



By Jenny Higgins

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Lawyers. They may not wear capes and they certainly don't have x-ray vision, but a good one can save your company from the perils and pitfalls of the business world. Take contracts – signing one you don't entirely understand can bring a promising start-up business to a grinding halt, or bog a more established one down with debts and lost revenues. Sarah Bradley saw this happen to a young manufacturing company that was brimming with potential until its owners signed an agreement with a large distributor.

“Without legal advice, they entered into a very large contract with an important customer that relied on them to produce this product in very large quantities,” says Bradley, a professor at Dalhousie University's Schulich School of Law. “However, their production method wouldn't work on a large scale and, because of the way the contract was worded, they were unable to get out of it and were on the hook for some very significant damages.”

The company ultimately went out of business, which is something that would not have happened if its owners had sought out legal advice before signing the dotted line. A lawyer would have identified any risks connected to the contract, drafted cautionary clauses to protect the company and provided some negotiating assistance. “They would have certainly not had the big downside that they ultimately had, or at least would have fully understood the risk before they entered into the contract,” says Bradley.

It's a problem that's all too familiar to Maureen Ryan, Stephen Winter and Tauna Staniland – all corporate lawyers with the firm of Stewart McKelvey. Despite the complex language used in a contract, and despite its ability to make or break a business, they say too many people just decide to write their own or recycle an old one without getting professional advice. But it's a decision that can result in future disputes, hefty legal fees and, in the worst cases, litigation or bankruptcy.

“That's the danger sometimes in non-lawyers writing up contracts,” says Ryan. “They don't always understand the ramifications of how they've said something or what they've said. Businesspeople take risks all the time and I think that sometimes they're afraid that lawyers are too conservative and all we do is point out all the risks.”

All three say it's cheaper for businesspeople to visit a lawyer before signing a contract – or even before starting a company – than it would be to fix any mistakes made along the way. “We all see time and again that when they don't do that, it ends up costing them more in the long run,” says Staniland. “Whether it's that you have to go back and re-do what was done or whether it results in litigation.”

One of the most high-profile and lengthy court cases to come out of Atlantic Canada involves Knowledge House...

Litigation Limbo

If a problem does result in litigation, it could mean years of court battles and tens of thousands of dollars in legal fees. One of the most high-profile and lengthy court cases to come out of Atlantic Canada involves Knowledge House – a Halifax-based educational software company that was worth \$100-million in 2000 but went bankrupt one year later. During a single week in August 2001, the company's shares nosedived from five dollars to a mere 65 cents. Investors lost millions virtually overnight and the Toronto Stock Exchange issued a cease trading order on the company. Knowledge House announced it could not meet its payroll and other obligations in September 2001, leaving 70 employees suddenly out of work and with no severance pay.

In the wake of the collapse came a flood of lawsuits and counterclaims alleging that stock manipulation and insider trading had made the company's shares appear to be worth more than they actually were. It's a difficult case to keep track of – the various lawsuits have dragged on for years and involved more than a dozen high-profile defendants, including Knowledge House CEO Dan Potter, some of the company's major shareholders, a corporate lawyer who was both Knowledge House counsel and one of its directors, and National Bank Financial Ltd., which lost millions when the company collapsed.

The heaviest litigation began in August 2003, when National Bank Financial launched a suit against Potter and 18 other defendants alleging they conspired to manipulate the stock price of company shares. The institution even named one of its own former brokers as a defendant, claiming he helped to orchestrate the alleged scheme. In return, Potter, who denies any wrongdoing, filed a countersuit against National Bank, claiming the institution laid charges against him in an attempt to cover up its own operational failings and inability to control one of its brokers.

Despite the complexity of the case and severity of the allegations, Potter, a former lawyer, is representing himself – and he's won many of the cases he's appeared in. A major victory came in 2005, when the presiding judge banned three National Bank lawyers from the case after finding that they improperly acquired and read hundreds of emails that belonged to Potter or his company and may have contained privileged solicitor-client communications. A second significant win came in 2008, when Potter and other opponents of National Bank blocked the institution from amending some of its previous pleadings.

