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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Blaneys on Business

"...the (franchise disclosure) regulation ensures that franchisees will have a 'better understanding of what they bargained for'..."

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.

NEW ONTARIO DISCLOSURE RULES MAY CONTAIN BENEFITS FOR FRANCHISORS AS WELL AS FRANCHISEES

The regulation under Ontario's new franchise disclosure act has come into force and as Blaney McMurtry's Todd Greenbloom reads it, the regulation, even though it is designed primarily to help investors make better-informed decisions about whether to become franchisees, contains possible spin-off benefits for franchisors, too.

Mr. Greenbloom, an authority on franchising and licensing, says the regulation ensures that franchisees will have a "better understanding of what they bargained for" because the disclosure a franchisee is entitled to receive requires the franchisor to "make it abundantly clear what it is that the franchisee is getting."

While that means a franchisor might have a more challenging time convincing a prospective franchisee to sign on, it also means the franchisor will be better able to defend the agreement if it is challenged subsequently.

The Arthur Wishart (Franchise Disclosure) *Act*, 2000, requires a franchisor to provide a prospective franchisee with a "disclosure document" at least 14 days before an agreement is signed or a payment made. The regulation, which took effect January 31, specifies what must be in the disclosure document and, according to Mr. Greenbloom, addresses a number of contentious issues that recur regularly:

Supplier rebates – Franchisors often get bulk discounts from suppliers and do not pass the savings along to franchisees. The regulation requires the franchisor to disclose rebate practices and to state that the prices franchisees pay for supplies are not necessarily the lowest prices. This disclosure equips the franchisee to better estimate business costs and protects the franchisor from accusations of secret "kickbacks."

Advertising funds – Franchisees are often required to pay a percentage of sales into a corporate adverting fund. The regulation requires the franchisor to stipulate how much must be paid, what percentage has been spent locally and nationally in the last two years, and what percentage the franchisor has retained.

Unfulfilled expectations – "You promised me the moon and you didn't deliver." The regulation requires the franchisor to detail the assumptions on which profit projections are based. It obliges the franchisor to recommend that the franchisee retain independent legal and accounting advice so that due diligence can be as comprehensive and sophisticated as possible. It also requires the franchisor to specify what training is mandatory, what can be expected and what kind of financial assistance is made available to franchisees.

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"In recent months, Blaneys has also been involved in helping a number of clients interpret the provisions of existing leases where landlord and tenant repair obligations...have been at issue."

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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Franchisor reputability – Finally, the regulation requires the franchisor to disclose information that will equip the franchisee to evaluate how the franchisor operates. In this connection, the franchisor is required to tell the franchisee what a credit report is; what the franchisor's litigation history has been, and what units in the system have closed in the last three years and why. The franchisor must also supply the locations, names and telephone numbers of "all franchises in Ontario of the type being offered."

BEWARE EXPENSIVE SURPRISES HIDDEN IN REAL ESTATE LEASES

Landlords and tenants tend to focus on "bread and butter" financial issues when they negotiate leases – basic rent, amounts to be included in the tenant's contribution to operating costs, and how percentage rent will be calculated and paid in shopping centre leases, for example.

Some recent cases that have come to Blaneys, however, serve as important reminders of the many other key business issues that must be given equal attention when commercial real estate leases are drafted.

One such issue, rarely thought of but often important, is the calculation of the rentable area of a tenant's premises. Most leases have a measurement system for calculating this area. The area, in turn, drives the rent payable, which is ordinarily expressed in dollars per square foot per year.

It is important for a tenant, particularly in a new building under construction, to try to negotiate an upper limit to the area of its premises, even if final measurement shows the tenant is occupying a larger area. We have seen a case in the office recently in which a landlord relied in good faith on its architect to provide "approximate" premises areas to prospective tenants. The architect made significant errors in his calculations. When the building was finally measured, a number of tenant spaces were considerably larger than had been anticipated. Only one of the tenants had "capped" the maximum area of its space and so was much less affected by the results of the final measurement.

Of even more importance in the case of a new building under construction is the issue of guaranteed construction completion dates and whether there should be penalties if those dates are not met. For a tenant relocating from other premises for which an old lease is about to expire, this is critical. For a landlord, commitments to firm completion dates can be dangerous. Such commitments should be subject to some flexible extension to reflect the realities of building construction and to take into account events beyond the landlord's control, such as strikes.

Another "hidden" cost in many standard commercial leases is the provision that requires the tenant at the end of the lease to remove alterations or improvements that it has made to the premises. For a tenant about to move, this is an additional and unproductive expenditure. However, the landlord can argue that it should not be faced with the cost of restoring the building to its original pre-alteration condition. There are a number of reasonable compromise solutions to this issue that should be part of the lease negotiations.

