MINDEN GROSS LLP

Summer 2012

TOPICS:

What's In A Name?

How the Internet Changed Forever on June 13, 2012

You may not have realized it, but June 13, 2012 may have been the most significant day in the history of the Internet since Al Gore invented it back in the 90s.

As we are all familiar with, there are relatively few Top-Level Domain Names currently in existence. The most common of these are: .com, .org, or .net, with .com being the most important by leaps and bounds. There are also the country specific top level domain names such as .ca, .uk, .de, etc.

As of now, however, there are at least 1500 more including: **.drive .car .read .guitars .estate .engineering .baseball .church .Madrid .pharmacy .bank** - *You get the idea.*

If you want the whole list, follow this link: http://newgtlds.icann.org/en/program-status/application-results/strings-1200utc-13jun12-en

For a couple of years now, trademark lawyers (who are obsessed with protecting their client's brands in cyberspace) have been keenly following developments in this area since the Internet Corporation for Assigned Names and Numbers (ICANN) decided in June of 2011 to allow for an open number of Top-Level Domain Names to be applied for. The deadline for applications for these new generic top level domains ("gtlds"), was May 30, 2012.

The application period is now closed and the domain names being applied for have been released for consideration. There are over 1,500 new such domain names being applied for.

You will recall that in the late 90s, many companies rushed to secure .com domain names and there were lots of domain name squatter disputes. There were some very high valuations put on the .com domain names. Given all the new domain names, all of that effort may possibly have gone out the window as of June 13, 2012. People are going to be looking in new places and expecting to find new things on the Internet. The old domain names may not matter quite as much.

The Internet is now going to be fractured, or it is anticipated it is going to be fractured, into a series of different domain names which are going to represent types of services or brands and will represent the exclusive location for the websites run by those entities. The possible uses and business models to be connected with these new domain names are really endless.

I note for example that Amazon has applied for .read. They will now control what parties can have an internet domain name that ends with the .read suffix. Imagine the URL www.greatbooks.read. Its not hard to imagine how a monopoly over .read will help them sell books. In trademark law, generic and descriptive trademarks are prohibited. No one can have the trademark "Read" in connection with books. Apparently that is not the case for domain names. I wonder what the Competition Bureau may have to say about that…

If you are Christian, will you look for religious advice at .church, .catholic, or for most, just at .christmas? I suppose the Existential among us might look to .dot or .you. or .onyourside for our counsel.

And yes, if you are interested, there is now a .law domain name and a .lawyer domain name for us to consider.

The first of the new gtlds that was allowed to be registered, a test case if you will, was, understandably, the .xxx domain name. It is easy to conceive how that domain name is used to identify pornographic material or products related to the sex industry. However, what trademark lawyers took a special note of was the fact that there was a pro-active registration of domain names that .xxx top level domain to remove brands from being available in the open market to be registered in the .xxx domain. So, for example, Nike might have registered Nike.xxx or The Gap might have registered Gap.xxx so that there could be no use of their brand on the .xxx domain name. If you think that this was just a few people, you should know that it has been announced at INTA 2012 that the .xxx domain name registry generated revenue in excess of $17,600,000.00 by selling .xxx domains to brands specifically so that their brand would not be used in the .xxx space. An unusual business model to be sure, but certainly an interesting one. Perhaps the people who just applied for .sex have the same plan in mind?

This may all prove to be a tempest in a tea cup, but at this point it is anticipated that there will be something of a land rush where there will once again be huge pressure to register domain names, protect brands in cyberspace and reconsider all advertising and marketing strategies. We will see.

You should realize that the domain names are not yet available for use. All that has been announced at this point is the number of domain names that have been applied for. There is now a public review and objection process. However, if you intend to dismiss these domain names applications as frivolous, you should know that the sticker price for applying for one of these gtlds was US$186,000.00 (plus the legal fees connected

with doing so, the incorporations connected to it, etc). In other words, the more than 1,500 different people who applied for these domain names are not screwing around. They have serious plans for these domain names and they have given them a high value.

Who will this matter most to? This will matter most and immediately for anyone who operates in the retail space, but ultimately for anyone who does business through their websites (i.e. everyone).

Up to this point, it has been theoretical as to what these top level domain names would be or how many there would be as it was all secret. It is now a reality that they are out there and over the next year or two you can expect to hear quite a lot about them. Of course, if you think this is all a waste of time, feel free to post your complaint at .sucks

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Welcome

We are pleased to announce that Amy Cull will be joining the firm as an Associate in the Wills and Estates group. Amy will join the firm in mid-July, working exclusively in the Estate Litigation area with Howard Black.