But progress on the case is slow – almost a full decade after the company folded, the litigation drags on. "I can't imagine the legal fees that have been incurred in this case by the various litigants involved," says Steven Enman, who teaches business law at Acadia University and is the co-author of *Canadian Business and the Law*, published in 2010. "I think it's fair to say that the whole Knowledge House case is a finger pointing exercise by the various actors involved."

"The basic issue is that lots of people invested money in this company and, for whatever reason, it failed and people lost their investment. That's the reality of the situation and now the investors and the lawyers and the banks and the accountants and all the constituencies in that litigation are trying to recover money from each other."

Although Knowledge House is an extreme example, it illustrates some of the

major problems a business can encounter – bankruptcy, becoming delisted from a stock exchange, and litigation. It can also serve as a cautionary tale about how time consuming, expensive and complex litigation can become if a business owner ever sees the inside of a courtroom. Unfortunately, there are plenty of legal pitfalls out there – from tax laws to shareholders' agreements to safeguarding a company's intellectual property, businesspeople must grapple with a wide range of complicated laws and legal issues.

Enman says finding a good lawyer early is one of the safest ways for business owners to protect their company from future problems, but adds that it's also important for entrepreneurs to have a general awareness of the major legal issues and potential pitfalls that can affect whatever type of business they're engaged in. This in turn may help them to decide when to call a lawyer, when to seek advice from another source, and when to proceed alone.

Five Areas of Law All Businesspeople Should Know

There are a few key areas of law that will likely impact most businesses, according to Enman. First and foremost is contracts. A knowledge of contract law is vital because almost every businessperson will have to sign or draft one at some point in his or her career. Sign one you don't understand and you could wind up in future disputes with your clients and partners, or, like the manufacturing company at the start of this article, you could lose your business entirely.

If a business has employees, it must also be aware of a host of labour laws that relate to human rights, the hiring and firing of workers, and the safeguarding of employees' private information. Ryan says the way employers deal with staff can impact them years down the road if they don't handle the situation properly from the beginning. "Sometimes in the employment

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law context, people – because they don't get advice early on in terms of dealing with an employee who might be a problem – they don't realize that as time goes by they're probably incurring greater obligations to the employee than if they'd dealt with something early."

A third area of law that affects many businesspeople is property law. This may mean real property, such as land, or intellectual property, such as inventions and artistic works that may need to be patented or trademarked. Roddy Awad, co-owner of Moncton-based IT firm Tech Knowledge Solutions, says protecting intellectual property that belongs either to his company or the clients he represents is crucial to remaining profitable. "It is certainly a topic for us being in a technology field and providing professional services. We typically provide a service for some of our clients and allow them to keep their intellectual property, so it's important from a legal perspective that they are well covered. That's a piece where legal counsel is very important."

Safeguarding intellectual property is not only paramount in the IT sector, it's vital for any company that needs to protect the formulas and procedures that make its products unique. An example is Tvål Skincare, which produces handmade natural soaps, bath products, skincare and mineral makeup for its shops in St. John's and Toronto. "We made up a confidentiality agreement for the employees to sign, just protecting our recipes and trade secrets and stuff like that," says company co-owner Bobby Bailey. "We had that drawn up by a lawyer."

Then there are the laws that govern real property. These not only address the buying, selling and leasing of land, but also any zoning or urban planning issues that determine what size or type of structure can be built in different areas. If you're a developer working in Atlantic Canada, you may have to work around some pretty complex regulations.

"Whether it's in St. John's, or Moncton, or Halifax, or Sydney, or anywhere, there are urban planning rules and you're going to have to navigate your way through that," says Colin MacLean, president of Nova Scotia's Waterfront Development Corporation. "In Halifax, one of the governing principals around development in the downtown is the view from Citadel Hill. The city has developed what are called view corridors from that hill, so that you cannot obstruct the view from that hill to Halifax Harbour, except in certain corridors."

