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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Blaneys on Business

"If the federal experience is any indication, Ontario business may face significant costs in complying with privacy legislation and...the result may be reduced business opportunity."

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.

ONTARIO REVISING PRIVACY LEGISLATION, MAY BE TABLED BY END OF SEPTEMBER

Jill E. McCutcheon

Ontario's new premier, Ernie Eves, won the leadership of the provincial Progressive Conservative Party last spring partly on the promise that he would listen carefully to all stakeholders as he and his cabinet colleagues went about governing.

That would seem to be what the government has been doing, at least with regard to the Ontario draft protection-of-personal-privacy legislation, which was first made public for comment last February.

Although the formal consultation period on the draft bill ended last March 31, the government continued to meet with stakeholders in the business, not-for-profit, legal and health care communities throughout the summer.

These consultations have produced a good bit of food for thought and, as a result, revisions are being made to the bill, which is expected to be introduced in the Legislature this fall.

Until the revisions are made public, it will not be clear how far the government is prepared to go to meet the major concerns of such stakeholders as the Canadian Marketing Association.

In the meantime, the government is suggesting that, at minimum, it proposes to simplify the legislation by separating out health care sector provisions from all others and by harmonizing the bill more thoroughly with the new federal privacy law which came into force January 1, 2001.

Jill McCutcheon, chair of Blaney McMurtry's privacy practice group, says Ontario's consultation draft was not a reproduction of the counterpart federal legislation. The federal law currently applies to certain federal businesses, like banks and to the cross-border trade in personal information. However, the federal law will apply to all other commercial activities across Canada, unless provincial governments adopt "substantially similar" legislation before 2004. The original Ontario draft bill contains some potentially important differences.

"While purporting to adopt the 10 principles of fairness with respect to privacy in the Model Code for the Protection of Personal Information, which is verbatim part of the federal act, the draft Ontario legislation is

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"Like the federal act, the Ontario legislation provides that individuals have the right to consent or not to consent to the collection, use and disclosure of their personal information "

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broader and could be administered as if it contains more far reaching requirements."

Like the federal act, the Ontario legislation provides that individuals have the right to consent or not to consent to the collection, use and disclosure of their personal information, and it anticipates that this consent can be implied or express. The draft legislation specifies when consent can be implied, and that is only under the following circumstances:

• if the purpose for the collection, use and disclosure of the personal information will be reasonably obvious to the individual from whom it is collected;

• if it would be reasonable to expect that the individual would consent to the collection, use or disclosure; and

• the organization will not use the information for a purpose other than for which the information was reasonably collected.

"Will a local business which collects the name and address of its customers and then offers them other goods or services, be able to make that offer without specifically asking each and every customer for permission to do so? In the original draft, it appeared not. And there was no provision for grandfathering existing lists of customers who may have been receiving these kinds of offers for years.

"Furthermore, the original draft legislation left open the door and has been interpreted by many as requiring an overt opt-in by customers to cross-selling by the businesses from whom they buy goods and services. In other words it may not have been enough, if a business tells a consumer that their name and address will be used to offer them other goods and services and offers an opportunity to decline to receive those offers.

"It has become apparent in applying the federal law that the scope and impact of the legislation will in large part depend on how the legislation is administered by the Privacy Commissioner. If the federal experience is any indication, Ontario business may face significant costs in complying with privacy legislation and if the draft Ontario legislation is enacted in its original form, the result may be reduced business opportunity." ■

SORT OUT LITIGATION COSTS BEFORE LAWYERS' CLOCKS START TICKING

Rodney L.K. Smith

Two of the biggest questions business people ask when they contemplate commercial litigation are, "How much is this going to cost me' and 'How can I ensure financial discipline and good value?'

These key concerns can be addressed effectively if clients hold fast to two simple rules:

Have a forthright discussion with your lawyer about fees and ultimate costs before you retain him or her.

During that discussion, explore ways that the

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two of you, together, can keep a handle on costs. There are reasonable disciplines that can, and should, be imposed.

Even though commercial litigation can be enormously expensive, lawyer-client discussions about potential costs can be surprisingly vague. The client might ask about hourly rate and ultimate cost. The lawyer will quote a rate but usually observe that it is very difficult to determine overall cost.

