



Avoiding the Pain of Litigation: Effective Corporate Strategies

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May 2005

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A. INTRODUCTION

There are many good reasons to avoid litigation. These include the heavy financial loss, the loss of corporate focus, the potential adverse publicity, the potential disclosure of confidential information and the inevitable lost opportunity costs.

In B.C., untold millions of dollars are wasted every year on litigation which could have been avoided altogether or which could have been managed much more efficiently. The risk of litigation for Canadian businesses appears to be increasing every year. There is no question that the costs of being involved in that litigation are also increasing. The savvy corporation will take reasonable steps to avoid litigation altogether and to properly manage unavoidable litigation.

Hopefully, some of the common mistakes and potential cures outlined in this short paper may provoke some thought about how companies can avoid litigation or how companies can make litigation a little less painful.

B. JOHN'S TOP 10 MISTAKES LEADING TO LITIGATION

1. Failure to appreciate the impact of litigation

It constantly amazes me to see the horror on the face of a sophisticated corporate client when I describe to the client the money and time that I am likely going to require from the company and its representatives over the life of the case. Most companies have been or are eventually going to be involved in some sort of litigation. It makes sense to appreciate what the likely impact of that litigation will be and to investigate the common causes and potential cures in order to try and steer clear.

2. Lack of clear corporate policy or guidelines

Many companies lack a coherent set of policies or guidelines which require company representatives to follow certain procedures designed to avoid common mistakes leading to litigation or to needlessly painful litigation. In general, it is fairly safe to say that if a fraction of the amount spent by most corporations on litigation was expended on procedures to avoid litigation or to properly manage it, overall fees would plummet. In a corporate context, there would appear to be few reasons why there should not be corporate policies or guidelines relating to review of contracts prior to signing, quality control, representations to be made about company products, credit terms, documentation and record-keeping, limitations of liability and the conduct of litigation. Any outcry from company representatives about being “hamstrung” by more red tape will very likely be outweighed by the time and money saved through avoiding litigation or through better managing it.

3. Lack of due diligence

The courts are full of cases which would not have arisen had there been proper due diligence. References are not that hard to check. It is not that hard to phone others who have purchased the same product or received the same service. It is generally not hard to check out a credit history. It is not that hard to get a second opinion. It is often not hard to negotiate a trial period. It is not that hard to obtain financial statements or to assemble the expertise necessary to ask the penetrating questions that need to be asked about the financial statements. Neither is it difficult to obtain professional advice on the potential pitfalls of the proposed transaction. Finally, it may be possible to find out whether the party on the other side of a transaction is litigious or not. Many very successful businesspersons agree that the deals that you don’t do are as important as the deals you do. There is no reason that before the deal is signed, there should not be some “sober second thought”, almost always involving a second set of eyes going over some sort of due diligence checklist.

4. **Lack of quality control**

Whether or not you are selling products or services, that one (sometimes tiny) slip can cost you a great deal in terms of potential litigation and the associated negative publicity. Quite apart from the potential for losing contracts as a result of a non-existent or insufficient quality control program, the nature and sufficiency of the quality control program will often be critical in the litigation. A relatively small amount spent on quality control is likely to deliver a considerable amount in litigation savings. Finally, it is often advisable to retain an independent expert to “troubleshoot” corporate quality control systems. Although such consultants are often vilified, at least they may have a different perspective, a new idea or two, and they may not be burdened by internal politics.

Before the marketplace gets its hands on your new product or service, it is obviously essential to have done everything reasonably possible to ensure that the product is generally safe and that it is generally suitable for the purpose for which it is intended. There is no way to stop frivolous suits brought against companies from time to time, however, the spectre of class action certification in a case where there is a real question of negligence or breach of contract can be uncomfortable.

