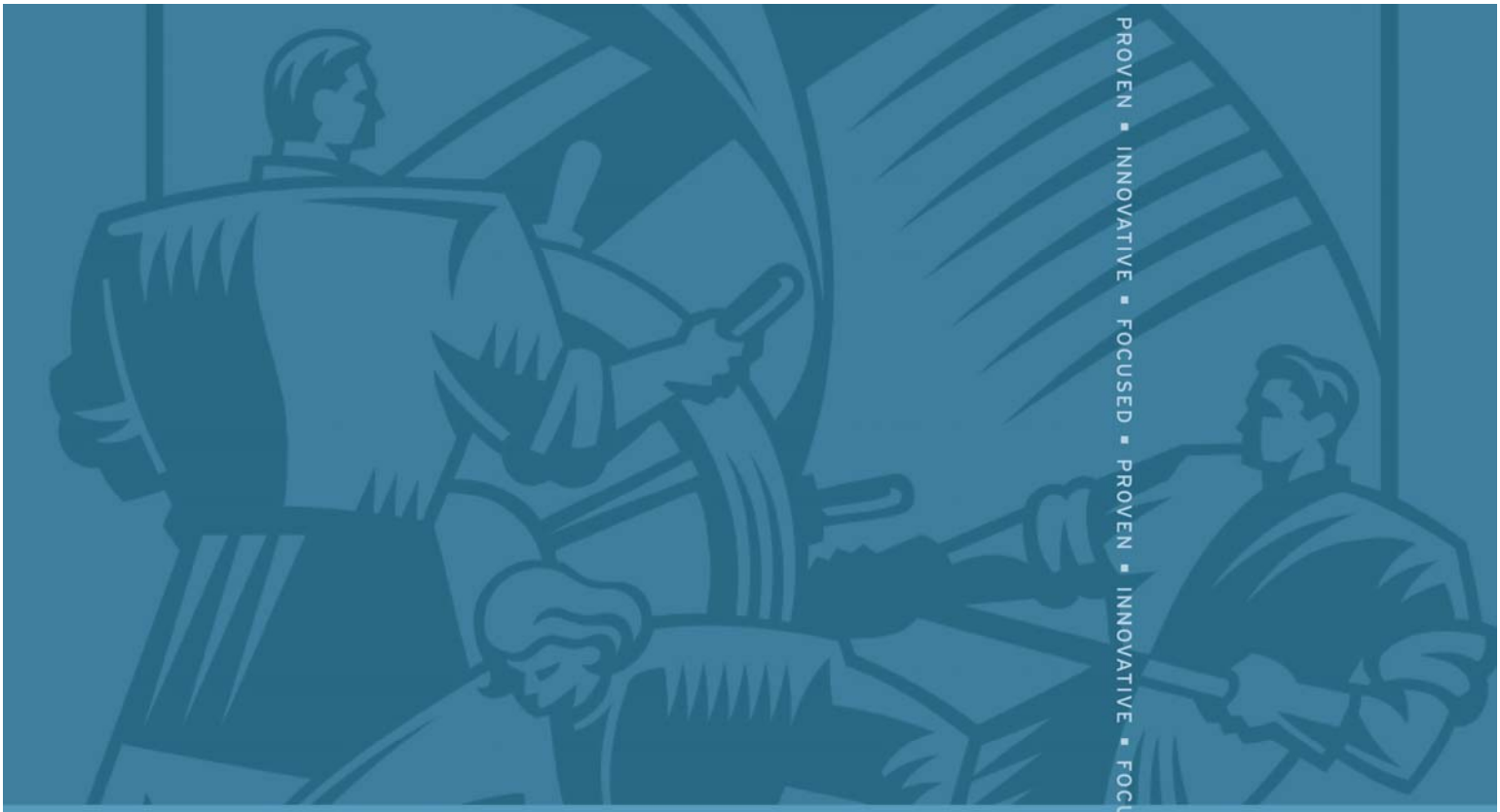

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Foreign investors face tough times

Mark Katz

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Online reputation management

If you aren't thinking about it yet, you soon will be

TONY WILSON

Even though it's been a bad year for advertisers, advertising — whether on radio, TV, print, on-line adverting, telemarketing or flyers delivered to your door — is still a multi-billion dollar industry. Advertisers are trying to do two things: make you connect with a brand, and create a demand for the product or service associated with the brand so that you'll buy. The way to legally protect a brand is by owning a trade-mark for the words or design that make up the brand.

But just like The Beatles were more than the mere sum of their parts, a "brand" is more than just a trade-mark. There is goodwill associated with a brand, and this includes subjective and hard-to-quantify attributes like the loyalty of the customers who buy the product or service associated with the brand (just talk to any Mac owner about Apple). It also includes the reputation of the company behind the brand.

Reputation matters. That's why when Maple Leaf Foods had a problem with an outbreak of listeriosis in its products last year, it was a public relations nightmare as much as a legal one. But sometimes the only way to save the brand is for the public relations objectives to outweigh the legal ones. Having the CEO say in newspaper ads and elsewhere in the media, "Sorry, it's totally our fault and we'll fix it," might give the lawyers fits, but it might make the customers very happy. Customers appreciate the fact that someone actually takes responsibility for a mistake rather than weaving, dodging and bobbing around the issue to avoid legal liability. By dealing with a crisis by taking responsibility for it, Maple Leaf Foods may well have saved its brands and saved the company's reputation.

