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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

# 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 Business Law Department, Steven Jeffery at 416.593.3939 or sjeffery@blaney.com.

## STRICT NEW LAWS AIM TO PROTECT PERSONAL INFORMATION ABOUT CUSTOMERS

Jill E. McCutcheon, Bruno P. Soucy

New law is placing strict requirements on Canadian businesses to protect personal customer information - names, addresses, telephone numbers, health history, credit rating, for example -- and creating strict penalties for corporations that use such information "for purposes other than those for which it was collected."

The protections and penalties come from Quebec and federal statutes already in force and will be contained in bills to be tabled in Ontario and a number of other provinces.

Ottawa's statute, the Personal Information Protection and Electronic Documents Act (PIPEDA), which covers federally regulated corporations and the inter-provincial and international activities of provincially-regulated corporations, provides individuals with broad rights to challenge an organization's activities surrounding personal information.

Bruno P. Soucy, a Blaney McMurtry specialist in E-Commerce, technology and intellectual property law, suggests that the new body of law is emerging in response to the significant threat to personal privacy created by emerging technology that has the increasing capacity to harvest bits of information about individuals from a variety of sources and create whole new "profiles" of those individuals.

Jill McCutcheon, chair of Blaney's privacy practice group, advises of a number of things that businesses must do under the law and can do on their own initiative to ensure that they are in compliance:

• Designate a privacy officer, one person who is ultimately accountable for the organization's privacy policy and compliance with the PIPEDA;

• Document and publish, externally and internally, the identity of the privacy officer and any authorized delegates;

• Draft, circulate, and implement a privacy policy that adopts the principles of PIPEDA and consider whether the organization's Board of Directors should adopt the policy.

• Draft, circulate, and implement information handling standards and data security and access protocols to assure the security of personal information;

• Adopt a procedure whereby employees already in place and new employees coming on board sign-off on the privacy policy, information handling standards and data security procedures;

• Track complaints and inquiries regarding privacy. Make sure employees know who to go to if they

BLANEYS ON BUSINESS

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have received a request from a customer for certain information and they are not sure if they should disclose it;

• Make the privacy officer accountable for receiving and reviewing complaint and inquiry reports from operating departments and addressing the issues raised in those reports;

• Track requests by customers who do not wish their personal information used for certain purposes (e.g. e-mail marketing campaigns or direct mail promotions), and

• Test compliance with privacy obligations from time to time. Consider having the organization's internal audit departments conduct periodic audits of compliance with the organization's own privacy code and PIPEDA (and the applicable provincial legislation) or scrutinize privacy compliance as part of routine internal audits of operating departments.

Jill McCutcheon practices corporate/commercial law with a particular emphasis on corporate insurance. The chair of Blaney's Privacy Practice Group, Ms. McCutcheon has considerable experience helping corporations implement privacy codes.

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## AVOIDING THE PAIN OF LITIGATION

Rodney L.K. Smith, Q.C.

Pity the business people who find themselves preoccupied in expensive and time-consuming litigation.

The other day I was putting the finishing touches on the settlement of a real estate deal that had gone off the rails. The whole situation was particularly distressing for the business people involved. How did they get into such a mess?

I can see, after many years of handling commercial litigation, that there are recurring themes. In this note I want to talk about two common types of lawsuits and offer a few thoughts on how both potential plaintiffs and defendants can stay away from litigation.

The first I will call "the business deal that goes sour" and the second "the product that does not perform." In both, I believe a healthy dose of "buyer beware" can protect a business person from becoming a plaintiff. I also believe that in both cases restraining overselling can protect the businessperson from becoming a defendant.

Business deals are usually made in an atmosphere of enthusiasm and high expectation of a successful outcome. For the buyer, this is a time of danger. The other party may be a sales person masquerading as an advisor or another business person in search of capital. Whether the deal be an investment in real estate or an investment in a business, the buyer must beware. A minimum level of scepticism and due diligence is required in every investment. The seller or party seeking financing is also at risk. In the enthusiasm for making the deal, representations or commitments may be made that can come back to haunt.

The best protection is to manage expectations and enthusiasm and carry out real due diligence. It is also wise to write things down. It is almost the norm that oral representations are misunderstood. The process of writing down the deal forces both parties to articulate how far one can rely on what the other is saying and really protects both. Even with a written contract, scepticism and due diligence are essential.

The second type of transaction I want to talk about is the sale of a product by a manufacturer or distributor. These are the cases of the harvesting machine that doesn't harvest properly or the rock

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BLANEYS ON BUSINESS

*"In recent decades there has been a continuing increase in litigation stemming from normal commercial transactions. There are attitudes that can be adopted and steps that can be taken...that will reduce the risk of commercial litigation."*

crusher that doesn't crush rocks properly. There are often substantial consequential damages claims based on lack of performance.