5. **Promising more than you can deliver**

Salespeople can be very enthusiastic. It is reasonable to assume that in order to make the odd sale, they will from time to time step over the line and make promises they cannot keep. Obviously, this must be actively discouraged. The sales documentation must be quite clear on what and what is not promised. It must regularly be made clear to the sales force that litigation arising from allegedly promising more than can be delivered is costly and must be avoided. Companies may find it appropriate to institute incentives (or disincentives) to reinforce this behaviour. A good deal of thought should be given to delivery dates. If the product or service cannot reasonably be delivered by your company in the time promised, the financial consequences can be grave. Some companies insist that a second set of eyes review certain contracts prior to execution, in order to avoid the perennial problem of having salespeople promise more than they can deliver.

6. Unfair agreements/Mistakes

These are a quick way to litigation. Furthermore, courts have an uncanny way of interpreting unfair agreements against the party who has negotiated the seemingly great deal. It is common for companies to spend thousands of dollars on lawyers who draft unfair agreements, only to see the agreements unravelled by the courts. Rather than paying a solicitor solely to try to ensure that the contract contains as many favourable terms as possible for you, consider working with the solicitor to include provisions which will make the agreement reasonably fair or at least provide mechanisms to deal with a contract that may become unfair over time.

From time to time, one negotiating party will know or will have every reason to suspect that the other party is mistaken on some essential point prior to entering into the contract. In such cases, the courts have shown a clear disposition to relieve the mistaken party from the consequences of the mistake. Accordingly, rather than staying silent, it may be better for the non-mistaken party to raise the matter prior to the execution of the contract and ensure that the parties are on the same page.

7. Extending too much credit/Lack of proper security

In making that big sale, it is often easy to overlook the purchaser's ability to pay. The courts are full of collection actions which could and should have been avoided. Rather than hoping for the best, it is reasonable to do a credit check. It is reasonable to refuse credit in some circumstances. It may be reasonable to require security prior to extending credit. It may also be reasonable and appropriate to insist on a policy that anyone providing security for a credit line obtain independent legal advice before giving the security. Unbelievable amounts of money are regularly spent arguing over whether or not guarantees, for example, were adequately understood and are thus enforceable.

The law seems to change more and more quickly all the time. Accordingly, it is critical to have sales and marketing documentation reviewed regularly by a lawyer or lawyers with the necessary

expertise.

8. **Lack of proper documentation**

At the time most contracts are signed, the parties are full of enthusiasm for the “big picture” and are not eager to “sweat the details”. Unfortunately, this often leads to a failure to properly document the transaction. Unfortunately, it is before the contract is signed that a great deal of thought should be given to the details and the method by which disputes will be resolved. Given the horrendous consequences which can flow from a documentation failure, the relative cost of a good solicitor on the “front end” is minuscule. An experienced solicitor will have a constantly updated set of precedents and will not have to reinvent the wheel for you. That solicitor will be able to focus you on a variety of potential issues you will not have considered. Most solicitors are not “deal breakers”. Thankfully, they are detail people and they tend to be indispensable. Unfortunately, if the deal is done when you take it to them, their potential benefit will be severely compromised. The time to get the solicitor into the deal is well before it is signed. The simple act of looking at an agreement in a similar transaction can save a lot of headaches down the road.

It is important to understand that if there is no proper documentation, the terms of the contract can be in question. In order to determine what the terms were, the court will have to hear evidence from the parties. The court will then have to determine what the terms of the contract were. If the court concludes that certain essential terms were not discussed at the time, the court will imply terms based on the court’s view of commercial efficacy. You do not want this uncertainty. Take the time and paper the deal properly before it is done.

9. **Failure to limit liability or exigible assets**

Within certain limits, companies can limit their liability to a contracting party through an appropriately worded disclaimer contained in the contract. In many cases, where the disclaimer has clearly been brought to the attention of the contracting party and where the contracting party has had the option to avoid the contract rather than agreeing to the clause, the courts will enforce the disclaimer. A good example is the disclaimer you might see on your ski ticket and over the

ticket kiosk prior to purchasing a ticket at Whistler. In addition to ensuring that a product or service is reasonably safe in all of the circumstances, there is no reason why a company should not attempt to limit liability where possible.

