

# Blaneys on Business

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, Stanley Kugelmass at 416.593.3943 or [skugelmass@blaney.com](mailto:skugelmass@blaney.com).

*“...the [Far North Act] will become the cornerstone of the province’s plan to protect the character and environmental integrity of more than 225,000 sq. km of Ontario land while providing for sustainable economic development.”*

## ONTARIO’S NEW FAR NORTH ACT PROMOTES COLLABORATION BETWEEN FIRST NATIONS AND RESOURCE COMPANIES

Patrick H. Gervais and Daniel I. Horovitz

*Blaney McMurtry has a long-standing record of effective counsel in matters involving Canada’s First Nations. In the following article, Patrick Gervais and Daniel Horovitz discuss Ontario’s new Far North Act, its implications for First Nations and resource developers, and concerns going forward.*

On October 25, 2010, Ontario’s *Far North Act* (the *FNA* or the “Act”) received royal assent. Once proclaimed, the *FNA* will become the cornerstone of the province’s plan to protect the character and environmental integrity of more than 225,000 sq. km of Ontario land while providing for sustainable economic development.

The most significant effects of the new law will be felt by the First Nations communities populating the Far North and by the mining, forestry, power generation and other resource sector companies with interests in the region.

The “Far North,” as the *FNA* defines it, lies east of the Manitoba border, south of the Hudson Bay, west of the Quebec Border and

south to a series of provincial parks and management units designated under Ontario’s *Crown Forest Sustainability Act, 1994*. It constitutes 42 per cent of Ontario’s land mass and, at present, is not subject to any specific development review. It contains 34 communities, including Moosonee, Pickle Lake and Peawanuk, and 32 First Nations, with a total population of 24,000.



The *FNA* is the result of a 2008 provincial government initiative to protect the Far North through the use of land planning. The March 2010 Throne Speech launched the Ontario Government’s five-year “Open Ontario Plan,”

*“The Far North Act provides a method of land planning that demands consultation between resource developers and the First Nations.”*



Patrick H. Gervais is a member of the Ontario and New York state bars, and of Blaney McMurtry's corporate commercial practice group.

Patrick may be reached directly at 416.597.4891 or [pgervais@blaney.com](mailto:pgervais@blaney.com)

Daniel I. Horovitz holds a JD-MBA from the University of Western Ontario, is an articling student with Blaney McMurtry, and is scheduled to be called to the bar this year.

Daniel may be reached directly at 416.597.7221 ext.4445 or [dhorovitz@blaney.com](mailto:dhorovitz@blaney.com)

which included a commitment to protect half the Northern Boreal Forest and capitalize on the chromite deposit discovered in a swampy area 500 km northeast of Thunder Bay, known as the Ring of Fire. (Chromite is used in the production of stainless steel and other alloys.)

The *FNA* applies to undeveloped public land in the area. It does not apply to any land that is part of a reserve. Nor does it apply to federal land, municipal land or, in the words of the Act, any land that is “not public.”

Prior to the Legislative Assembly's passage of the *FNA*, the Ministry of Natural Resources (MNR) held outreach discussions with Far North municipalities and First Nations communities on a process for ensuring that any land development would be done in a manner that recognized and affirmed the existing rights of First Nations.

As a result, a number of planned areas in the region have been identified and the ministry estimates that 90 per cent of the First Nations communities intending to develop these areas, which are in their vicinities but off their own reserves, will do so under the *FNA*.

#### **The New Development Regime**

The *FNA* provides a method of land planning that demands consultation between resource developers and the First Nations. The Act, which does not specify what kind of consulting must be conducted, provides for a significant role for First Nations.

Under the Act, in the opening stages of any land development planning process, the ministry

must work with any interested band leader from a reserve in the Far North to create terms of reference aimed at guiding the development process. (The terms of reference are a preliminary statement about the objectives and goals of a project, including a preliminary delineation of roles and responsibilities). This first step seeks to establish a “community-based” land use plan that brings together the communities in the area and the developers, and helps them forge a common vision and co-ordinate their efforts.