It is also vital that many businesspeople have a good understanding of tort law, which protects individuals who have been injured by the negligence or wrongdoing of others. "Tort law is obviously relevant in terms of the harm that might be caused to people by business activities, such as pollution or defective products," says Enman. "The big one in the news right now is the Toyota mess and what responsibility Toyota may have to people who either have defective cars or, in the more serious case, who've been injured as a result of malfunction of the vehicles."

Tort law can be especially important to businesses that deal with the public directly, such as shops, restaurants, and pubs. Russell Floren, owner of the Bookery on Signal Hill/Sweet Relic in downtown St. John's, says having liability insurance is critical if you're running a retail establishment.

"Someone could come in and trip and sue me for whatever. So it's good to have a good liability and insurance policy for a public space before you open. That's the number one thing."

A final area of law that businesspeople should be familiar with is tax law. Professor Bradley warns that this is a highly complex field that would be extremely difficult for most people to understand without seeking expert advice. "When businesses are engaging in almost any relationship that involves the transfer of money from one party to another, tax issues will arise. The Income Tax Act is extremely intricate and contains many rules and provisions that really are only well-understood by experienced tax professionals and tax lawyers."

Finding a Good Lawyer

Most business owners will have to seek legal advice at some point of their career – whether they're starting, growing, or selling a company. Although there are plenty of skilled lawyers in Atlantic Canada, there are a variety of factors that businesspeople should take into consideration before choosing one. A good starting point is to assemble a few prospective lawyers who specialize in or have relevant experience with whatever field of business the company is operating in. The more a lawyer knows about a business and how it operates, the more effectively he or she can provide services to that company.

Fit is also important – this means finding a lawyer you can get along with and who supports your goals and motivations. Bradley suggests that businesspeople invite prospective lawyers to visit their place of work so they can watch the daily routines, see what the products are, and get a general idea of how the company operates. "That's something that a lot of lawyers would be very willing to do," she says. "It might help to contextualize the advice that they give and provide them with a better understanding of what the business is doing."

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(L-R) Stephen Winter, Tauna Staniland and Maureen Ryan, corporate lawyers with Stewart McKelvey, say it's always cheaper for a business owner to visit a lawyer before signing a contract or starting a company, than it is to fix a problem later.

Finally, cost is an important consideration when choosing a lawyer. Businesspeople should always be upfront about how much they are willing or able to spend when shopping around for a law firm. “That should be something that you as a client can simply talk to the lawyer about right off the bat,” says Bradley. “Especially in establishing a new relationship, many lawyers will be willing to have an introductory meeting at no cost, and will give you a sense of what they’re actually able to do for you, what their competencies are, and that’s something a business starting out will want to take advantage of as they try to find a lawyer and establish a relationship.”

Businesspeople in Atlantic Canada can choose between large interprovincial firms and smaller boutique firms. Each has benefits that may attract different clients, depending on their needs. The big regional firms can draw on a large pool of experienced lawyers who together cover almost every area of legal practice. Stewart McKelvey’s Maureen Ryan

says this gives clients access to a broad range of services. “At our firm we have depth in pretty much everything, which I think gives businesses a lot of comfort because they may come to me on a particular contracts issue, for example, but then if a labour and employment issue comes up, they don’t have to go somewhere else and re-educate another team of lawyers about their business.”

On the other hand, there are also clients who may prefer to deal with a more locally based and smaller firm. David Melvin is a lawyer who practices corporate and commercial law in the Dartmouth-based firm of Livingstone and Company. He says clients who choose a smaller firm often get to work more closely with their lawyers than clients in interprovincial firms. “Smaller firms can offer more one-on-one contact,” says Melvin. “Clients are able to interact directly with the main lawyer on the file as opposed to paralegals or junior lawyers.”

Kenneth Godfrey, who practices business

law with the Charlottetown firm of Campbell Lea, agrees. “What we offer clients is a more personalized service and, perhaps more importantly than that, the assurance that our focus is on local business. In a small market such as PEI, conflicts can become a problem for the regional firms and no one wants to be bumped because their lawyer has concerns that are more focused on their national clients, or their regional clients, or interests that are at the regional and national level. I think the main thing we offer is that independence.”