A company may wish to protect its assets from potential claimants by ensuring that in the event of successful litigation down the road, the company has no assets available. For example, it is relatively common for some construction companies to incorporate a new company for each project. There is generally nothing legally wrong with that. There is also nothing wrong with having the profits earned by the company returned to the parent company, so long as any transfer of assets does not offend legislation designed to prevent fraudulent conveyances or preferences. When acting for a plaintiff, the first question asked by counsel may be whether or not the potential defendant has or will have any exigible assets in the event of a successful action. If the answer is no, it may be a show stopper.

10. Failure to manage an early resolution

Some people seem to hold the view that you should not worry about being sued until you receive the Writ. Nothing could be further from the truth. Generally, the Writ is preceded by a good deal of correspondence. Often, the more correspondence there has been, the more the parties have begun to dig in their heels. By the time the Writ has been issued, the matter has often become a “matter of principle” and a good deal of money and effort has been expended. The plaintiff is often loath to settle the matter in the same manner as that which might have been possible had there been an early resolution.

It is obviously important to be made aware of potential disputes before they reach the litigation stage. Company representatives are not always eager to publicize such disputes and accordingly they are often allowed to fester for too long. Although it does not always work and it must be handled carefully, an early meeting with all interested players and a cooperative attitude can lead to an early resolution. Prior to the early meeting, legal advice will have been obtained to ensure that the meeting is not solely an opportunity for the aggrieved party to collect admissions or other evidence. The tone of the meeting should be conciliatory. Options and alternatives should be

explored. Settlement terms, including Releases, may be negotiated. In certain circumstances, the services of a mediator may be beneficial. In “early intervention” cases, the parties will often come up with creative alternatives for the settlement of the case, often providing both parties with the opportunity to continue doing business. It is amazing how often a potential dispute can be diverted from litigation if handled early and properly. The only losers in any such attempt will be the litigation lawyers. They will make a little assisting with the early resolution, however they will lose the big payday of a long case.

C. JOHN’S TOP 10 MISTAKES LEADING TO NEEDLESSLY PAINFUL LITIGATION

1. Lack of proper insurance

When the Writ is served on your company, it can be a comforting thought that a policy of insurance taken out by the company will result in the defence costs being paid by the insurer and any judgment being paid by the insurer. Given the costs associated with litigation, it is critical for any company to review its policies of insurance to ensure that there is coverage for suits that may be brought against the company. It is also prudent to have an experienced insurance lawyer look at the company’s policies regularly to ensure that available coverage is in place for risks which may lead to litigation. Based upon counsel’s review, all appropriate questions should be put to the company’s broker to ensure that there are no holes in the coverage that may later come back to haunt the company. It is also important to ensure that the company’s policies and guidelines with respect to dealing with claims include insurance considerations. For example, admissions of liability by company representatives can void policies. Further, insurers must be given proper notice of potential claims, otherwise they may not be obligated to respond.

2. Failure to use expertise appropriate to the task

Although most litigation is not “rocket science” it is generally not wise to have a plumber do finished carpentry. Often the plumber can do it, but it will be painful, time-consuming and expensive for all involved. In determining which lawyer to use, the company should do a little due diligence, find out who the “top” lawyers in the field are supposed to be, interview 2 or 3 of those

lawyers and ask them who they would use if they were in the company's shoes. Having gone through that process, the company can make an informed decision on who the lawyer should be. In many cases, there may be a suitable lawyer at the firm generally used by the company. In some cases, there will not.

Often, it may make sense for a company to use a lawyer who may not be the most senior lawyer having the most stellar reputation. Depending upon the case, it may be in the company's interest to retain an "up and comer" who is a little less busy and who will give the case more personal attention.