The next stages of the planning process underscore the importance of developing terms of reference suitable to both band leaders and the province. The Act stipulates that any “community-based” land use plan, founded on jointly-created terms of reference, will be of no force and effect unless it is approved by both the government and the council of each of the First Nations bands involved in creating the terms of reference. This requirement provides an equal level of approval between the government and the First Nations. From the ministry's perspective, it provides the First Nations communities with real power and real control over the land in question.

For the government and private companies with interests in the region, the need to collaborate with the First Nations on effective terms of reference and a land use plan should be at the forefront of any project, which is what the *FNA* encourages.

In addition to requiring joint approval for any community-based land use plans, the *FNA* also prohibits a number of large-scale development projects unless they include an approved com-

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munity-based land use plan. Such projects include opening a mine, engaging in oil and gas exploration or production, and constructing or expanding any wind- or water-powered electrical generation facilities. An exemption is available for some of these enumerated projects, but even without a formal plan the approval of the First Nations is still required before development can begin.

#### **Concerns Over Future Development in the North**

The *FNA* is not without critics or concerns. For example, many First Nations leaders are concerned that the provincial government’s say is equal to that of local leaders. From their perspective, land use plans may be a good idea but they should be developed completely internally by the First Nations.

At the opposite end of the spectrum are businesspersons equally concerned with the level of government “red tape” that the bill imposes. They insist that this Act represents an unnecessary roadblock to economic advancement in the region, created by a government located in Southern Ontario that does not understand development challenges in the Far North. These critics believe that the bill will turn the Far North into one giant provincial “superpark,” and bring to a standstill crucial development projects.

For example, for each proposal under the *FNA*: a) each First Nation community interested in a project may express that interest to the MNR, requiring that b) a joint body be created to develop terms of reference, and c) those terms of reference must be approved by both the gov-

ernment and the First Nations. All of this needs to be completed before any party can think about negotiating a contract for the development of the land in question. If nothing else, land development in the Far North may become a lengthy undertaking.

Finally, there is a subtler concern that the definition of First Nations in the *FNA* extends beyond those bands living in the Far North. In other words, a large group of people may have a significant amount of influence over decisions made regarding the development of lands to which they have no true connections but in which they declare an interest (perhaps rooted in some historic claim). Economic development may be negatively affected to the detriment of the area’s communities.

#### **Moving Forward**

Concerns aside, the *FNA* is about to be proclaimed the law in Ontario and, as of this writing, a number of First Nations communities have already begun engaging the process. Perhaps the most effective way to ensure that ministry-based, bureaucratic intrusion is minimal is for the region’s First Nations communities to work with resource companies in developing land use plans. An encouraging suggestion is that the Ministry may be more inclined to approve a land use plan that is jointly drafted by a First Nations community and the private sector. A good plan should be focused in its objective and clear in its language, and obtaining legal advice will be critical in ensuring that First Nation rights are defended, economic interests are advanced and environmental protection is assured. ■

*“While we often think of elections as events that interest or affect us simply as voters, there are many aspects of election law that can affect businesses in their activities as voting day approaches.”*



Jack Siegel, a member of Blaney/McMurtry's Election and Political Law practice group, is counsel to the Liberal Party both federally and provincially. He has represented dozens of elected members and candidates on election recount, election finance and ethics matters and advises individuals and businesses on election law compliance.

Jack may be reached directly at 416.593.2958 or [jsiegel@blaney.com](mailto:jsiegel@blaney.com).

## LET THE GAMES BEGIN - WHAT EVERY BUSINESS NEEDS TO KNOW ABOUT ELECTION LAW THIS YEAR

Jack B. Siegel

A recent poll suggests that only 15 per cent of Canadians pay any attention to domestic politics between elections, leaving 85 per cent who allow the volume to be turned up only once the race officially begins. So, if you're one of the 85 per cent, this is your year.