But it's not just companies and trade-mark owners who have reputations to protect. We all do, and these days, much of our personal reputation is on the web for all the world to see. This is one reason most law and business schools tell their first-year students to get rid of their compromising Facebook pages and to change their e-mail addresses from mojokitty69 @whatever.com to something more professional. They are warned to watch what they say and do on social media and on their personal blogs. Employers can and will check up on prospective employees on the web, and so will clients. People will be judged on the basis of those provocatively dressed pictures that were posted on Facebook way back in 2008, or the nasty rant about a deadbeat job and a lousy boss from 2006 on a blog.

Unfortunately, once something is on the web, it's hard to get it off — a lesson learned by B.C. NDP candidate Ray Lam during the last B.C. election, when some "inappropriate" photographs were found on his Facebook page, and he was forced to drop out of the election after the pictures went public.

Just like there was no such thing as Internet law before the Internet or franchise law before there were franchises, a new and growing niche area is "reputation management law." It straddles libel, slander and defamation law, freedom of speech, privacy law, copyright and trade-mark law, employment law and the rules governing Youtube, Facebook, Twitter and other social media. And like environmental law 25 years ago, it has nowhere to go but up.

For example, blogs aren't anonymous anymore (even if they're meant to be), and won't shield a person from an action in defamation, as New York blogger Rosemary Port learned the

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Foreign investors face tough times

MARK KATZ

For most of its close to 25 years of existence, the *Investment Canada Act* (ICA) has flown under the proverbial radar screen. But recent months have seen this relatively obscure and often opaquely drafted statute take on a new prominence that may signal difficulties ahead for certain foreign investments in Canada.

A major change to the legislative framework occurred in March, when the ICA was amended to incorporate a new "national security" review process (key thresholds were also revised). The new process arms the federal government with broad powers to review and prohibit foreign investments in Canada on the grounds that they "could be injurious to national security."

The term "national security" was deliberately left undefined to allow for maximum discretion. The government can also invoke the process at any time (before or after closing) and without regard to the value of the investment or the level of interest acquired.

The new national security provisions appear to have already affected the fate of at least one transaction since they were enacted, namely the proposed acquisition of Forsys Metals Corp. (Forsys) by George Forrest International Afrique S.P.R.L. (GFI).

Forsys is a publicly traded mineral exploration company incorporated and listed in Canada. Its projects, including a uranium deposit that Forsys describes as being close to production, are located in Namibia. GFI offered to acquire Forsys in November 2008. Then, in August 2009, Forsys issued a cryptic press release indicating that it had been provided with a copy of "an unsolicited letter" sent to GFI by Industry Canada stating that "GFI is prohibited from implementing the investment pending further notice from Industry Canada." Six days later, Forsys announced the termination of the proposed transaction.

No one involved would comment publicly on why Industry Canada

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Foreign investors have difficulty meeting undertakings

Industry

Continued From Page 9

had sent its letter. However, based on the reported book value of Forsys' assets and its prior public disclosure, it does not seem that the normal ICA review process applied. Therefore, the only explanation for Industry Canada's intervention, and the subsequent collapse of the deal, is that the ICA's national security provisions had been invoked. Presumably, this had to do with the Forsys uranium project, even though the mine is not in Canada.

National security was also an issue in the proposed acquisition by Ericsson of Nortel's wireless unit, announced last July. Although the transaction was not ultimately derailed, opponents of the deal tried their best to use the national security provisions to do so.

Ericsson, a Swedish telecom company, successfully bid for Nortel's wireless unit as part of an auction stemming out of Nortel's bankruptcy proceedings initiated last January. During the auction process and following its conclusion, RIM, Canadian makers of the Blackberry and one of the companies losing out to Ericsson, argued that the federal government should prevent the sale because it would "jeopardize Canada's national interests." Various federal and provincial politicians agreed that Nortel's wireless unit should not fall into foreign hands. There was even an emergency meeting of the House of Commons' Industry Committee to investigate the deal.

Notwithstanding these protests, the federal government announced on Sept. 16 that it would not challenge the Ericsson/Nortel transaction. The minister of industry, Tony Clement, said that the government had "no grounds to believe that the transaction could be injurious to Canada's national security."

In addition to national security concerns, the government has also been grappling with the recession's impact on the ability of foreign investors to meet commitments (undertakings) provided to obtain ICA approval. These undertakings are a common part of the ICA process. There have been reported incidents of foreign investors renegotiating their undertakings with the federal government. But, earlier this year, the government went one step further and started court proceedings to enforce a set of undertakings obtained from U.S. Steel.

U.S. Steel committed to these undertakings in 2007, in connection with its acquisition of Stelco. Last spring, U.S. Steel shut down most of its Canadian operations. In July, the government filed an application with the Federal Court seeking an order requiring U.S. Steel to increase its Canadian steel production, maintain employment levels in Canada and pay $10,000 per day for each day that it allegedly failed to comply with its undertakings. This unprecedented step marks the first time that the Canadian government has gone to court for such an order. The matter is still pending.

Although most foreign investments will continue to be approved in Canada without incident, the above examples show an increased resolve by the Canadian government to use the review and enforcement mechanisms available to it under the ICA. Even the Ericsson/Nortel transaction, which the government ultimately let through, shows how determined opponents can use the ICA process to throw up roadblocks to a deal.

All of this spells more interesting — and in some cases more difficult — times for foreign investors in Canada. ■

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