CORPORATE NAMING: WHAT IS IN A NAME?

Mae Chow & Greg Miskie

"That which we call a rose by any other name would smell as sweet, so Romeo would were he not Romeo called retain such dear perfection to which he owes without that title".

You may or may not agree with Juliet that a name has nothing to do with what your business offers or how it runs. If you choose to operate 'nameless', as a numbered corporation, then you will likely agree with her. If though, you have spent many sleepless nights agonizing over the perfect name, a name that represents your corporation's identity, its products and its vision, then its name likely means so much more.

Basic Rules

Practically speaking, a corporate name usually consists of three components: a distinctive (unique) part; a descriptive part that describes the type of business or industry and; a corporate suffix at the end. Another requirement, which may overlap with more than one of the above categories, is that the name must not cause confusion.

i. Distinctive

All corporate names are required to have some distinct or unique word(s) that can be used to differentiate a corporation from all others (as well as from trademarks, trade names, partnerships, and the like). If your name only describes the products or services offered by the corporation, it is not distinct. For example, "Snow Removal Ltd." is likely not distinct or unique. "South Edmonton Snow Removal Ltd." or "John Henry Snow Removal Ltd." may be distinct enough for use. From a practical standpoint, there are an increasing number of corporate names in play each year and it becomes more and more difficult to choose a unique name. Consider a "made-up" word, an out of the ordinary location, or some other phrase to improve the chances that your corporate name is unique. A consequence, if you choose a name that is not distinctive or unique, can be the expensive requirement to change your name in the future.

ii. Descriptive

The descriptive word or phrase describes the type of activity or business that will be conducted by the corporation. It can be broad in nature depending on future plans. Some examples of descriptive words are: accounting services, gardening, plumbing, welding, developments, enterprises, holdings, consulting, management, etc. For example, if the descriptive word or phrase chosen is the broad word "trucking", you are not restricted in any way (provided your Articles of Incorporation are not restrictive), in terms of the services you can provide. For example, this descriptive word would allow for fish and chip sales. The only limitation of "trucking" and fish and chip sales might come from a branding or marketing perspective. From experience, initials such as "AA" as in "AA Consulting Ltd" are names that are common and should be avoided.

iii. Corporate Suffix

This is the word at the end of the name that indicates that it is a corporation. Examples include: Ltd., Inc., Limited, Incorporated, Corporation, Corp., or the French version of those words. There is no significance to which of these that you choose and this cannot be the only difference between your proposed name and an existing name. "Ltd." is the most commonly used suffix. The use of a less common suffix may result in mistakes being made that can cost time or money, for example, incorrect cheques being printed. The use of your exact legal name is important for certain legal processes such as land registration, bank financing, etc.

iv. Confusion

One of the most common reasons that corporate names are not chosen for use or even rejected for registration is because they are too similar to existing registered corporate names, trade names or trademarks. Your corporation cannot have a name similar to another corporation. In Alberta, your name may still be approved even though it is arguably confusingly similar; there is a risk that you may be liable at a future date though if you are in the same industry as the other corporation or if the public might confuse your corporation for another. Alternatively, the corporation may be directed by the Registrar of Corporations on application by another corporation to change its name within 60 days.

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SHAREHOLDER AGREEMENTS 101: UNANIMOUS VS STANDARD AGREEMENTS

Mark Baergen

Starting up a new business is a very exciting time for many entrepreneurs. However, enthusiasm and optimism for the new venture can cause a business owner to overlook the potential for future disagreements on how best to run the company, the long-term obligations of shareholders and how the business or shares in the business can be sold. Putting in place a Shareholder Agreement can avoid considerable conflict, expense and distraction from the business operations down the road.

To operate a corporation effectively, there is no substitute for a good corporate decision-making process and governance. Even a small, closely held company with a few shareholders is better served by good governance practices.

Although it's impossible to sit down and list out all of the potential events that could have an impact on the corporation in the future, a structure that provides a framework to assist and guide the board of directors can be very useful for the business. This framework is often most effectively provided through a Shareholder Agreement.

There are many common issues that are generally dealt with within a Shareholder Agreement. Examples include:

- Governance, Management & Control
- Financing / Participation
- Holding of Securities / Permitted Transfers
- Disposition and Acquisition of Shares
- Restrictive Covenants
- Dispute Resolution

Once you have decided that your corporation needs an agreement between shareholders to help govern its affairs, you must decide what form of Shareholder Agreement will be most effective. There are generally two options: a Unanimous Shareholders Agreement ("USA") and a standard Shareholder Agreement.