Ontario will hold its second ever fixed-date provincial election on Thursday, October 6, 2011 and, depending on which pundit you're listening to (assuming, of course, that you are one of the 15 per cent who bothers), the chances are pretty high that there will be a federal election some time this year as well.

While we often think of elections as events that interest or affect us simply as voters, there are many aspects of election law that can affect businesses in their activities as voting day approaches. And although the rules for different levels of government are often similar, there are differences to be aware of, as well.

As an election lawyer, I sometimes think I've seen it all, from campaigns fending off complaints that the Dixieland jazz bands that they put on the back of a truck are making too much noise, to candidates filing nomination papers with two minutes to spare. But I've long since learned that there is something about elections that can inspire human creativity to new levels – and not always for the best. Here are some topics many business people know nothing about; at

least not until someone complains. On the theory that an ounce of prevention is worth a pound of cure, here are a few pointers to keep you on the straight and narrow.

### Employee Rights

As employers, businesses have obligations under election laws that are often overlooked, despite the fact that breaches of these requirements can lead to charges and substantial fines.

Both the federal and provincial Elections Acts require employers to provide leaves-of-absence to employees for election purposes, but in entirely different contexts. The Ontario law, for example, provides for unpaid leaves of absence, without loss of vacation entitlement, for employees who serve as election officials. The Canada Elections Act, in contrast, provides no similar protections for election workers, but instead provides a similar right to employees of *federally regulated* employers so that these employees can seek nomination or be candidates during an election campaign. Oddly, although the law does not require an employer to pay such a candidate, it does permit the employer to continue to pay them without making such payments count as campaign contributions.

Under both federal and provincial law, employers must give employees three consecutive hours (at the employer's "convenience") to vote on Election Day. In light of the length of voting hours (9 a.m. – 9 p.m. provincially and 9:30 a.m. – 9:30 p.m. for a federal election in the Eastern Time Zone), this is not an issue for employers of typical 9 to 5 employees. If the employer, however, has long or less common shifts (e.g. 11a.m. - 7 p.m.), then adjustments must be

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made for employees who ask for them without any reduction in the pay such employees would ordinarily receive for that day.

#### **Building Access**

During election campaigns, operators of both residential and commercial properties can often find themselves caught in between residents and tenants who just want to be left alone, and candidates and their volunteers who insist on their right to knock on every door or to campaign in public space.

Ontario provincial law grants a right of entry for candidates and their representatives to rental apartment buildings, condominiums and Co-ops, regardless of the level of the election. Federal legislation casts the net more widely, including any of these, plus any other multi-residence building (e.g. a university residence) and gated communities, and adds a right to campaign in common areas of any sort of multi-residence building between 9 a.m. and 9 p.m. Federal law also requires the operators of commercial and other buildings to permit campaigning in areas that are open to the public. While this latter right seems a bit extreme, the practical reality is that it is also self-limiting, as was learned by the candidate in the last federal election who alienated more voters than he won over, while accosting them in line for their morning coffee at a well-known donut establishment.

#### **Know Your Limitations**

Parties and candidates alike need money to run their campaigns. While they may ask for contributions at any time, the need is greatest at election time. Business owners need to know that while it is illegal for federal parties and candidates

to receive contributions from corporations, they may still be asked to contribute as individuals. The current federal contribution limit is \$1,100 per party at each of the local and national levels. In other words, a single public-minded individual can contribute, for example, \$550 to each of two local Liberal candidates and another \$1,100 to the Liberal party nationally, and then do the same with respect to the Conservative Party and the New Democratic Party, parting with \$6,600 across the three parties.

Provincially, annual contribution limits are much higher. Contributors can be individuals, corporations or unions, as long as they live or carry on business in Ontario, and contribution limits double up in an election year. A theoretical donor in Ontario can give to each central party up to \$9,300 any time this year; up to \$1,240 to any single local riding association, provided that the total given to local riding associations of a single party does not exceed \$6,200. Then, during the election campaign, this generous soul can give a party another \$9,300 and give its candidates up to \$1,240 each, up to a collective maximum of \$6,200. That's as much as \$31,000 in 2011. And if the donor wants to hedge her bets, she can do that for each party, keeping in mind that all contributions over \$100 are publicly reported within 10 days of receipt.

