



# KERR & NADEAU

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At **Kerr & Nadeau**, we are committed to providing our clients with the very best legal services and counsel we can in these tough economic times. Your success is our success. Consequently we are taking this opportunity to remind our clients of a number of "risk management" services we offer in order to best prepare you and your business for the coming year. In our experience, taking *proactive* measures now - before your business is directly broadsided by the economic crunch - will be significantly more effective and less costly for you and your business than trying to react after the damage has been done. By taking moderate risk mitigation steps now you may in the end find yourself protecting your bottom line at a time when generating top line revenue is harder than it has been for many in a long time.

Below are a few questions you might want to ask yourself as part of your New Year's planning effort as you seek to position yourself and your business for success in 2009:

## CORPORATE STATUS

- **Corporate Returns:** Are all of your corporate filings, resolutions and Minute Book up to date? How well would you withstand an audit?
- **Shares:** Are all issued shares properly authorized, described and recorded?
- **Shareholders' Agreement:** Do you have one? How long ago did you put it in place? Does your *Shareholders' Agreement* still reflect the reality of your business? When was the last time you reviewed it? Have things changed in any significant way (including new shareholders, directors or officers) since you first signed it?
- **Directors & Officers:** Do you know what the law expects of you as a Director and/or Officer of your company in these difficult times? Do you know what your duties are toward the company, its shareholders, employees and other stakeholders? Do you know what your *personal* liabilities are if you fail to exercise your fiduciary and statutory duties conscientiously and diligently? Do you know how real and immediate the impact of that liability can be on your business, and on you *personally*? Do you know what steps you can take to mitigate those risks? Are you taking them?
- **Succession Planning:** Whether you are the President or C.E.O. of a SME, or the owner-manager of a family owned and operated business, have you given thought to succession planning? Is there a "natural" succession for the business? If the "natural" succession is not likely, what is the alternative succession plan for after you leave or retire?

## BUSINESS OPERATIONS

- **Accounts:** Are you managing your Accounts Receivable/Accounts Payable sufficiently well to stay on top of cash flow? Are there problems with any of your receivables or payables? Have you taken or given security on any of your core assets that might be at risk? What steps are you taking to enforce delinquent accounts as a secured or unsecured creditor?
- **Employment Agreements:** Do you have written employment agreements with your employees? Do you remember who prepared your employment agreement templates, and how long ago that was? Are there sufficient risk mitigation mechanisms in your employment agreements to protect you and your business from onerous severance obligations if you are required by operating conditions to terminate employees without cause? Do you have sufficient provisions in your employment agreements to protect the confidentiality of your proprietary information and your intellectual property? Do you have the required non-solicitation or non-competition clauses in your employment contracts? Is that important to your business? Do you know whether your new employee is bound by pre-existing non-compete clauses or other restrictions on his ability to accept employment from you, or use information he acquired from a prior employer?
- **HR Policies:** Has your business reached the point in terms of size and make-up that HR policies would assist you in managing the risks associated with human resource issues and enforcing select policies? If you already have HR Policies in place, are they current with existing employment legislation? Do you have a Management Guide to assist you in implementing and enforcing the policies?
- **Contractors:** Are you contracting with so-called "independent contractors" who the Canada Revenue Agency, WSIB and/or the courts would legally consider to be employees? Have you conducted that assessment? Do you know the risks and liabilities associated with getting that wrong? Do you know how to position yourself for an audit or wrongful dismissal complaint?
- **Creditors:** Are you taking the necessary steps to protect your personal assets from creditors in the event your business takes a turn for the worse? Have you examined your property holding patterns to determine exposure to seizure or execution? Have you reviewed personal guarantees and/or indemnities given by the company, its directors, officers, shareholders and/or their spouses? Is there anything you can do now to begin executing an *Asset Protection Program* in anticipation of rainy weather?
- **Contracts:** How well are you managing your contracts? Do you have a catalogue or database of all material contracts, both supplier and customer? How often are these reviewed? Are you complying with your contractual duties? Are you taking the necessary steps to mitigate your risks and enhance your bottom line in negotiating the terms and conditions of your contracts, or are you relying on old templates developed in different conditions or contracts downloaded from the web that may have nothing to do with your present business or transaction, or that may be based on U.S. or other laws? Are you ever asked to sign a supplier's, customer's or business partner's contract without having negotiated the Ts & Cs, i.e. at face value? Do you always read the contracts before you sign them? Do you always understand what it is you are signing up to and what the potential implications might be?
- **Negotiations:** How often do you find yourself meeting with a potential supplier, customer or business partner to "work out a deal", without any real negotiation strategy in place? Do you have any idea how much bottom line value can be derived from a carefully planned negotiation when it comes to securing terms and conditions that work in your favour while reducing the risk of terms and conditions that may actually work against you? Do you have enough experience to know what you don't know? Did you know that we can assist by helping you develop a negotiation strategy to achieve the results you wish to achieve from the negotiation, even without getting involved directly in the negotiation until the final contract terms and conditions are to be drafted?

