



Blaneys on Business

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This newsletter is designed to bring news of changes to the law, new law, interesting deals and other matters of interest to our commercial clients and friends. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the head of our Corporate/Commercial group, Alex Mesbur at 416.593.3949 or amesbur@blaney.com.

NEW ONTARIO CONSUMER LAW TAKES EFFECT JULY 30; EXPLICITLY COVERS BUSINESSES THAT SELL ONLINE

Bruno P. Soucy

Strict new legal requirements that apply to a number of businesses that sell goods and services to consumers in Ontario come into effect July 30.

And, for the first time, the province’s new consumer protection legislation and regulations, four years in the making, explicitly cover online consumer transactions involving Ontario residents.

Earlier consumer protection legislation came into force before e-commerce achieved its current prominence in the marketplace. Although it was the opinion of certain authorities in the field that the previous legislation could be interpreted to cover online transactions, tension existed as e-commerce transactions presented unique particularities which were not shared by other forms of consumer transactions. The new legislation, however, attempts to eliminate any potential ambiguity by addressing some of these issues directly.

It prescribes information that most every business will now be obliged to disclose to consumers before consumers enter into agreements, over the internet, valued at \$50 or more.

It also provides a “cooling off” period for consumers entering into a variety of agreements by any route, including online. These include time share agreements, personal development services

agreements (e.g. fitness, diet, dance, modeling, talent, martial arts) and direct agreements (concluded in person at the door step or anywhere else that is not the supplier’s premises or a marketplace, auction, fair or exhibition).

In addition, future performance agreements (goods and services are provided after the contract is made either periodically or on a particular future date) must provide the consumer with an express opportunity to review and correct errors in the proposed agreement immediately before entering it.

The new law does not apply to professional services regulated by statute or at facilities regulated by Ontario’s hospital and pharmacy acts. Nor does it apply to the supply of accommodation (other than time share) or goods and services agreements subject to provincial laws governing motor vehicle dealers, real estate and business brokers, the travel industry and burial professionals, facilities and services.

When the new legislation takes effect, there will be 14 specific items of information that all online sellers will be obliged to disclose to consumers in advance. They are:

1. The name of the supplier and, if different, the name under which the supplier carries on business.
2. The telephone number of the supplier, the address from which the supplier conducts business, and information respecting any other ways (e.g. fax number, e-mail address) in which the supplier can be contacted by the consumer.

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Bruno P. Soucy practices in the areas of intellectual property and technology law and corporate/commercial law (with an emphasis on E-Commerce and information technology).

He has represented a wide variety of Internet and other technology companies in various commercial matters and advises them regularly with respect to the conduct of their business.

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3. A fair and accurate description of the goods and services to be supplied to the consumer, including any technical requirements related to the use of those goods or services.

4. An itemized list of the prices at which the goods and services are to be supplied, including taxes and shipping charges.

5. A description of each additional charge that does, or may, apply (e.g. customs duties, brokerage fees) and the amount (if the supplier can reasonably determine it).

6. The total amount that the supplier knows would be payable by the consumer under the agreement, including amounts required to be disclosed under paragraph 5 above or, if the goods and services are to be supplied during an indefinite period, the amount and frequency of periodic payments.

7. The terms and methods of payment.

8. As applicable, the date or dates on which delivery, commencement of performance, ongoing performance and completion of performance would occur

9. For goods and services that would be delivered,

- the place to which they would be delivered, and
- if the supplier holds out a specific manner of delivery and intends to charge the consumer for it, the manner of delivery, including the name of the carrier (if any) and the method of transportation.

10. For services that would be performed, the place where they would be performed, the person for whom they would be performed, the supplier's method of performing them and, if the supplier holds out that a specific person other than the supplier would perform any of the services on the supplier's behalf, the name of that person.

11. The rights, if any, that the supplier agrees the consumer will have in addition to the rights under the Act and the obligations, if any, by which the supplier agrees to be bound in addition to the obligations under the Act, in relation to cancellations, returns, exchanges and refunds.

12. If the agreement is to include a trade-in arrangement, a description of the trade-in arrangement and the amount of the trade-in allowance.

13. The currency in which amounts are expressed, if it is not Canadian currency.

14. Any other restrictions, limitations and conditions that would be imposed by the supplier.

The Regulations also require that the supplier deliver a copy of the agreement in writing within 15 days after the consumer enters into the agreement and prescribes the methods for doing so. Failure to respect any of the obligations and requirements set forth above could result in the consumer having the unilateral right to void the agreement. Care should therefore be taken by businesses that deal directly with consumers to ensure that their e-commerce and other business practices comply with the consumer protection legislation and recently published regulations. ■

BUSINESSES GOING TO GREAT LENGTHS TO PROTECT COMPETITIVE ADVANTAGES CONFERRED BY TRADE-MARKS

Bruno P. Soucy

Some time after World War II, the story goes, Pablo Picasso was hosting a lunch for a group of friends at a restaurant in a French town.