Amy joins us from Whaley Estate Litigation where she practiced exclusively in the areas of Estate, Trust, Capacity, Fiduciary and Power of Attorney Litigation. She has written extensively for the Ontario Bar Association, the Canadian Bar Association, the Law Society of Upper Canada and was recently quoted in the Law Times on estate trustee bonds.

Amy was called to the bar in 2009, after receiving her Juris Doctor from the University of Toronto in 2008. Prior to law school, Amy obtained her Honours Bachelor of Arts from York University, where she graduated with distinction.

Leave Nothing Behind

1083994 Ontario v. Kotsopoulos and the Defence of Abandonment

At the expiry or earlier termination of a lease, tenants and landlords have a number of financial and legal considerations and obligations. While tenants typically take steps to recover their property, when faced with so many end of term concerns, this task is often neglected, forgotten or intentionally avoided. The landlords will then want to dispose of any abandoned equipment and chattels as quickly as possible, regardless of whether the exercise proves profitable. Before any such steps are taken, a landlord must be satisfied that a tenant has relinquished any claim to the property, or else run the risk of being exposed to an action for conversion.

The Defence of Abandonment

The tort of conversion consists of a wrongful interference with the goods of another, which results in damage accruing to the harmed party. The tort is one of strict liability and, accordingly, it is no defence that the wrongful act was committed innocently.

Abandonment is a recognized defence to an allegation of conversion. The Ontario Court of Appeal has defined abandonment as a "giving up, a total desertion and absolute relinquishment" of goods by the former owner. The party relying on the defence bears the onus of proof and must demonstrate, on a balance of probabilities, that the owner intended to abandon the chattels. This analysis is a question of fact and, in determining whether a party has truly abandoned their property, the judiciary will consider factors such as: (1) the passage of time; (2) the nature of the transaction; (3) the owner's conduct; and (4) the nature and value of the property.

1083994 Ontario v. Kotsopoulos

The case of 1083994 Ontario v. Kotsopoulos 2012 ONCA 143 ("Kotsopoulos") provides a relevant case study for both landlords and tenants.

In January 2006, Ronald James Dean and 1083994 Ontario Inc. ("Tenant") leased premises from Steve Kotsopoulos ("Landlord"), in order to operate a restaurant. The Tenant also purchased previously owned restaurant equipment from the Landlord for $40,000.00 (the "Equipment"). In June 2006, the Landlord sent notice to the Tenant that no insurance had been obtained and that the lease would be terminated on June 30, 2006 if this default was not rectified.

On July 1, 2006 the Tenant vacated the premises and began to remove the Equipment, making four separate trips to the premises with a truck. On July 2, 2006, the Tenant claimed to have returned to the premises to remove the remaining Equipment, but found the locks to the premises changed.

On July 6, 2006 the Landlord put a "For Rent" sign in the window of the premises and placed an advertisement in the Toronto Star newspaper stating: "restaurant and equipment for sale".

On July 13, 2006, the Tenant's lawyer notified the Landlord that the Tenant wanted an opportunity to access the premises to remove the Equipment.

On August 30, 2006, the Landlord entered into a new lease for the premises, which included the Equipment.

On November 10, 2006, the Tenant's solicitor notified the Landlord that the Tenant required access to the premises to claim the Equipment. The Landlord's solicitor responded on November 15, 2006, stating that the Equipment had been abandoned and the Tenant had no claim.

Decision of the Trial Judge

At trial, the Landlord defended the Tenant's claim for conversion on the grounds of abandonment. Justice Pitt (the "Trial Judge") considered each of the four factors and determined that the Tenant had made minimal efforts to recover the Equipment (as evidenced by the sending of only two letters to the Landlord). Justice Pitt also noted that the Equipment was a part of the business which the Tenant had left when they abandoned the premises on July 1, 2006. In addition, Justice Pitt stated that there was no evidence to demonstrate that the Equipment had any significant value. When taken together, the Trial Judge concluded that the Tenant had indeed abandoned the Equipment and dismissed the Tenant's claim.

Court of Appeal

Justice Feldman found that the Trial Judge had erred in his decision, and that there was sufficient evidence to demonstrate that the Tenant had not abandoned the Equipment and, accordingly, awarded the Tenant damages for conversion.

In making this determination, Justice Feldman found that the Trial Judge had failed to take the following evidence into consideration:

- the Tenant obtained an auctioneer to inspect and appraise the Equipment with a view to having it sold;
- the Tenant had begun moving the Equipment out of the premises and only stopped when the locks were changed;
- the Tenant caused its solicitor to write two letters to the Landlord asserting its right to the Equipment; and
- the Landlord failed to make efforts to contact the Tenant prior to disposing of the Equipment.

