kilometers, it did reduce the geographic scope of the clause following negotiations with the defendant. Accordingly, the court found the geographic area of the restrictive covenants was also reasonable. Creative Ltd. was incorporated for the purpose of assisting the defendant and 333 NS Ltd. to evade their contractual obligations to the franchisor. The franchisor was a franchising company and if its franchisees were able to obtain the benefit of the franchise and then disregard their obligations that would have a serious negative effect on its business reputation, and the value of its franchise. Franchisees and third parties who knowingly assisted the franchisers to circumvent their contractual obligations should be enjoined from competing with the franchisor. The franchisor would suffer irreparable harm if its injunction was not granted: *Bilomba Inc. (Fully Promoted Canada) v. Barrett*, 2025 CarswellNS 289, 2025 NSSC 124 (N.S. S.C.).

Employment Law—Wrongful Dismissal—Constructive Dismissal—Office Manager Always Working From Home—COVID "Return to Office" Initiative—Employee Not Fitting Paradigm—Employee Not Required to Accept Offer—Where the employee, as an office manager, had always worked from home, she was constructively dismissed after being required to work full-time in the office. In this case, the employee was the office manager for an aesthetics clinic for many years. She started in 1986, and her employment ended in 2023. For the duration of her employment, the employee largely worked from home. There was no dispute that her position was a work from home position. Despite that generalization, the employee attended at the office when needed, largely at her own discretion. Arising from a change in ownership, an effort was made by the employer that was initially framed as a "return" to the office initiative requiring the employee to transition to working from the office on a full-time basis. The notice given was less than three months. The employee pointed out that this was not a "return to the office", as she had always worked from home, and that was what her job permitted. A complicating factor was that at around the same time, the employee's husband had taken ill. The employee sought counsel, who asserted that there had been a constructive dismissal with the requirement to work full-time in the office being a significant change to the employee's employment terms. After that, the employer suggested that the employee work in the office for 2.5 days per week, but there was a required proviso under the proposal to the effect that the parties would see how that went, with the employer reserving the right to require full-time office attendance if necessary in the future. As a result, the offer really was not strictly a 2.5 days per week in the office offer, but an offer of 2.5 days and perhaps more in the future. The employee did not accept that offer. The employee commenced an action for wrongful dismissal, and applied for summary judgment. Her application was granted.

The court held, among other things that it was not a return to work arrangement of the type that was common after the COVID pandemic. The COVID return to work template did not fit that paradigm. That was an arrangement where the work was always from home. The court was satisfied that the work from home arrangements were an integral part of the employee's employment contract for the duration of her work, and that she was entitled to reasonable notice of the change. The notice given was less than three months for a 37-year employee. The court was satisfied that there was constructive dismissal, which triggered an obligation for compensation on the part of the employee. Having regard to the facts, a reasonable bystander would not expect the employee to accept the offer made to her by employer after the constructive dismissal was effectuated. For those reasons, the court was satisfied that the employee was not required to accept the mitigation offer as part of her mitigation responsibilities. The parties were to make further submissions concerning the notice period, damages, and any other mitigation issues which might affect the damages: *Nickles v. 628810 Alberta Ltd.*, 2025 CarswellAlta 786, 2025 ABKB 212, [2025] A.J. No. 367 (Alta. K.B.).