A USA is the most common form of shareholder agreement. A USA covers all shareholders of the corporation both present and future. A USA is considered one of the framework documents of the corporation along with the articles and bylaws. Due to this, under the legislation, a USA may not be amended without the written consent of all those who are shareholders at the effective date of the amendment.

If you were to have a minority shareholder that you subsequently brought in for financing purposes, who does not agree with the proposed amendment, you will have no recourse. If you're likely to be in a situation such as this, a standard Shareholder Agreement may be a better option for you.

A standard Shareholder Agreement can offer greater flexibility than a USA. It is a contract between certain parties and it may include any shareholders of the corporation but does not need to include all shareholders. Future shareholders can choose to be bound by the agreement (the agreement would need to be amended for this to happen) but would not be automatically bound upon subscribing as a shareholder.

A standard Shareholder Agreement may be comprehensive or limited in scope and may also include non-shareholders. Major shareholders are able to operate the corporation without needing unanimous consent of all shareholders, which in some circumstances can stall corporate progress.

THREE COSTLY EMPLOYMENT LAW ERRORS THAT ARE HOLDING BACK YOUR BUSINESS

Ronald Smith

Employment lawyers typically spend their time helping clients resolve a dispute. After all, there are so many different obligations for employers it is little wonder that their fingers get burnt every now and then. Or is it? A few years ago, Duncan Craig LLP began conducting Human Resources (HR) Audits for companies ranging in size from 5-100 people to see if their HR practices could be improved so that the number of disputes and associated costs could be reduced. The companies had different management structures and were in different sectors. The one thing that most of the companies had in common was that they did not have a full-time professional HR person in-house.

The three most common errors we have found in conducting the audits were:

#1 - Not having Employment Contracts in Place

The number one problem we have found when conducting HR Audits was that too many employers did not have signed employment contracts with their staff. This can be a major problem and significant liability if you need to terminate staff. In one instance, there was a staff member with 25 years of service who was not under contract. The potential liability for the employer if that staff member was terminated was $0.5M. Once a contract was put in place with the appropriate termination clause, that liability was capped at a fraction of the potential amount.

It is never too late to ask employees to sign an employment contract. However, proper steps need to be taken to ensure it is enforceable.

#2 - Illegal Overtime Practices

The second error that stood out from our audits was that many companies had overtime policies that did not comply with the Employment Standards Code. Depending on the size of the workforce, an employer could have a massive liability that they are not aware of. If a complaint is upheld by the Employment Standards Office an employer could be required to pay employees for all overtime from the past six months. Solutions we have introduced to prevent potential overtime claims include restructuring the workforce to make better use of staff resources without incurring overtime costs and putting in place overtime agreements that introduced alternatives to overtime pay such as banking time.

#3 – Non-compliance with Human Rights Code and Employment Standards Code

Being an employer is challenging, especially when there are so many rules set out in the Alberta Human Rights Act and the Alberta Employment Standards Code. The most common errors we have come across are violations of the polices on maternity and other forms of leave of absence, drug testing, and holiday and vacation pay. Violations of the Human Rights Code in particular can be costly. Employees do not need to hire a lawyer to launch an action. Complaints can be filled with the Human Rights Commission and if an employer is found to be in breach the damages award can be significant.

Staff Know their Rights

Being on top of employment laws has always been important. These days, the chances of any indiscretion going unnoticed are slim. In the past ten years or so we have witnessed a profound change in the level of awareness staff at every level have about their employment rights and the duties of employers. Any employee who thinks their employer's actions violate their rights is just a few clicks away from finding the information they need to determine if they should make a complaint, and bad news spreads quickly. If an employee feels they have not been paid adequate overtime, then you can be certain every employee will soon feel the same way. An HR Audit can help identify these types of issues before anyone else does.

Much more than Risk Prevention

While the initial objective of the HR Audit was risk prevention, we quickly learned that there were other significant upsides. At all the companies we reviewed, the day-to-day HR management was conducted by the head of the company or someone in senior management. Inevitably, the person responsible for HR had little, if any training. Not surprisingly, managing the day-to-day HR paperwork was challenging. Dealing with real HR problems was extremely time consuming and stressful for these business leaders. Time and stress have a cost and that cost was impacting the running of the business.

The audits we conducted identified problem areas. The contracts, policies and processes that were put in place afterwards gave management the roadmap they needed to deal with employment law issues in a clear and consistent way. The reduced stress and time required to deal with employment law issues freed up these business leaders to focus on the things that made their business a success in the first place. It allowed them to spend less time on the day-to-day management and more time to focus on taking their business forward.