#### **Third Party Advertising**

Finally, your business may have an interest in issues that are being spoken about during an election campaign and you might want to go so far as to spend some money on advocacy, either to encourage voters to make their decision based on a particular issue, or to support a candidate or party that is on the same side of that

*“If your company is developing new technologies or new brands... You should also determine whether other companies have IP rights in your field of business...”*

Michael Schiff, a Patent Agent licensed by the U.S. Patent & Trademark Office since 1996, is a lawyer in Blaney McMurtry's Intellectual Property practice group. With a PhD in molecular biology and an MBA in business finance, he has served as Director of Intellectual Property for a California biotechnology company and Vice President of Intellectual Property for a US pharmaceutical company.

Michael may be reached directly at 416.597.4897 or mschiff@blaney.com.

issue as you are. It used to be that you could not only do this anonymously, but that you were free to spend any amount you wanted for any such purpose. Not any more.

Both levels of government certainly recognize that such expressions of view are a matter of free speech, and should not, and cannot, be prohibited. But that does not mean they can't be *regulated*. Unless the amount spent is small (\$500 federally or provincially) anyone who spends money for such “third party advertising” must register with election officials and have their identity publicly disclosed on the Internet. The natures of such third parties vary widely. Past registrants include “The Coalition for Education Fairness Ltd.”, the United Steelworkers, and my personal favourite, “ZAP-A-ROCK”. And while third parties remain free to spend provincially without limit, the sources of the money are controlled in much the same manner as are political contributions. Federally, however, there are also spending limits in place to prevent a third party from economically overwhelming a candidate or political party. These limits amount to \$3,765 in any single riding up to a nationwide total of \$188,250 for any registered third party. ■

## INTELLECTUAL PROPERTY CHECKLIST

Michael Schiff

Creative ideas in product development and marketing provide opportunities for a company to get ahead of the competition. If your company is developing new technologies or new brands, you can build a portfolio of intellectual property

protection to sustain your lead. You should also determine whether other companies have IP rights in your field of business, since this is potentially a minefield through which you need to chart a carefully planned course.

The following checklist provides some points your company should consider to help protect your own intellectual property, and keep clear of IP owned by others. It is not a comprehensive list of all the IP issues that may affect your business — but it is a good starting point for some strategic IP planning with your legal counsel.

### Patents: Protect your technology by function

A patent can prevent others from copying your technology by making products that are built in a similar way, or perform a similar task. If your technology has features that are both new and critical to its operation, patent protection may be available. But there are some tight timelines.

- Have a **notebook policy** that prescribes how new data and ideas are to be recorded in notebooks on a daily basis
- Have an **internal disclosure system** to bring new discoveries to the attention of technology supervisors and legal counsel
- Review new technology** regularly to identify features that can provide a competitive advantage if kept exclusive. If these features are new and inventive, file an initial **patent application**
- In view of the potential world-wide market, consider filing a foreign or **international patent application** within a year of each priority application

- Periodically review pending patent applications to **reallocate expenditures** to newer technology, when appropriate
- Periodically review matured patents to identify protected but unused **technology that can be licensed out** as an additional source of revenue

#### **Trade-marks: Establish a brand**

Each name and distinguishing feature of what you sell may be protectable as a trade-mark, establishing an identity through which to win brand loyalty.

- Develop a compelling **corporate image** for your products and services by having a structured process to create the names you use, your advertising slogans, packaging, advertising, and website design
- Before committing to a new product name or logo, consider commissioning a **trade-mark search** to avoid names and designs already used by other companies
- File a **trade-mark application** for each brand name, logo, and product ornamentation that identifies or has come to distinguish what your company sells
- Consider whether **licensing a trade-mark** to another company may help promote the brand or increase your market share
- Periodically conduct **quality control audits** on products and services sold under the trade-marks you have licensed to others

#### **Ensure freedom to operate**

Having patents and trade-marks of your own doesn't mean that you won't infringe patents and trade-marks owned by others. Dealing with third-party IP in a proactive way can avoid complicated legal issues later on.