Melvin also adds that many clients may find it more economical to turn to a smaller firm for advice instead of an interprovincial one. He says the smaller firms tend to have fewer overhead expenses and can therefore charge lower hourly rates. They also have a more flexible fee structure and may be able to provide a fee for a service instead of by the hour.

Both men, however, say that the regional firms also have their advantages. “Larger firms have far more resources and tend to be more specialized in areas like tax law, for example,” says Melvin. “They may have a core of expertise that other firms may not. If I don’t have that expertise, I’ll refer a client to one of my colleagues in a larger firm.”

“There’s a place for both in the Maritimes,” says Godfrey. “For clients that want a job done that needs to be done across the country, then they might prefer the one-stop shopping aspect of a regional firm.”

Legal Tips to Help Your Business

Although different businesses will encounter different problems and regulations, there are some general legal tips that can be applied to most companies. First and foremost is to keep a paper trail of every deal and transaction that takes place during the life of your business and to maintain orderly files so you can retrieve information fast. It sounds simple, but lawyers know that too few businesses keep good corporate records. Not only is this an avoidable problem, but it’s one that can hurt business owners years down the road when they try to sell their company.

Stephen Winter, who practices corporate law with Stewart McKelvey, saw this firsthand while working with a company that had no documents in place to identify its shareholders. “Down the road, when the company went to sell some shares and the buyer wanted to see what had transpired – who are the shareholders? how much did they acquire the shares for? – those records

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weren't in place. There was a complete lack of documentation," says Winter. "These people buying the shares needed to know that the people they were giving money to owned these shares and that wasn't something that was easily ascertained. We had to do a lot of work to rectify these problems."

It is also critical for companies to remain financially responsible – this means keeping your liabilities down and paying all of your taxes and debts in a timely fashion. Godfrey says the single-most important piece of advice he gives all business owners is to get a good tax accountant or tax lawyer. "Most businesspeople understand the business nature of the transaction, they often do not understand the tax details," he says. "That is the number one item that causes pitfalls and problems later on."

Staniland agrees. She says businesses often enter into transactions without realizing the many side effects that their actions may have in the future. It's not uncommon, for example, for clients to consider signing a deal that could change the way they're taxed or, much worse and less frequently, could cause their company to become

delisted from the stock exchange. "So how they decide to structure a deal – it's generally really important that they get that advice," she says.

A piece of advice for businesspeople who do find themselves in a dispute is to try and work things out before going to court. If that doesn't work, then settle whenever possible. It's cheaper, faster, and easier. Floren says he learned this while watching another shop owner work through some legal problems with a contractor. The contractor agreed to do some renovations for \$25,000, but then delivered a bill for \$80,000. His client refused to pay more than the original quote, but had nothing in writing saying what that was.

"So the contractor goes and throws a lien on the property, which they can do, it's called a mechanics lien," says Floren. "With the lien on his property, the shop owner could never sell the store or do anything with it until paying the contractor." In the end, Floren says the shop owner took the contractor to court and ended up paying as much in legal fees as he would have if he had just paid the \$80,000 to start with.

"What I learned out of that story is: try to settle, don't go to court and try to get everything in writing," he says.

Finally, it is important that businesspeople know how to be good clients. Lawyers can do wonders to keep a company profitable and out of trouble, but they need direction and input. The easier you can make your lawyer's job, the faster he or she can work and the lower your legal fees will be. Melvin, of Livingstone and Company, says it's always a great help when his clients make their documents readily available and provide him with contact information for all the parties involved. He also says it can create a lot of delays if the client is out of reach or slow to return his phone calls and emails.

The single-most important thing a client can do, he says, is to never sign any contracts or enter into any transactions without asking a lawyer first. This will help to stave off future problems and keep legal fees low. Otherwise, once a client has signed a bad agreement or performed another ill-thought-out piece of business, it's just damage control. **IABM**

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