MARCH 2014

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Blaneys on Business

EDITORS:

Steven Jeffery, Editor
416.593.3939
sjeffery@blaney.com

Kym Stasiuk, Assist. Editor
416.593.3995
kstasiuk@blaney.com

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, the editor, or the head of our Corporate/Commercial Group:

John C. Papadakis
416.597.3998
jpapadakis@blaney.com

IN THIS ISSUE:

"Starting July 1 of this year, when much of Canada's Anti-spam Legislation comes into force, there will be rules and severe consequences for not adhering to those rules."

BUSINESSES ADVISED TO ACT NOW TO EASE COMPLIANCE WITH NEW CONTROLS ON COMMERCIAL ELECTRONIC MESSAGES

H. Todd Greenbloom

Canadians are often bombarded by unwanted emails, text messages, faxes, tweets and other forms of electronic communications. There has been little regulation, and spammers have conducted their business as they have seen fit. Recipients of electronic junk could not help but feel that they were in Wonderland. This feeling was expressed by Alice when watching the Queen's croquet game.

> "I don't think they play at all fairly," Alice began in a rather complaining tone, and "they don't seem to have any rules in particular; at least, if there are, nobody attends to them, and you've no idea how confusing it is."[1]

Spammers' free-for-all, or Wonderland, may be coming to an end in Canada. Starting July 1 of this year, when much of Canada's Anti-spam Legislation[2] (CASL) comes into force, there will be rules and severe consequences for not adhering to those rules. Even though there will now be rules in place, however, there will be confusion.

Much has been written about the contents and implications of CASL. (Please see Blaney McMurtry newsletter articles by my colleagues Henry Chang at http://blny.ca/antispamjuly1 and Danielle Stone at http://blny.ca/newrulesbusinesscommunication.)

Other than to state that CASL:

(a) prohibits the sending of commercial electronic messages unless:

  (i) the recipient has provided consent,

  (ii) the message contains certain regulated information,

  (iii) the message provides the sender's contact information and

  (iv) the message contains an unsubscribe mechanism; and

(b) that the fines are $1million for an individual and $10 million for a company,

this article is not intended to describe CASL. Rather, its purpose is to provide a brief summary of steps that should be taken, before June 30, 2014, to prepare for CASL becoming effective.

Before discussing the steps to take now, it would be helpful to understand the difference between an express consent and an implied consent.

---

[1] Lewis Carroll, The Annotated Alice, Bramwell House (1960) at 113.

[2] The actual name of the legislation is *An Act to promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain activities that Discourage Reliance on Electronic Means of Carrying out Commercial Activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, SC 2010, c 23.*

BLANEYS ON BUSINESS

"A consent will be implied if there is an existing business relationship or where the recipient sends its electronic address to the sender ..."

H. Todd Greenbloom is a partner in Blaney McMurtry's Corporate & Commercial practice group. His active general business law practice intersects with a host of competition and restrictive trade practices issues. Todd is a recognized authority on all aspects of franchising and licensing. His clients come from a wide variety of industries including advertising, trade shows, retailing, restaurants, food service, hospitality, recreation, and manufacturing.

Todd may be reached directly at 416.593.3931 or tgreenbloom@blaney.com.

A person will have given an express consent where an actual consent is given and the person giving the consent was advised of:

- the purpose, or purposes, for which the consent is being sought;
- the name by which the person seeking consent carries on business;
- the mailing address, together with one of (i) a telephone number providing access to an agent or a voice messaging system, (ii) an email address or a web address of the person seeking consent, and
- a statement indicating that the person whose consent is being sought can withdraw that consent.

There are additional rules if a person is seeking consent on behalf of someone else.

A consent will be implied if there is an existing business relationship or where the recipient sends its electronic address to the sender (e.g. by sending the address or conspicuously publishing it without indicating that it does not wish to receive unsolicited commercial electronic messages and the message is relevant to the recipient). Certain relationships are considered to be an existing business relationship and therefore result in an implied consent (e.g. the two-year period after a purchase, the two-year period after the recipient accepted an electronic message regarding a business, investment or gaming opportunity offered, and the six-month period following an inquiry by the recipient to the sender).

Steps to be taken to get ready for CASL include:

1. Messages

Steps should be taken to ensure that after June 30, 2014 all electronic messages include the information described above for obtaining an express consent. If it is not practical to include that information in the commercial message, then the information must be posted on a page on the World Wide Web that is readily accessible to the recipient of the message, at no cost to the recipient, by means of a link that is clearly and prominently set out in the message. If applicable, the website and links should be developed soon.