Some companies have a policy that they always use lawyers from at least two different law firms. Some companies find that when they are not "captive" clients, they get more out of their law firms. Some companies find that different law firms tend to do things differently, and that when one has an idea beneficial to the company, the other may be willing to consider it.

Much money is wasted in lawyers carrying out tasks which could be done by paralegals, legal secretaries or company representatives. It is reasonable to make serious attempts to ensure that all work is delegated down the line to the appropriate individuals. Often company representatives can be utilized to assist with document listing and generally with the gathering of evidence and assembling it in the necessary format.

In many cases, it is lack of planning that results in lawyers carrying out work that others could do. In other cases, lawyers do the work because their legal secretaries are not able to bill for it. In certain circumstances, in order to encourage proper delegation, it may be wise to enter into an arrangement with the lawyer that "semi-secretarial services" may be billed at a nominal rate.

3. Failure to investigate potential retainer arrangements

Many lawyers would candidly admit to amazement at the apparent reluctance of many clients to seriously discuss a deviation from the "usual" retainer arrangements. Many lawyers would admit that if asked, they might, depending upon the client and the case, be prepared to consider a

variety of retainer arrangements, including (1) a full or partial contingency arrangement, (2) a bulk arrangement if a number of files are involved, (3) full or partial payment through shares in the company or (4) simply a reduced rate.

It is important to remember that the legal business, like any other business, is a competitive business. It is sometimes true that the busiest lawyers may be more difficult to negotiate with, however the busiest lawyers are not always the best lawyers. Furthermore, many great lawyers may be prepared to consider an alternative fee arrangement as they may simply find the case interesting.

Given the state of the law with respect to the provision of legal services, it may be that the lawyer is better off having no written retainer agreement with the client. Conversely, it is generally wise for a company to ensure that there is a written retainer agreement in place. If there is such an agreement, the company can be relatively certain that the lawyer will be held to it. The company can also be relatively certain that any ambiguities in the agreement will be resolved against the lawyer.

It is generally folly to focus too much on the lead lawyer's hourly rate without focussing on the hourly rates of all other lawyers and staff who will be working on the file. There is no point in getting a \$10 or \$20 per hour break on the lead lawyer's hourly rate when the legal assistants (who may do most of the work on the file) are being charged at \$50 per hour more than they should be. Further, it is generally more important to have an efficient lead lawyer who is an effective delegator than it is to have a lead lawyer who is \$10 or \$20 per hour less expensive than someone else.

Finally, it should be clear that if there is an expectation that the lawyer will "premium bill" in the event of a great success, it should also be expected that the lawyer will "discount bill" in the event of an abject failure.

4. **Lack of an early opinion letter**

It is very important for the company to insist that a comprehensive opinion letter be prepared by the lawyer at the earliest possible time. That time will not arrive until the lawyer has, in an organized form, all of the documents and information necessary to the task. The opinion letter should include all of the facts and assumptions upon which the opinion is based. It should also include a summary of the applicable law and an opinion on the findings of fact and law that are likely to be made by the court. It should include an estimate of all of the legal and other corporate costs which will be incurred by the company and by the opposing party on a best case/worst case/likely case analysis. Finally, it should include recommendations for the disposition of the case. The opinion should be updated from time to time as new facts come to light or as the law changes.

Massive amounts of money are wasted as a result of the failure of companies to insist upon early opinion letters and the failure of lawyers to provide them.

5. **Lack of a litigation plan**

Should it appear that the case cannot be disposed of without continuing down the litigation path, the lawyer should set out a litigation plan and budget for the review and approval of the client. The plan and budget should be updated regularly. This tends to regularly focus both parties on costs and progress. It also helps focus the company and the lawyer on a goal. In litigation it is easy for the company and the lawyer to get lost in the details. A coherent litigation plan helps to prevent that from happening. Should it appear that the litigation plan is not working, the plan may have to be changed. From time to time, the goal may have to be changed. A litigation plan may include attempting a mediation or an arbitration. Mediation is of course non-binding, relatively low cost, low risk, quick and private. Arbitration is generally quicker than litigation and has the attraction of an expert decision maker. It is also private, generally less formal and the parties can more or less design their own rules.

