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Must-Read Decision on Business Name Disputes and Agency Decision-Making: MBCA

An application under s.14(1) of [*The Business Names Registration Act*](#) (to review the Director's decision concerning a business name registration) is a true appeal and not a trial *de novo* according to the Manitoba Court of Appeal in [*Friesen \(Brian Neil\) Dental Corp. et al. v. Director of Companies Office \(Man.\)*](#), 2011 MBCA 20. Noting the "contradictory and dated case law" on this issue, especially in the business names context, the court conducts a careful contextual analysis of both the legislation and the jurisprudence (paras. 17- 72). On the scheme of the *BNRA* the court concludes:

the object of the Legislature was to provide an informal, inexpensive process to register business names and resolve business name disputes in Manitoba by utilizing the expertise of a statutory decision-maker to make discretionary decisions which are well informed by past practical experience. Given this, it would be difficult to accept that the Legislature intended to permit aggrieved persons to present additional evidence to a court, on appeal, as a matter of course. Not only would this defeat the object of having an informal and inexpensive process for dealing with these matters, but it would also be counter-intuitive to the discretion given to the Director with respect to issues as to whether a name was confusing, similar or objectionable on public grounds. Allowing a court to consider those issues anew, with additional evidence, would allow a court to disregard the expertise of the Director, and could potentially upset the bureaucratic continuity which otherwise would be established.

The court allowed the appeal and referred the matter back for a further hearing, however, on the basis that the Director's three-line, conclusory reasons were "not susceptible to effective appellate review and clearly do not evidence a decision-making process of 'justification, transparency and intelligibility.'" (para.99) The court describes how the adequacy of reasons

given by an administrative tribunal should be assessed at paras. 89-92 and gives examples of good and bad reasons in business name disputes at paras. 93-97.

Alberta Court of Appeal First to Rule on Legislation to Establish a National Securities Regulator

The federal government's proposed legislation to establish a national securities regulator is unconstitutional according to the Alberta Court of Appeal in [Reference re Securities Act \(Canada\)](#), 2011 ABCA 77. The legislation would intrude into "an area of regulation long occupied by the provinces and long considered to be clearly within provincial jurisdiction," does not meet traditional tests for inclusion in the trade and commerce power, and is inconsistent with prior court decisions on division of powers says the court at para. 47. This will not be the last word on the subject, however, as Quebec has made a similar reference to its Court of Appeal and the Supreme Court of Canada will hear the federal government's reference in April. Manitoba and New Brunswick oppose the national regulator; B.C. and Saskatchewan support the idea but not its conception; and Ontario is a proponent.

Critics are sceptical that the bid for a national regulator will succeed, as this *Lawyers Weekly* article by U of T professor Jeffrey MacIntosh reflects: [National securities regulation - A saga of political futility](#).

More on GST/CCAA Case

In [Crown Loses Priority Battle Over GST Funds in Century Services Inc. v. Canada \(Attorney General\)](#) author Christine Kellowan adds to the debate on insolvency law occasioned by the Supreme Court of Canada decision in [Century Services Inc. v. Canada \(Attorney General\)](#), 2010 SCC, summarized in last month's eLaw.

How New Product Safety and Anti-Spam Legislation Will Affect Business Practices

These articles explore the impact of recently passed and soon to be in force legislation dealing with product safety and commercial electronic messaging:

- The *Canadian Lawyer Inhouse* article [Safety First](#) takes a close look at [Bill C-36](#), the *Canada Consumer Product Safety Act*, which will streamline product recalls and impose record keeping and incident reporting standards on sellers, manufacturers and importers. As noted in last month's eLaw, the legislation was passed in December and will come into force soon.
- [Bill C-28](#), the *Fighting Internet and Wireless Spam Act*, will change the way businesses communicate and personal information is regulated according to those quoted in [New anti-spam law carries stiff penalties](#), a February 11, 2011 article from *Lawyers Weekly*. Compliance is complicated and penalties for violation are severe, so businesses will need to review and change their practices before the in force date, likely next fall. See also this [article](#) from McCarthy Tétrault's [Technology Law Quarterly](#).

Resources on Business Topics

Business lawyers may be interested in these recent publications:

- Ned Brown's paper, [Should the Use of the Personal Property Registry be Expanded?](#), posted March 4, 2011 on [Pitblawg](#), considers whether the Manitoba Personal Property Registry's use should be further expanded to cover additional situations where a person who possesses or controls personal property grants other types of non-security interests to third parties.
- The March 2011 issue of the CBA's [Business and Corporate Bulletin](#) contains articles on intellectual property, competition law, mergers and acquisitions, and the CRA's voluntary disclosures program.
- CBA members will want to take a look at the latest edition of the [Canadian Bar Review](#), which contains articles titled Fiduciary Accountability, The Mortgage Mess in Canada, Exemption Clauses and Fundamental Breach in Contract and A Practitioner's Guide to

the new Canada Not for Profit Corporations Act.

- Although [Key Points in Advising Franchisors](#), from BC CLE's [Practice Points](#), is written from the perspective of a province that does not have franchise legislation, it contains some useful pointers for advising franchise clients across Canada.
- The March edition of [Business Law Quarterly](#), a McCarthy Tétrault publication, contains 18 articles on a wide range of business topics.

Time is of the Essence

The early bird deadline to register for Frank Sanitate's [Time Mastery for Support Staff](#) and [Time Mastery for Lawyers](#) is March 31, 2011. These popular day-long programs take place on April 27 and 28, 2011 at the Law Society of Manitoba classroom.

MBA/CBA Programs

Two Toronto lawyers will speak on the topic of [Clients of a Lesser God? Solicitor-Client Privilege Issues for In-House Counsel](#) at the next meeting of the Corporate (In House) Counsel section, to be held March 16, 2011 at the Caboto Centre.

Upcoming online programs in the CBA Skilled Lawyer Series - Corporate Stream include: [Due Diligence Fundamentals](#) on April 6, 2011 and [Buying and Selling a Business](#) on May 3, 2011.

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