2. Consents

(a) *Consent mechanism:* Design a methodology for consents to be given. In designing the methodology have the person giving the consent do something to indicate the giving of consent; do not use an opt out mechanism (like pre-checking a box)

(b) *Evergreen consents:* According to the Canadian Radio-television and Telecommunications Commission (CRTC), which is one of the administrators of the CASL regime[3],

> *"If you obtained valid express consent prior to CASL coming into force, you will be able to continue to rely on that express consent after CASL comes into force, even if your request did not contain the requisite identification and contact information. However, all CEMs (commercial electronic messages) sent after CASL comes into force must contain the requisite information, meet all form requirements and contain an unsubscribe mechanism. If requesting*

[3] http://www.crtc.gc.ca/eng/casl-lcap.htm.

BLANEYS ON BUSINESS

"... the allure of stardom and publicity can easily lead to a business biting off more than it can chew."

Jessica Freiman, a graduate of Queen's University Faculty of Law, is an articling student at Blaney McMurtry LLP. She is to be called to the bar later this year.

express consent after CASL comes into force, you must meet all form requirements, including setting out the identification information. Please keep in mind that the legislation requires you to prove that you have obtained such express consent after CASL comes into force, even if your request did not contain the requisite identification and contact information."

Essentially, existing consents will be grandfathered. After June 30, 2014 the rules of CASL will come into play, making it difficult to solicit consents electronically. Accordingly, it is suggested that businesses update or refresh the consents by obtaining compliant consents now.

3. Unsubscribe

The mechanism must be accessed without difficulty or delay, and should be simple, quick, and easy for the consumer to use (examples of appropriate unsubscribe mechanisms include a link in an email that takes the user to a web page where he or she can unsubscribe from receiving all or some types of CEMs from the sender or for text messages over cell phone giving the recipient the choice between replying to the text message with the word "STOP" or "Unsubscribe" and clicking on a link that will take the user to a web page where he or she can unsubscribe from receiving all or some types of CEMs from the sender.

4. Record Keeping

The onus is on the sender of electronic messages to show that it has a consent and that the **consent** has not been withdrawn. Procedures should be established for recording and storing consents but, more importantly, for keeping records up to date so that anyone unsubscribing or withdrawing their consent is removed immediately from any lists from which mass electronic communications are sent. An acceptable method of obtaining a consent is checking a box on a web page to indicate consent, but there needs to be a record of the date, time, purpose, and manner of how that consent is given. So, databases need to be established to capture that information.

Where an implied existing-business-relationship consent is being relied upon, the database should include a record of the start date and the end date for the implied consent. There needs to be a mechanism for removing the person from the list of those providing consent at the end of an applicable period (i.e. six months for an inquiry and three years for a transaction) There are additional rules for installing programs on someone's computers.

Compliance with CASL should not be onerous, but it is important to understand the rules and follow them. Steps taken now will make compliance easier. ■

REALITY TV PUBLICITY FOR YOUR BUSINESS VENTURE? BEWARE THE RELEASE YOU ARE REQUIRED TO SIGN

Jessica Freiman with Kym Stasiuk

It is tempting for a small business to sign up to be on a reality TV competition.

The free publicity and exposure may be a great way to broadcast a fledgling idea to a wide audience. If she's lucky, an entrepreneur's appearance will draw interest, awareness and maybe even some investment in her company.

But the allure of stardom and publicity can easily lead to a business biting off more than it can chew.

BLANEYS ON BUSINESS

"Signing a release ... opens up the possibility of being humiliated on TV ... with no recourse, since the right to sue has been signed away."

Kym Stasiuk is a member of Blaney McMurtry's corporate/commercial practice group. In his corporate practice, Kym acts on the purchase and sale of businesses, the structuring of business transactions, including the creation and organization of business entities; the drafting and negotiating of various commercial contracts and the provision of ongoing strategic advice to business owners and managers.

Kym may be reached directly at 416.593.3995 or kstasiuk@blaney.com.

And, in the recent case of a startup's appearance on CBC's reality competition, Dragons' Den, one entrepreneur certainly did not get what he thought he had bargained for.

It all started simply enough when Montreal lawyer Marc Ribeiro signed up to appear on CBC's Dragons' Den to pitch a board game that he and his company had created.