6. **Lack of a litigation manager**

The company and the lawyer will both be well served if the company has one individual responsible for the day to day management of the litigation. That person is the conduit to the lawyer. That person ensures that there is a proper flow of information and documentation between the company and the lawyer. That person takes care of the details and annoyances that the ultimate decision-makers do not want to deal with and that might otherwise fester. That person ensures that the opinion letter and the litigation plan are updated as necessary and that only the critical decisions go to top management. The litigation manager should have a good working knowledge of the law in the area. The litigation manager should keep up on that law in order to ensure that he or she can effectively deal with the lawyer. The company's lawyer will be more than happy to arrange, with the litigation manager, in-house courses to keep the company's representatives current on the law relevant to them. This is especially true when the company uses more than one firm.

7. **Poor communication**

At least half of the disputes that arise between companies and their lawyers are the result of poor communication. Every company has a different idea about the nature of the reporting it requires from its lawyers. The nature and regularity of reporting should be raised early and the issue should be revisited regularly. For example, some companies find it helpful to see, on each monthly invoice, the cumulative amount billed on the file. This can have a sobering effect on both the lawyer and the company. Some companies require monthly reports. Others require quarterly reports. The comfort level should be found early.

It is important that if there is a problem, however small, the problem be raised by the company or the lawyer quickly and resolved. Given that almost all aspects of litigation are negative and irritating for the client (and often the lawyer), it is particularly important to avoid letting the little irritations go untreated.

Many companies naturally think positively and hope for the best. That is why it is particularly

important that communications from the lawyer not be ambiguous. If the case is bad, it is important to say so. If the company should not go to trial because the company will lose, the lawyer should say so unequivocally. If the case is going to cost a fortune, the fees should not be soft pedalled by the lawyer. It is sometimes difficult to be as blunt as is often necessary, however it generally pays off in the long run.

8. Poor company organization

Many companies are very poor at assisting their lawyers with the litigation. The lawyer can do it all, however it is generally far more cost-efficient for the company to actively participate. For example, if prior to the initial meeting, the company presents the lawyer with a chronology of the relevant facts and a binder of key documents indexed to the chronology, much money and time will be saved. As well, much money can be wasted while the lawyer happily proceeds with the litigation, awaiting timely instructions from the client. The litigation lawyer is the director of the movie. However, the producer is the company. The company that remembers this distinction will be much better served by its lawyer.

9. Failure to focus on overall efficiency

The litigation manager and the lawyer should ensure that the litigation is being carried out as efficiently as possible. For example, if a mediation is coming up, it may make more sense to prepare for the mediation than for the trial. In cases where there are going to be thousands of documents, it may make sense to use document management software and incur more than the usual costs at an early stage in order to save five times the cost at a later stage. It may make sense to discuss at a very early stage which lawyers, paralegals and other staff in the lawyer's office and the company's office will be involved. It may make sense to ensure that all large photocopying tasks are outsourced to avoid the usual law firm rates. It may make sense to carry out one or more "surgical" discoveries rather than carrying out days of discovery early, even if the evidence will be a little less "fresh" later.

10. **Failure to act on recommendations of lawyer**

Very often, a company will not act on the recommendations of its lawyer. Sometimes, the company ends up being right. More often, the lawyer ends up being right. If the company is not going to take the recommendations of the lawyer on an important matter, a second opinion should be considered. If the second opinion is the same as the first, then the company should give the matter more thought. Often, companies proceed with litigation as heels have been dug in and the company is proceeding on a “matter of principle”. These “matters of principle” can be very costly. The question to ask is “Two years down the road, will this look like a good decision?” The answer is usually no.