"Is there a component of your business that is a novel process or product? If so, you may have something that could be patented or that might be a trade secret or both."

Alex A. Mesbur, Q.C., a Blaneys partner, has an active general practice in business law, including the sale and acquisition of shares and assets; shareholders' agreements; and franchising, marketing and competition law matters. He is an authority on commercial leasing, focusing primarily on office, shopping centre and industrial leases for both landlords and tenants. A Queen's Counsel since 1983, Alex is Founding Chair of the Queen's University Faculty of Law Advisory Council.

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In recent months, Blaneys has also been involved in helping a number of clients interpret the provisions of existing leases where landlord and tenant repair obligations (particularly with respect to roof and structural repairs), and the scope and intent of various option rights held by both landlords and tenants, have been at issue.

What has struck me most forcefully in reviewing these documents is the insufficient care taken by the parties in working through their intentions and then documenting those intentions unambiguously.

Ambiguous or unclear contract provisions create uncertainty, and uncertainty often leads to costly court proceedings in which judges, and not the parties themselves, get to decide what documents mean.

Alex A. Mesbur

PROTECTING YOUR INVALUABLE, INTANGIBLE BUSINESS ASSETS, Part Two

The first part of this three-part article, which appeared in the previous issue of *Blaneys on Business*, argued that it is important for businesses to protect their intellectual property – their intangible assets.

From time to time you take a physical count of your product or supply inventory to try to figure out just what you have on hand. Similarly, the first step in protecting your intellectual property is to take stock and determine just what that inventory comprises at any particular moment.

Is there a component of your business that is a novel process or product? If so, you may have something that could be patented or that might be a trade secret or both.

Is there a component of your business that has its value in the way you express an idea, either in writing, via computer software, in a drawing, model, plan, piece of music? If so, you may have something in which a copyright exits.

Does the name of your business or your product or service have a certain cachet? Does the name identify your business simply when the name of the business, product or service is mentioned? For that matter, is the shape or design of the product sufficiently distinct to serve to identify it as originating with you, as opposed to your competitors? If so you may possess valuable trade-mark rights.

Do your products have distinctive ornamentation? If so, those ornamental features may be capable of protection as industrial designs (also known in some countries as design patents).

In fact, if you have unique circuitry that you employ in your business, it may be that the designs for those circuits may constitute protectable integrated circuit topography. (How's that for piece of mixed technical and legal jargon?).

Once your inventory is completed, the next step in your IP protection program is to sit down with a lawyer knowledgeable in the IP field. You should discuss whether to seek registration for various aspects of your IP inventory that might benefit from registration, or that might not be protectable unless they are registered.

For example, your copyrightable IP inventory is automatically the subject of copyright protection once it is reduced to some tangible form of expression, although it is wise to upgrade that protection by seeking registered copyright status and by identifying your copyrighted material in a specific fashion.

On the other hand, certain IP rights (such as patent and industrial design rights) do not arise unless and until they are registered. In fact, the applications for their registration must be made within fixed time limits or the inventions or designs become free for anyone to use.

One final point: Today companies are seeking to expand globally, so remember that when you speak with an IP lawyer, it is also a good idea to have a handle on the territorial extent of your business and your expansion plans (if any).

Because intellectual property can often exist in more than one location at the same time, it is important to consider the impact or necessity of registration and the applicable IP laws in those foreign jurisdictions in which you carry on or intend to carry on business. Few of us appreciate that our new and novel inventions will be free for the public to use, for example, in the United States if we only seek to register patent rights in them in Canada.

Stephen I. Selznick

Stephen I. Selznick, is a partner in Blaney McMurtry's business law department. His practice concentrates on corporate/commercial law; intellectual property, entertainment, advertising, media and communications law; and competition, trade and technology law. This article was originally published in Your Office magazine.

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BLANEYS NEWS

We are pleased to announce that Remy G. Boghossian has joined the firm's corporate/commercial group following his completion of the Bar Admission Course.

Remy can be contacted by telephone at 416.593.3932 or by e-mail to rboghossian@blaney.com

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There has been much talk recently of economic slowdown. Our Insolvency Group is available to meet with our clients to discuss tightening your credit procedures, business reorganizations, creditor-debtor issues, enforcement of security or any related topics, if you are making plans to prepare for a slowdown.

Feel free to contact the Head of our Insolvency Group, Deborah Grieve, at 416.593.2951 or dgrieve@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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