- **Regulatory Compliance:** Do you have all the necessary permits, licenses and registrations required for your business? Are you compliant with joint health and safety requirements? Do you have a Privacy policy and compliance program in place to ensure compliance with new privacy legislation?
- **Government Procurement:** Do you do business with Government (at the federal, provincial or municipal levels)? Would you like to? Do you understand the rules and how best to position yourself to achieve bottom strategic advantage?

## INTELLECTUAL PROPERTY

- **Intellectual Property:** Does your business depend on its intellectual property as a competitive differentiator? Do you know what your intellectual property is or how valuable it is to the success of your business? When was the last time you conducted an IP audit?
- **Confidentiality:** Do you have a Proprietary Rights Protection Policy in place with your employees? Do your employees know the importance of not disclosing sensitive, proprietary information without a duly executed *Non-Disclosure Agreement* in place? Do you have any business controls in place to mitigate against the risk of unauthorized disclosure? Are you ever required to execute *Confidentiality* or *Non-Disclosure Agreements*? If so, what steps, if any, are you taking to ensure that your business is complying with its obligations of confidentiality to the Disclosing party?
- **Pre-Mature Disclosure:** Are you guarding against pre-mature disclosure of your inventions or intellectual property? Do you know that if you disclose your invention or idea publicly without having applied for a patent, you could lose your rights to patent the invention everywhere in the world except Canada, the United States and Australia (and even in these countries you have, at most, under the right conditions, a 12-months grace period)? Are you taking the necessary steps to safeguard yourself and your business from unauthorized public disclosure? Did you know there is an easy, inexpensive way to protect yourself and your business from the potential fallout of pre-mature disclosure?
- **Licensing:** Does any part of your business include "licensing in" or "licensing out" of software or other intellectual property? If so, what mechanisms or business controls do you have in place to ensure that you are compliant with the terms and conditions of your Licensor's License and/or that your licensees or end-users are compliant with the terms and conditions of your License? Are you monitoring/auditing usage to ensure all appropriate royalty payments are being collected and/or paid?
- **Infringement:** Are you monitoring the usage of your trademarks or copyright to protect yourself against infringement and the loss of your intellectual property rights? What steps are you taking, if any, to ensure that your products or intellectual property are not infringing the intellectual property rights of third parties?
- **Registrations & Assignments:** Have you completed all necessary applications, registrations and/or assignments of your patents, trademarks and/or copyright?

These are only some of the questions that prudent business managers should be asking at this time as they take steps to plan their business strategies for 2009. If you think there might be opportunity for you and your business to take proactive steps now to mitigate your risks while protecting or improving your bottom line, please feel free to give me a call. As always, there is no charge for any preliminary consultation.

Let me close with one final philosophical point: we believe that it is far better for our clients to invest a little bit of time and a little bit of money up front positioning themselves legally and strategically for success than it is for them to invest a whole lot of time and a whole lot of money down the road trying to "fix" something that could so easily have been avoided or mitigated with a little planning up front. We want your success. Your success means our success. We wish you the very best of 2009 - for yourselves personally, your families and your businesses.

Sincerely,

*Robert ("Robaire") Nadeau*  
December 31, 2008