LEGAL ALERT

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Current Legal Developments Critical to Corporate Management

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***If the machine of government is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law.***

**~ Henry David Thoreau (1817 – 1862)**

TECHNOLOGY LAW

# Wishing you happy holidays, if CASL permits

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**Holiday-themed greetings or party invitations may constitute CEMs under CASL .**

The holiday season is an important season in which to focus on good will and the profound messages that the holidays celebrate. Many organizations use the holiday season to communicate with clients and associates to share that sentiment.

For example, an organization may wish to invite individuals to a holiday-themed party, or simply send a seasonal greeting. What many organizations may not have considered is whether these seemingly benign messages will attract seven-figure liability.

## Consent

Canada's anti-spam law, more commonly known as "CASL," generally provides that a sender must obtain the consent of a recipient before sending a "commercial electronic message," or "CEM," to that recipient. Exemptions might also apply.

The threshold question for an organization to consider here is whether an

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DIRECTORS' AND OFFICERS' LIABILITY

# Policy ambiguity resolved in favour of directors and officers

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**Where the language of a D&O insurance policy requires contractual interpretation, the policy must be read as a whole, in the context of the surrounding circumstances and factual matrix.**

In the context of claims by directors and officers for insurance coverage, including the advancement or subsequent payment of defence costs, Canadian courts may be called upon to interpret insurance policies which (arguably) contain ambiguous terms. Given the potentially significant personal liability for directors and officers, the stakes can be high.

In its recent decision in *Onex Corp. v. American Home Assurance Co.*, the Court of Appeal for Ontario had a

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purpose) the raising of funds. This exemption will likely more clearly apply where a request for a donation accompanies a holiday greeting.

### *Business to business*

The "business to business" exemption may also apply in a number of situations. This provision exempts CEMs sent by employees or representatives of an organization to employees or representatives of another organization, provided that the organizations have a relationship and the message concerns the activities of the recipient organization.

In the situation where an organization sends a bare holiday greeting to the personnel of a business affiliate, it would be difficult to argue that this exemption does *not* apply. The question turns on whether building good will, or otherwise encouraging employees to network with the employees of business associates, constitutes an activity of the recipient organization.

In most cases, it is suggested that networking and relationship management constitute business activities in which we suggest almost all organizations participate. Of course, there may be outlying situations in which such activities do not constitute activities of a recipient organization.

Note that this conclusion assumes that the sender organization and the recipient organization have had dealings sufficient to constitute a "relationship," a term which (unhelpfully) has not been defined. Senders should not rely on this exemption to spam employees of unrelated third parties.

## Forms of consent

In the event that no exemption applies, an organization wishing to send a holiday greeting that is likely a CEM will need to comply with the consent provisions of CASL. Canada's anti-spam law recognizes two kinds of consent — express and implied. The former requires a positive action on behalf of a recipient, while the latter arises in certain factual situations.

## Due diligence

Fortunately, in contemplation of CASL coming into force last year, many organizations attempted to do two things: (1) determine whether implied consent existed for some (or all) members of the organizational "rolodex;" and (2) seek express consent from those individuals for whom implied consent did not exist. Further, once CASL came into force, many organizations pruned non-consenting addresses from their contact lists.

As a result of this due diligence, many organizations are reasonably comfortable that they hold some type of consent for all individuals on their mailing lists. For these organizations, sending non-exempt holiday greetings that are CEMs will require little extra effort.

However, in the event that an organization has not undertaken due diligence in respect of its lists, or in the situation where an organization has a separate list for holiday-themed greetings — for example, party invitations — that organization will need to undertake further due diligence before moving forward.

## CASL compliance

Finally, all organizations that determine their holiday greetings constitute non-exempt CEMs will need to satisfy the required formalities and disclosures under CASL. What is the best approach to compliance here? It seems less likely — though not impossible — that the CRTC will interpret CASL in any way that results in a prohibition on the sending of legitimate, benign holiday greetings.

## Significance

Such a position may well raise constitutional issues that may well result in the courts' assessment of the legislation in light of fundamental constitutional protections such as free speech. The CRTC may adopt a moderate approach with respect to benign holiday greetings as was the case with its public position in 2014 regarding mere factual reports.

The question of non-compliance may not even arise for those organizations that have already chosen to undertake due diligence with respect to their mailing lists. As such, it seems that, in many cases, holiday cheer will continue to flow.