For most business leaders, having their HR practices audited and updated is like eating healthy and going to the gym. They know they should do it but too often it gets put on the back burner until there is a real problem. Our experience conducting the audits over the last few years has shown that there are real and immediate benefits. If you would like to learn more about the benefits of having an HR Audit at your company, the Employment Solutions Group at Duncan Craig LLP would be pleased to help.

BEAUTIFUL BC (EXCEPT WHEN YOU DIE):

ESTATE PLANNING SOLUTIONS FOR ALBERTANS WITH ASSETS IN BC

Rhonda Johnson

For many Albertans, the dream of owning property or retiring in BC is part of their life plan. No more shoveling. No more scraping ice. However, for estate planning purposes, the two provinces are surprisingly different. Albertans need to know about these differences, and, where possible, do some planning to reduce the costs and uncertainty- both financial and emotional- of their estate plan.

How are Alberta and BC Different?

There are 2 fundamental ways that Alberta and BC are different for estate planning purposes: probate fees and who can vary a will (dependants' relief).

Probate: In Alberta the maximum probate fee payable to the Alberta government is $525. In BC, it is roughly 1.4% of the value of the estate, with no upper limit ($0 on the first $25,000; $6 per $1000 on the next $25,000; and $14 on anything more than $50,000). For example, a $2 Million estate in Alberta will have a probate fee of $525. In BC, the fee will be $27,450. Given the real estate values in BC, it is easy to imagine very high probate fees, possibly without easily accessible cash to pay the fees.

Wills Variation: In both provinces, we can mostly leave our property to whomever we want in our wills EXCEPT that we must adequately provide for our dependants. In Alberta, dependants are defined as our spouse or common law partner of 3 years or more (Adult Interdependent Partner), our minor children, and our adult, disabled children (and our grandchildren if we are raising them). In BC, dependants are defined as spouse or common law partner of 2 years or more, and our children, regardless of age or ability.

There is a fundamental philosophical difference between the two provinces on our moral obligations to our family: in Alberta, once the will maker's children are 18 and able, the legal and moral obligation ends. In BC, the will maker's obligation to justly and adequately provide for his children lasts the children's entire lifetime. This has resulted in considerable litigation by adult children in BC. It is particularly problematic where there are competing claims by spouses and adult children, or among adult children and charities. The court can vary the will to provide what it thinks is "adequate, just and equitable in the circumstances" and, "like a snow flake", it is different depending on the facts of each case (as per Justice Williams in Smith v. Smith 2009 BCSC 1737 at paragraph 75).

The end result? Uncertainty, delay and possibly higher costs- financially and emotionally- after death. Or, one could argue, greater deference to the time honoured tradition of passing wealth down through the blood lines.

Which Laws Apply to Which Assets?

Where we have property in both BC and Alberta, which property is governed by which probate procedure and fees, and which property is subject to a possible claim by an adult, independent child?

There are 3 factors to consider: What type of property is it? Where do we live permanently (our domicile)? And what types of law are we dealing with?

For estate purposes, there are essentially two types of property: land (immovables) and everything else (movables). Our domicile is where we consider our permanent home to be.

For estate purposes we must refer to at least two types of laws: administrative or procedural laws (the requirements, formatting and payment of fees for probate); and substantive laws (the right of an adult independent child to make a moral claim against a parent's estate).

For probate procedure and fees, land is governed by the laws of where it is located, regardless of where we are domiciled. So if we are domiciled in Alberta but own a condo in Kelowna, BC, our executor will need to get a grant of probate in BC, plus pay the 1.4 % of the value of the land in fees, before he can administer the land.

For wills variation claims, land is also governed by the laws of where it is located, regardless of where we are domiciled. So, once again, if we are domiciled in Alberta but own land in BC, the BC land may be subject to a claim by one of our adult independent children. The claim would be commenced and determined in BC, according to what the BC courts deem is adequate, just and equitable in the circumstances (having regard to what the adult child received in Alberta or elsewhere, or by way of survivorship). Our executor would need to obtain a BC grant of probate, plus serve all adult children with notice of their potential claim, then wait at least 210 days before making any distribution. Those adult children will have 180 days from the grant of probate to commence their claim in BC, and 30 days after that to serve the claim on the executor.

For all property other than land, we look to where we are domiciled to determine probate procedure and fees, plus potential for a wills variation claim. So if we are domiciled in Alberta but own shares in a private BC corporation, or have other non-land investments in BC, Alberta law will govern all our property for both probate and wills variation matters. On the other hand, if we own shares in a private Alberta company then retire in BC, the value of those Alberta shares will form part of our estate for BC probate fees and claims by adult independent children.