In addition, Justice Feldman found that the Trial Judge had erred in finding that the Equipment had no significant value, as the Tenant had paid $40,000.00 for the Equipment only five months earlier. Further, the fact that the equipment was included in the Landlord's lease to the subsequent tenant also demonstrated that the Equipment still retained value.

Conclusion

Kotsopoulos provides both landlords and tenants with a roadmap as to how to handle the issue of a tenant's equipment and chattels in the case where such items are left on the premises. A tenant must always be diligent in asserting its right of ownership by taking steps to recover the items, by notifying the landlord of its ongoing interests and by preparing all relevant documentation to demonstrate the value of its items. A landlord should take care to provide notice to the tenant of what items are in its possession and provide periodic updates as to the landlord's intentions in respect of those items. Ultimately, situations such as these can be very difficult to navigate. If there is only one lesson to be learned … "Leave Nothing Behind!"

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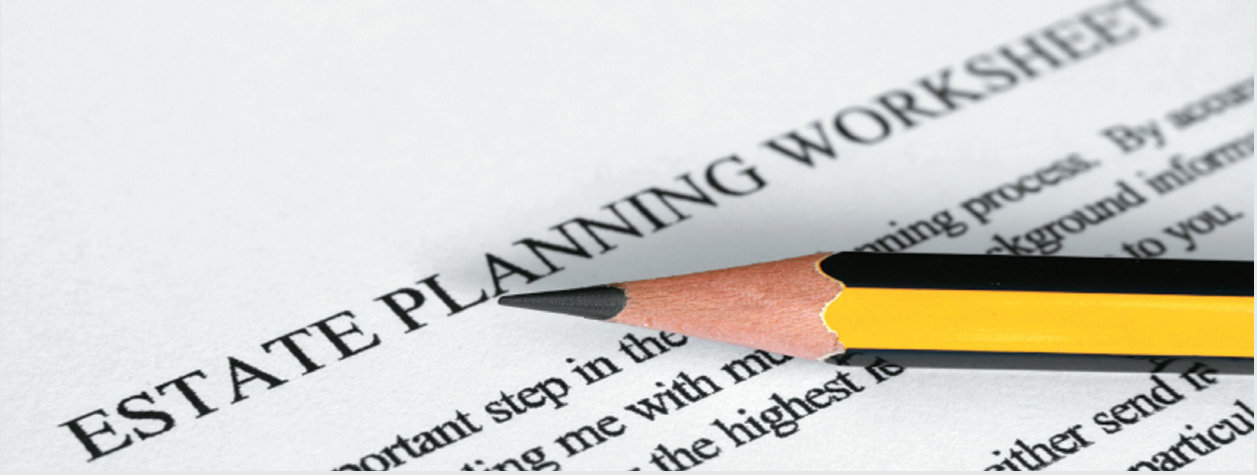

Tax Planning Your Will: Part 1

Testamentary trusts, those trusts which are created upon an individual's death pursuant to a Will, are most often utilized for practical purposes. The most common types of testamentary trusts are: "spousal trusts" (often used to protect assets for future generations and to maintain some control over the use of these assets during the surviving spouse's lifetime); "family trusts" (often used in conjunction with a spousal trust when the testator does not want to wait until the surviving spouse dies for the children to benefit from the estate); and "trusts for issue" (often used to ensure that the testator's issue do not receive their inheritances until a certain age). Where the testator has adult children, such children usually receive their inheritance outright without the use of a trust. However, the Will would still normally contain a trust for issue to deal with a grandchild inheriting from the testator's estate where an adult child predeceases the testator leaving children surviving him.

Surprisingly, our experience is that testamentary trusts are rarely used for tax purposes.

The fundamental tax advantage associated with testamentary trusts is that any income earned by the trust can be taxed within the trust at graduated rates. In this regard, the use of a single testamentary trust can result in approximately $20,000 less tax – in each year – on roughly the first $125,000 of income taxed therein.

Significant tax savings can be achieved where - rather than distributing an individual's estate outright or upon attaining a certain age, as is most commonly the case - inheritances are put into, or continue to be held in, trusts drafted specifically as tax-planning tools. Generally, these trusts provide sufficient flexibility for the individual to deal with the inheritance such that it is akin to paying the assets outright to the individual – only they provide an extra set of graduated rates while the assets remain in the trust. This is generally achieved by appointing the individual to act as the sole trustee of his trust, providing him with the unfettered discretion to use all of the trust funds for himself during his lifetime, the ability to determine how the trust funds shall be distributed upon his death, all the while also providing him with the ability to retain the funds in the trust in order to take advantage of the graduated rates. More details regarding the structuring of these trusts will be contained in Part 2 of this article.