The lunch went on for some time and, responding to the restlessness of his guests, Picasso, reputedly a cheapskate about small things, finally asked for the

BLANEYS ON BUSINESS

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Blaney McMurtry LLP provides counsel and service with respect to patents, trade-marks, copyright and other areas of intellectual property law. For more information, please contact James Carson 416-593-3958 or Bruno Soucy, 416-593-2950.

bill. When he received it, Picasso did a little drawing on it and passed it back to the owner of the restaurant, saying, “How about I give you that?”

“Wonderful,” replied the restaurateur, “but Monsieur would you kindly sign it?”

Picasso’s answer? “Monsieur, I’m buying the meal, not the restaurant!”

Picasso obviously understood the value of his trade-mark signature. It has not always been thus with business in general. In an increasingly competitive world, however, more businesses seem to be developing a greater appreciation of the values of their signature trade-marks than ever before.

Trade-marks, whether they be words, designs or other distinguishing elements (such as product or package shape and appearance), encompass the goodwill of a business and the goods and services which are associated with such trade-marks. As a company’s goodwill in its products and services grows, so does the value of its trade-marks used in association with those products and services.

The immense value in Coca-Cola’s script logo or in Nike’s swoosh logo is readily apparent. But that value didn’t exist in the beginning. It grew with each respective business.

Little did Ms. Davidson know, when she accepted \$35 from a fledgling Oregon enterprise to design a logo, that her resulting swoosh would become one of the world’s most recognizable and famous symbols.

Nor, likely, could Frank Robinson, the bookkeeper of Atlanta pharmacist John Pemberton, the inventor of the Coca Cola formula, foresee the entire future when he wrote out the product’s double “C” name in that elaborate Spenserian script.

But Robinson and Pemberton were evidently hopeful, and they clearly appreciated what the future could hold, because they took early steps to protect their rights by registering the Coca-Cola script lettering logo as a trade-mark in 1887.

Picasso and the others were obviously mindful of their trade-marks, too, and so should every business be. There are simple steps all businesses can take to protect their goodwill as represented by their trade-marks, be they names, words, designs or otherwise:

- Register your trade-marks – There are significant benefits and rights that accrue to a registered trade-mark including the exclusive right to use the mark throughout Canada in association with the wares and services covered by the registration and other procedural advantages relating to the enforcement of such trade-mark. Moreover, in Canada a trade-mark registration also constitutes a valid defense to an allegation by others of infringing their unregistered trade-marks.
- Maintain your trade-marks – Your trade-mark rights are acquired and maintained through “use”. “Use” is a fundamental concept in trade-mark law. Non-use, inconsistent use, or improper licensing of trade-marks and their use can result in trade-mark registrations being found to be invalid or in trade-marks losing their registered status.
- Enforce your trade-marks – Distinctiveness is the very essence of a trade-mark, which is used to distinguish your goods and services from those of others. Distinctiveness may be lost when others use confusingly similar marks, and this can happen not only by allowing persistent and unchecked infringement of your trade-marks, but also by mere neglect or misuse by allowing the marks to become descriptive of

BLANEYS ON BUSINESS

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the names of the goods or services, or otherwise part of the public domain by allowing common use of the mark. Loss of the trade-marks distinctiveness carries with it loss of protectability.

Given the valuable brand equity and competitive advantage that can reside in a trade-mark, it should not be surprising that companies will go to extraordinary lengths to enforce their trade-marks and protect their exclusive rights to them.

In fact, one protracted and celebrated case in the highly competitive children’s plastic construction blocks industry is now before the Supreme Court of Canada. Trade-mark cases do not commonly reach the Supreme Court.

In the case in question, the makers of Lego blocks, the patents on which have expired, have alleged that the makers of MEGA BLOKS have infringed Lego’s registered trade-marks by producing blocks that have surface protuberances similar to Lego’s.

Both the trial and appeal courts have concluded that the protuberances are not part and parcel of a trade-mark per se because they are primarily functional in nature and do not constitute a “distinguishing guise.”

The appeal court has also noted that, by recognizing the Lego block form as a trade-mark, the court would be allowing Lego to acquire a perpetual patent-like monopoly thereby sidestepping the limited time period of monopoly afforded to patent owners. ■

The decision of the Supreme Court will be issued shortly and we will be letting our readers know the result in a future article.

WE ARE PLEASED TO ANNOUNCE:

**James W. Carson**

has joined the firm, and will head up the patent and trade-mark areas of our Intellectual Property Group.

With over 25 years experience, Jim’s practice covers the full range of intellectual property law including patents and trade-marks. He can be reached by telephone at 416.596.2883, or by e-mail to jcarson@blaney.com

**Nadim Wakeam,
LL.B., M.B.A.**

has joined the firm’s Corporate/Commercial Group.

Nadim will continue his practice in corporate and securities law, including purchases and sales of businesses, mergers and acquisitions and corporate finance.

Nadim was called to the Bar of Ontario in 1985 and has a joint LL.B./M.B.A. from Osgoode Hall Law School and the Schulich School of Business, York University. Nadim can be reached by telephone at 416.593.2980 or by e-mail to nwakeam@blaney.com.

Blaneys on Business is a publication of the Business Law Department of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.

We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Chris Jones at 416.593.7221 ext. 3030 or by email to cjones@blaney.com. Legal questions should be addressed to the specified author.

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