For those organizations which have not developed compliance programs, the consideration of doing so for their holiday mailings may help them get to a cheerier place for the New Year and thereafter. 2017 is not too far off, and the likely commencement of private actions and class action law suits means that all organizations should ensure that they are well prepared.

# Directors' and Officers' Liability *continued from page 65*

second opportunity to consider the scope of D&O insurance policy terms regarding defence costs. In a welcome result for directors and officers, the court upheld the trial judge's determination that the ambiguity in the policy should be resolved in favour of extending coverage to the directors and officers of Onex Corporation ("Onex").

## Georgia action

In 2003, Magnatrax Corporation ("Magnatrax"), an Onex subsidiary, filed for bankruptcy. In 2005, the Trustee for the Magnatrax Litigation Trust commenced an action in the State of Georgia alleging that the directors and officers of Onex had caused the bankruptcy of Magnatrax

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for the benefit of Onex and its executives.

The litigation was settled for US $9.25 million, and the settlement and defence costs totalled approximately US $33.5 million. Onex's insurer, American Home Assurance Company ("AHAC"), paid US $15 million pursuant to a run-off policy that had been purchased prior to the bankruptcy, in contemplation of Onex selling Magnatrax (the "Run-Off Policy").

However, Onex and its directors and officers sought to recover the remainder of the defence costs pursuant to a 2002-03 Policy and an excess policy which covered directors and officers of Onex and its subsidiaries up to a limit of US $60 million, in respect of liability for claims first made against them and reported during the policy period.

## Round one

The motion judge granted summary judgment in favour of Onex and its officers and directors. In a 2013 decision (the "2013 Appeal"), the Court of Appeal upheld the motion judge's conclusions respecting the notice requirements under the policies; however, the court found an ambiguity in an Endorsement to one of the relevant insurance policies. The court returned the matter to the Superior Court of Justice for a trial and to hear evidence to resolve the ambiguity.

## Interpretation

The interpretation of Endorsements to each of the 2002-03 Policy and the Run-Off Policy were at the heart of this appeal. Endorsement #14 to the 2002-03 Policy provided that AHAC would not be liable for

> loss alleging, arising out of, based upon or attributable to or in connection with any Claim brought by or made against

Magnatrax. Endorsement #14 further provided that AHAC would not be liable to make payment for any

> loss in connection with any Claim made against an Insured alleging, arising out of, based upon or attributable to any breach of duty, act, error or omission

of Magnatrax or its executives. Endorsement #16 to the Run-Off Policy dealt with coordinating limits between the Run-Off Policy and other AHAC policies, including the 2002-03 Policy.

## Denial of coverage

American Home Assurance Company denied coverage under the 2002-03 Policy, arguing that it excluded coverage for any Magnatrax-related claims. In the alternative, AHAC claimed that any monies owing under the 2002-03 Policy could be set off against the monies already paid out under the Run-Off Policy.

In the 2013 Appeal, the court found the word "Claim" in the 2002-03 Policy to be ambiguous because it could be interpreted to encompass an entire civil proceeding, or it could refer to each of the several bases for relief made within a single civil proceeding.

Consequently, the court sent the matter back to trial to hear evidence regarding the parties' reasonable expectations or intentions in adopting the Endorsements.

## The trial

The trial judge concluded that the term "Claim," as defined in the 2002-03 Policy, need not encompass the entirety of a civil proceeding. Rather, it was broad enough to encompass multiple claims within a single proceeding. Further, Endorsement #14 did not plainly and unequivocally remove coverage for Onex executives acting in their capacity as such.

As a result, the trial judge held that Onex was entitled to the US $15 million limit of coverage under the 2002-03 Policy. The trial judge further concluded that Endorsement #16 did not entitle AHAC to set-off monies paid under the Run-Off Policy.

## 2015 appeal

Upholding the trial judge's decision, the Court of Appeal found that many of AHAC's arguments that did not rely on extrinsic evidence led at trial had already been addressed in the 2013 Appeal. The court found it unnecessary to consider those arguments again.

### *Extrinsic evidence*

With regard to its new arguments based on extrinsic evidence, AHAC made two key arguments. First, AHAC submitted that the trial judge erred in looking at extrinsic evidence to interpret Endorsement #14; it argued that the correct approach to contract interpretation is to begin with the contractual language, and then to look to further evidence only when necessary.