By way of an extreme example, where an individual with a spouse and three children – each of whom, in turn, have three children – was otherwise planning to leave his entire estate outright to his spouse, the use of multiple testamentary trusts can result in potential tax savings as high as $500,000 in each year. These savings can be achieved by taking advantage of the graduated rates associated with a testamentary trust for each of the surviving spouse ($20,000), the three children ($60,000) and the nine grandchildren ($180,000), while also taking advantage of each child's and grandchild's graduated rates where such child or grandchild

does not otherwise earn any income in the year ($240,000), where applicable. Upon the surviving spouse's death, the potential tax savings can increase to up to $720,000! While the surviving spouse's trust savings ($20,000) will be foregone, the surviving spouse could create an additional trust for each child and grandchild, resulting in up to an additional $240,000 of potential tax savings in each year ($20,000 per additional trust).

Not only does this extreme example require significant income-producing assets in order to maximize savings ($90 million, assuming a 5% rate of return, roughly half of which must be owned by each spouse), but the use of multiple trusts may not always be desirable (primarily because in order to achieve the result, a surviving spouse's inheritance will be significantly reduced). In fact, where the testamentary trust "strategy" is utilized, many individuals will choose to hold the entire estate in a single testamentary trust on the first spouse's death, for the sole benefit of the surviving spouse during her lifetime, in lieu of an outright distribution (requiring income-producing assets of only $2.5 million to achieve annual tax savings of roughly $20,000 during the surviving spouse's life). It is only upon the surviving spouse's death that most individuals opt to use multiple testamentary trusts for children and/or grandchildren.

In recent news, the new "top" marginal tax rate in Ontario has made the use of multiple testamentary trusts even more appealing as an additional $11,500 can be saved in each year where a trust earns $500,000 of income. While significant income-producing assets will be necessary to maximize those savings (i.e., $10 million per trust), the cost of not using such trusts has clearly gone up!

Finally, it must be noted that there are costs associated with this strategy, including (i) Wills becoming more complex and requiring additional time and effort; (ii) estates becoming increasingly difficult and more costly to administer; (iii) compliance costs increasing significantly; and (iv) the potential for fiduciary claims by contingent beneficiaries who feel aggrieved. The hope is, obviously, that the potential tax savings will outweigh these costs.

The second part of this article will discuss the structure of the tax-oriented testamentary trust and will appear in the fall Newsletter.

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Firm News

Find out what is happening at the firm by following us on Twitter @Mindengross

We recently launched our new website. Some of the changes include: new photos of the office and lawyers; the website is now mobile friendly; improved searchability for lawyers; and enhanced biographies of our lawyers to name a few. Please visit www.mindengross.com

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Professional Notes

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Reuben M. Rosenblatt Q.C. is recognized as one of Canada's leading Property Development lawyers by The Canadian Legal Lexpert® Directory.

Howard S. Black presented Making the Case for Mediation in Estates Disputes as a capability webinar to members of the Meritas community.

Stephen Posen and **Stephen J. Messinger** attended ICSC RECon in Las Vegas.

Samantha A. Prasad is now contributing to The Fund Library – Canada's Investment Resource Centre. (www.fundlibrary.com).

Matthew P. Maurer is now contributing to SLAW – Canada's online legal magazine. (www.slaw.ca).

Howard S. Black and **Michael A. Goldberg** attended STEP Canada's 14th National Conference.

Jerry S. Grafstein Q.C. launched the online American Political Newspaper, The Penn Ave Post Washington, D.C. (www.pennavepost.com). Jerry is Co-founder and Chair of the Advisory Board to The Penn Ave Post.

Steven I. Pearlstein presented Title Insurance vs. Title Opinion at the Ontario Bar Association conference on The Key to the Successful Purchase of a Multi-Tenant Commercial Property.

David T. Ullmann was quoted in the Globe & Mail article Nortel dodges environmental orders, for now.

Stephen Posen and **David Ullmann** attended the Glenn Gould Foundation's Ninth Glenn Gould Prize Laureate presented to Leonard Cohen. Stephen continues to act as Executor for the Glenn Gould Estate and as a Director for the Glenn Gould Foundation. Stephen has played a leadership role in all these events since Glenn Gould's death over three decades ago. David acts as Solicitor for the Estate of Glenn Gould.