- Periodically **search and evaluate patents owned by others** that may block a product or service that you intend to commercialize
- For patents that are potentially problematic, decide how to manage your position: file for patent revocation, design a work-around technology, or obtain a license
- Periodically **search and review trade-marks owned by others** that may be similar to your own
- For trade-marks that are potentially problematic, decide how to manage your position: file for opposition or expungement, or consider rebranding

#### **Protect your trade secrets**

Rather than disclosing your technology in a patent application, some features may be more suited for temporary or long-term protection as a trade secret — but only if you actively maintain its privacy.

- Establish an internal policy to **identify and safeguard trade secrets** (such as underlying technology, unpublished patent applications and data, ideas, know-how, computer code, and customer lists)

- Have **confidentiality and non-compete agreements** with business partners, potential business partners, contract employees, consultants, visitors, and others who may have access to your trade secret information
- Establish a **chain of authority for approving publication** or other public disclosure of your technology. Have written agreements with your business partners about the publication and patenting of joint inventions

#### Other forms of IP protection

There are several other types of protection in Canada and internationally that may be especially appropriate for your area of technology. Consider these questions:

- Is there an ornamental or non-functional design feature of a product that is worthy of **industrial design protection**?
- Should you register the **copyright** of your company's written and creative works?
- Does your technology qualify for other forms of protection: for example, **integrated circuit topographies**, **data exclusivity** for clinical trial data, or **plant variety protection**

#### Keep control of your assets

Your company needs to ensure that it has full ownership and control of important inventions and intellectual property created on its behalf.

- Employment, consulting, and contract research agreements should explicitly transfer rights in inventions, copyrights and other intellectual property to the company

- Trade-mark license agreements should specify quality standards for branded products and how quality will be monitored
- Joint research or development agreements should clearly state which party will own joint discoveries, and who will control the patent application and enforcement process

#### Optimize your website

The Internet establishes a strong public presence. Websites should be constructed to enhance branding, safeguard intellectual property, and avoid misunderstandings by website users.

- Register or acquire a **family of domain names** that reflect not only your company name, but also branded products, trade-marks, and derivative names
- Empower your public affairs and marketing group to take charge of your company's presence on the Internet so that **the site reflects your corporate image**
- Have a **Terms of Use** section that indicates IP rights owned by the company, acknowledges third-party trade-marks, and includes disclaimers and limitations appropriate for the products and services you provide
- Have a **Privacy Policy** section informing users about how you collect and use order information and other data from the site

#### Assert your intellectual property rights

Putting IP protection into place may not be enough to keep aggressive competitors at bay. Make sure other companies know about your patents and trade-marks. Keep a lookout for



infringers — and take action to protect your exclusive rights when necessary.

- Mark each product** with the serial number of each issued patent that protects the product or its use
- Identify all trade-marks** used with your products, services, packaging, promotional material, and website with the symbol ® if the mark is registered. Otherwise, use the symbol ™
- Survey competing products and services** periodically to see if they are using technology covered by the claims of your patents
- Survey competing products and services** periodically in your channel of trade to see if another company is using a trade-mark or guise that resembles your own

Your IP portfolio may enable you to stop infringers, collect damages, or both. But the Canadian Intellectual Property Office is not in the business of enforcing IP protection. If you suspect infringement of your patent, trade-mark, or copyright, consult your legal counsel about what action to take to **assert and protect your rights.** ■

EXPECT THE BEST

**Blaney  
McMurtry**  
BARRISTERS & SOLICITORS LLP

2 Queen St. East, Suite 1500  
Toronto, Canada M5C 3G5  
416.593.1221 TEL  
416.593.5437 FAX  
www.blaney.com

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