CBC drafted a comprehensive release for Mr. Ribeiro and his company to sign before appearing on its show. Like most releases for appearances on reality TV, the CBC contract stated:

"I understand that … my appearance, depiction and/or portrayal in the Program may be disparaging, defamatory, embarrassing or of an otherwise unfavourable nature which may expose me to public ridicule, humiliation or condemnation … [and that the] Producer shall have the right to … include any … appearances, depictions or portrayals in the Program as edited by [the] Producer in its sole discretion … I … agree that I will not sue … for any damage, loss or harm to me or my property howsoever caused, resulting or arising out of or in connection with ... participation and appearance in or elimination from the Program …"

Shows like Dragons' Den *do* open up opportunities for free publicity for businesses seeking a large audience. But this can come at a cost. Signing a release like the one that Ribeiro signed opens up the possibility of being humiliated on TV in front of that same large audience, with no recourse, since the right to sue has been signed away.

When Ribeiro's episode of Dragons' Den ultimately aired, a voice-over introduced his segment in a manner that Ribeiro would later contend had conveyed his board game business proposal as a "complete flop."

"The dragons never pull punches when they spot a money-losing venture," the segment began. "Unfortunately, these next few ideas hit the mat immediately."

Despite the comprehensive release he had signed when auditioning, Ribeiro and his company sued the CBC for gross and reckless negligence, intentional misconduct, malice and bad faith over the introductory voice-over and how his segment was edited. He argued that the CBC owed him and his company a stand-alone duty of good faith that was independent of the terms expressed in the release.

In the Ontario Superior Court of Justice, CBC's motion for a summary judgment dismissing Ribeiro's claim was granted. Ribeiro appealed.

The Ontario Court of Appeal, however, sided with the CBC. Participants in reality TV who sign waivers and take risks open themselves up to being portrayed however the show sees fit, often times in a negative way, since reality TV "drama" looks to provide entertaining viewing rather than public education.

The release Ribeiro had signed, said the court, gave the CBC sole discretion to edit the show however it wanted. The CBC had Ribeiro's permission from the release to portray Ribeiro and his company in any manner it chose – in a factual, fictional or even defamatory one. Therefore, the CBC had no contractual duty to edit the broadcast in a manner favourable to Ribeiro.

The business impact of an embarrassing reality TV show appearance can be severe. This is not to say, however, that taking the risk of dabbling in reality TV will always end in disaster or humiliation.

What *does* matter is the substance of the release that the show requires participants to sign. And, as this

BLANEYS ON BUSINESS

"... prospective buyers, such as builders, developers and landlords, must be very careful to determine clearly how they can limit their exposure to the liability ... when the seller is in the midst of insolvency proceedings."

Varoujan Arman is a member of Blaney McMurtry's Architectural, Construction and Engineering Services (ACES) Practice Group. He has experience in construction law, including construction liens and deficiency claims, and insurance defence litigation, including occupier's liability and professional negligence claims against architects, contractors, engineers and lawyers.

Varoujan may be reached directly at 416-596-2884 or varman@blaney.com.

case indicates, a careful review the contract and a full understanding of its terms before taking the plunge into reality TV stardom, or notoriety, are a must. ■

CONTAMINATION IS RISKY BUSINESS FOR RESTRUCTURING COMPANIES AND THEIR DIRECTORS AND OFFICERS

Varoujan Arman

This article has been adapted for Blaneys on Business from material published originally in Blaneys on Building.

Two Ontario Court of Appeal decisions released in October 2013, and a settlement of an appeal of a Ministry of the Environment (MOE) order, have set off alarm bells for owners, past owners and would-be buyers of contaminated properties, including their directors and officers.

The court decisions, one concerning Nortel Networks, Inc. and the other concerning Northstar Aerospace, Inc., demonstrate that companies that own contaminated property and that are contemplating restructuring should take a very careful look at whether an insolvency proceeding is the best approach in the circumstances.

The decisions also make it clear that prospective buyers, such as builders, developers and landlords, must be very careful to determine clearly how they can limit their exposure to the liability that may flow from such transactions, especially when the seller is in the midst of insolvency proceedings.

Finally, the lesson that flows from the settlement of an appeal of an MOE order is that current and potential directors and officers of corporations that own, have owned or are thinking about buying a contaminated site should seek legal advice on any personal risks that might be inherent in such ownership.

Background to *Nortel*

In *Nortel*, the company, which was insolvent, was undergoing restructuring under the *Companies' Creditors Arrangement Act* (*CCAA*). Under the terms of the court order granting Nortel protection from its creditors, the company was granted relief from cleanup obligations imposed by the MOE. The lower court found that the MOE order was tantamount to a financial obligation of Nortel because compliance with it would have required Nortel to spend money that would then have escaped the reach of creditors. As a result, the claim was stayed (i.e. put on pause) during the insolvency, just like any creditor's claim. The MOE appealed this, and succeeded, as explained below.