The problem here can often be caused by buyers failing to articulate their expectations. I do not propose to discuss warranties and conditions under the Sale of Goods Act which imply a certain legal regimen. The foolish purchaser headed for litigation is the one who does not have a healthy level of scepticism about what the product will do and fails in the due diligence before committing to the equipment or product purchase. This purchaser may end up being a plaintiff in a law suit.

The flip side of the coin is the enthusiastic sales person whose product will slice bread and solve all of the world's problems. It may be a computer software or hardware package or some other product. The danger for the manufacturer or distributor is the unbridled enthusiasm of their sales forces for their companies' products. It is natural for company employees to be true believers, but that can also be a danger. Many sales persons will promise anything to make the sale.

Buyers or sellers can protect themselves, to a certain extent, through contract language, but there is no substitute on the buyer's side for due diligence and on the seller's side for a culture within which products will not get oversold.

In recent decades there has been a continuing increase in litigation stemming from normal commercial transactions. There are attitudes that can be adopted and steps that can be taken by all business people that will reduce the risk of commercial litigation. Every business or business person can have a litigation prevention program. A well-designed program will not only review contract forms but also directly address attitudes that lead to litigation. ■

**Rodney L.K. Smith, Q.C. is Senior General Counsel in Blaney McMurtry's Litigation Group. He has a wide-ranging practice in corporate, commercial, insurance and municipal litigation and is an authority in construction, municipal, planning, environmental and expropriation law. He has counseled and represented the public and private sectors in a wide variety of cases and has been a director of the City of Toronto Economic Development Corporation (TEDCO) since 1997.**

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## NEW LAW PUTS DUTY OF FAIR DEALING UNDER FRESH SPOTLIGHT

H. Todd Greenbloom

When a business negotiates a contract with a supplier, a customer or another partner, there is always a risk that the contract will be nullified by the courts if it is ever challenged.

Contracts can be nullified for many reasons. One way to make them as litigation-proof as possible, says Blaney McMurtry's Todd Greenbloom, is to make sure that their terms are set out comprehensively, explicitly, unambiguously and understandably and that they are interpreted fairly.

The idea that the parties negotiating or operating under an agreement have a duty to deal fairly with each other is not a new one, says Mr. Greenbloom. "Because of the absence of a large body of case law in Canada, however, there is no certainty as to what the duty is and what obligations it imposes..."

"But assuming that a duty of fair dealing does exist, a contracting party can avoid suffering adverse consequences from the duty if it does not engage in conduct that is clearly bad faith dealing and that deprives someone of benefits for which they had clearly bargained."

"In that context, great care must be exercised in drafting agreements to ensure that ambiguities do not exist and that, where there are onerous terms, these onerous terms are clearly spelled out so that everybody knows what to expect and enters into the contract knowing that they may suffer from 'unfair' provisions."

Mr. Greenbloom expects the duty of fair dealing to become more prominent because of the attention it gets in Ontario's new *Arthur Wishart*

BLANEYS ON BUSINESS

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(Franchise Disclosure) *Act*, 2000, which came into full force last January 31st.

Greater prominence could lead to more court cases and, as a result, more precise definitions of what the duty means in different circumstances.

Looking ahead, Mr. Greenbloom says, "the duty may be limited to enforcing the manner" in which a party to an agreement exercises the discretion that the agreement gives him.

"In particular, a discretion may have to be exercised in a manner that is reasonable; does not nullify the bargained objective and benefit without justification, or does not violate community standards of decency, fairness and reasonableness."

How broadly might the duty be extended beyond that? There is a range of possibilities, says Mr. Greenbloom. "The one which will hopefully be followed, and which is consistent with a recent case, is that the duty will apply where there is inequality of bargaining position and the inequality is abused in the interpretation or enforcement of the agreement."

"However, the duty will not extend to a situation in which a party is 'forced' to enter into an agreement containing terms it does not like because it always has the option of not entering into the contract. So if somebody goes into a contract with their eyes wide open, notwithstanding a protest against the terms, they should not have recourse to the duty of fair dealing at another date." ■

**H. Todd Greenbloom, a Partner in Blaney McMurtry's Corporate/Commercial law group, has an active business law practice that includes all aspects of franchising and licensing. His clients are involved in a wide range of industries including restaurants, food service, hospitality, recreation, trade shows, retailing, manufacturing and advertising. He is a member of the Canadian Bar Association and the Canadian Tax Foundation and is an Affiliate of the Canadian Franchise Association**

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## BLANEYS NEWS

Blaney McMurtry is pleased to announce the launch of our new firm website.


We believe our online presence is a very important aspect of our relationship with our clients, allowing us to continually offer timely legal information and enabling direct access to our firm publications (including articles in most of our major practice areas, and all of our firm newsletters, including this one).

Our website also provides a convenient way for our clients to provide us with feedback, register for any of our firm seminars, and subscribe to any of our firm newsletters. All with the click of a button. What could be easier?

**WWW.BLANEY.COM**

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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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