In rejecting this argument as being without merit, the Court of Appeal noted that in the 2013 Appeal, it had already made findings about the wording of the policies read as a whole in the context of the surrounding circumstances and factual matrix. The court also noted that the trial judge had been tasked with the narrow question of considering Endorsement #14 in light of extrinsic evidence.

Second, AHAC argued that the trial judge used direct evidence of the parties' subjective intentions to overwhelm the language of the policy and in effect, granted rectification by giving effect to those subjective intentions (which was not sought by the respondents, and arguably could not have been granted). The Court of Appeal also rejected this argument, noting that it had already ruled that Endorsement #14 was ambiguous and that the trial judge had used the parties' mutual subjective intention to resolve the ambiguity in the language of the Endorsement.

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The trial judge stated that had there been any lingering ambiguity in the meaning of the word "Claim", it would have been resolved by applying the doctrine of *contra proferentem* (*i.e.*, in the case of ambiguity, a contract will be interpreted *against* the person who drafted the contract).

## Legal set-off

The court also considered whether Endorsement #16 to the Run-Off Policy entitled AHAC to set off monies already paid under the Run-Off Policy against the US $15 million payable under the 2002-03 Policy. AHAC submitted that the trial judge made an extricable legal error by using an incorrect interpretive approach in determining the meaning of Endorsement #16.

American Home Assurance Company noted that in the 2013 Appeal, the court did not find that Endorsement #16 was ambiguous and, therefore, the trial judge should have started by considering the wording of the Endorsement, rather than the extrinsic evidence. The court found that the trial judge *had* correctly read the language in Endorsement #16, given the meaning of "Claim" adopted by the trial judge. The interpretation of Endorsement #16 followed the interpretation of Endorsement #14.

## Significance

This decision makes it clear that where the language of a D&O insurance policy requires contractual interpretation, the first recourse is to read the policy as a whole in the context of the surrounding circumstances and factual matrix. If ambiguity still remains, extrinsic evidence may be used to resolve any ambiguities, failing which the doctrine of *contra proferentem* will be applied.

REFERENCES: *Onex Corp. v. American Home Assurance Co.*, 2015 ONCA 573, 2015 CarswellOnt 12283 (Ont. C.A.), 2013 ONCA 117, 2013 CarswellOnt 1969 (Ont. C.A.).

**TELECOMMUNICATIONS**

# CRTC's revised regulatory framework for wholesale HSA services

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**As part of its wholesale HSA service review, the CRTC determined that aggregated services will be phased out in conjunction with the implementation of a "disaggregated" service.**

In July 2015, the Canadian Radio-television and Telecommunications Commission (CRTC) announced a revised regulatory framework for wholesale high-speed access ("HSA") services. Wholesale HSA services are used to support retail competition for services including local phone, television and Internet access services.

The wholesale services framework sets out the rates, terms and conditions under which incumbent telecommunications service providers (*i.e.*, the telco and cable companies) are required to make available parts of their respective networks to (non-facilities based) competitors in order for the latter to provide a converged range of communications services — including Internet services, television and telephone services — to their retail end-customers.

## Framework review

A lengthy written process, as well as a public hearing, was held in November of 2014. During that time, the CRTC reviewed the existing wholesale services framework, various wholesale wireline services, and the approach it uses to set the rates for wholesale services.

In the proceeding, the CRTC reviewed its long-standing "Essentiality Test" which provides for criteria by which the CRTC determines whether a given wholesale service should be mandated. The CRTC found that the large, incumbent companies continue to possess market power in the provision of wholesale HSA services and, accordingly, required that these companies make these services available to competitors.

## Service provider obligation

A significant aspect of the wholesale services review proceeding hearing turned on the issue of whether the obligation on incumbent telecommunications service providers should be limited to providing aggregated services, or if such incumbents should be required to provide wholesale services on a disaggregated basis.

Aggregated services are those that provide competitors with high-speed paths to end-customers' premises throughout an incumbent carrier's entire operating territory from a limited number of "interfaces." A disaggregated service provides similar functionality to end customers, but limits the portion leased from incumbent carriers to the access component (*e.g.*, the last mile of the network).

*See Telecommunications, page 70*