When Clean-Up Orders Will Trump, and When They Won't

In coming to its *Nortel* decision, the Court of Appeal referred to the Supreme Court of Canada decision in *AbitibiBowater*. In this case, remediation orders *were* found to be subject to the insolvency process. The circumstances, however, were unique. The province would perform the remediation work itself and only *then* seek reimbursement. As a result, the MOE *became* a creditor, and so its claim was stayed.

In *Nortel*, the Court of Appeal distinguished *AbitibiBowater*. The court found that it was *not* clear that the MOE's sole option in Nortel's specific situation was to perform the remediation itself and only then seek reimbursement. Accordingly, the MOE orders in *Nortel* were not found to constitute orders to pay and therefore were not subject to the stay imposed by the insolvency proceeding. By virtue of Nortel being obliged to comply with the

"It is ... important for a corporation considering restructuring to seek legal advice at an early stage to assess the various options."

MOE's orders during the restructuring process, the ministry was effectively granted priority over creditors.

At the same time that it released its decision in *Nortel*, the Court of Appeal also released its decision in *Northstar*. In this case, the *CCAA* court had initially reached the same conclusion as in *Nortel* -- that the MOE's claim was a financial obligation, just like all other monetary claims of creditors, and therefore should be stayed. Unlike in *Nortel*, however, the Court of Appeal upheld the decision staying the MOE's claim against Northstar because the MOE had *already* begun remediation efforts following Northstar's bankruptcy. The central factor appeared to be the point in time at which the clean-up order had crystalized into a financial obligation of either the corporation or the taxpayer.

Impact on Owners of Land; On Prospective and Former Owners, and On Restructuring Corporations

Prospective buyers of potentially contaminated sites, such as builders, developers and landlords, will want to consider the impact of cases like *Nortel* and *Northstar*, particularly where property is to be purchased from a vendor undergoing insolvency proceedings. The impacts can be significant, so the ability to limit or reduce exposure to possible liability should be considered carefully.

In addition, for struggling corporations which may be contemplating restructuring, the *Nortel* and *Northstar* decisions may have a significant impact on the conduct of insolvency proceedings. In some situations, there may be strategic reasons why a *CCAA* proceeding will no longer be the preferred approach. It is therefore important for a corporation considering restructuring to seek legal advice at an early stage to assess the various options.

Personal Liability of Directors and Officers

Contaminated land transactions obviously contain risks for individual or corporate buyers and sellers. But these risks can also attract personal liability. In another recent case, *Baker v. Director (MOE)*, directors and officers of a corporation, including some whose appointment post-dated the contamination and who appeared to have no specific role or responsibility in relation to environmental matters, were named *personally* in a $15 million MOE remediation order.

These directors/officers appealed to the Environmental Review Tribunal. Shortly before the appeal was to be heard, an out-of-court settlement was reached, which included payment by eight of the directors and officers of $4.75 million to the MOE. This was in addition to the payment of legal fees plus interim remediation costs, which they were compelled to pay, even while the appeal was pending.

It is important to underline that because of the settlement, no determination was made regarding the liability of these directors and officers. Accordingly, prospective and current directors and officers of corporations that own, owned or are considering the purchase of a contaminated site would be well advised to obtain legal counsel to give careful consideration to any potential risks, such as those raised by the *Baker* settlement.

For more information and for legal inquiries regarding bankruptcy and insolvency please contact Lou Brzezinski at 416.593.2952 or John Polyzogopoulos at 416.593.2953, and for legal inquiries regarding environmental issues please contact Janet Bobechko at 416.596.2877 or Ralph Cuervo-Lorens at 416.593.2990. ■

BLANEYS ON BUSINESS

DID YOU KNOW?

Blaney McMurtry LLP

Did you know that Blaneys publishes nine newsletters relevant to a variety of practice areas?

Newsletters include:

- Blaneys on Building
- Blaneys on Business
- Blaneys on Class Actions
- Blaneys on Immigration
- Commercial Litigation Update
- Employment Update
- Enviro Bulletin
- Insurance Observer
- International Business Bulletin

Stay informed by signing up today:
www.blaney.com/newsletter-signup ■

Media Mention

Kym Stasiuk, a member of Blaney McMurtry's Corporate/Commercial practice group, was quoted in the article, "Properties in Default: When Can Second Mortgagee Take Control," which was published in *Law Times* on January 13, 2014. Stasiuk was sought out by the paper to comment on an Ontario Court of Appeal decision he had written about in a prior issue of *Blaneys on Business* (Please see http://blny.ca/breachedcovenants).

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