It is a mistake to let the conversation end there.

Estimates that litigation lawyers give can be significantly wrong. The beginning of the case is the time to have a thorough discussion about potential costs under a whole range of scenarios. Unless there is a long-standing relationship, including previous litigation experience, hiring a service-provider on an open-ended basis is seldom the best arrangement. The client should ask the lawyer to propose ways to reduce the cost of the litigation and the client should know that many alternative fee arrangements are possible.

The client can ask for budgets for different phases of the litigation. It may be possible to fix the cost of a phase of the litigation - this can be discussed. Clients may also wish to consider incentive fees. It makes good business sense for both the lawyer and the client to look at the litigation as a form of partnering. Such arrangements should recognize an upside and a downside for both the lawyer and the client.

The outcome of litigation is always uncertain. The lawyer can recommend a variety of approaches that will establish a good business-like relationship. In a great deal of litigation, the lawyer can, and should, have an incentive connected to a positive outcome. An arrangement with an incentive fee of a fixed percentage of the outcome above or below a certain result is often workable. This is referred to as a formula approach.

The arrangement does not have to include a formula. It may be no more complicated than a specified approach on interim fees with an agreement to discuss an overall fee at the end of the case that reflects the outcome, good or bad. The final fee should be based not only on the financial result but also on how quickly and effectively the lawyer resolved the dispute.

No matter what the fee arrangement, there must also be a discussion of budgets for every stage of the action.

The client should ask the lawyer to explain the different stages of a lawsuit (such as the completion of pleadings, documentary discovery, examinations for discovery, mediation, pre-trial, trial) and work out a budget for each stage.

If the case exceeds budget for the first stage, budgets for later stages should be revisited. The purpose of budgets is to encourage both the lawyer and the client to focus on the cost effectiveness of the approach to the case. Budgets should not be followed slavishly but should be used as a tool to work towards the desired outcome.

It may also be appropriate in some cases for the lawyer and client to agree to a minimum/maximum approach (e.g. the final fee will not

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exceed 125 per cent of the fee quote or be less than 75 per cent of the fee quote.)

As part of managing the cost of litigation, the client will want to review monthly accounts from the lawyer. Any considerable amount of time without the client receiving an account is not a good idea because when a bill finally does arrive the client may be in for an unpleasant surprise.

Clients are entitled to get detailed accounts with a description of the services provided, the hours spent and the hourly rates for not only the lawyer but students and clerks and any other lawyers in the office working on the file. (In that connection a discussion should take place between the client and the lawyer, at the beginning, about who, exactly, is handling the file.)

A client should not hesitate to contact the lawyer and ask for a full explanation of how the billings fit with the estimates that have been given previously and whether those estimates are still valid.

One of the most expensive parts of the litigation process is the cost of documentary production and oral examinations for discovery. Lawyers will sometimes conduct long and exhausting examinations for discovery under the theory that they need to find out absolutely everything about the other side's case. This sometimes occurs out of an abundance of caution or because it's simply the way lawyers are trained to approach cases.

The client and the lawyer can and should look for ways to slim down the discovery process. Not every stone necessarily has to be looked under. With a proper spirit of partnering, the businessman and the lawyer can decide together on the scope of the examinations for discovery and focus on the key areas.

The use of technology in litigation is often put forward as a way of reducing overall cost. It does not always work out that way, however, and I would recommend that a cost benefit analysis be done before throwing technology at the organization of a case.

Another area of cost saving is the use of shared resources and best practices. Depending on the size and capabilities of the client, resources ranging from experience in other similar cases to use of client staff in organizing materials can be considered.

To sum up, before embarking on any litigation, the client should have a thorough discussion with its lawyer about the cost of litigation and ways to control it, including the use of budgets, incentives, regular accounts and other methods, some of which are mentioned above. It makes more sense to have the fee reflect the outcome of the case rather than the number of hours that have been spent. A lawyer rewarded for a timely and effective resolution of a dispute will be focused on achieving that result for the client. ■

EXPECT THE BEST

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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.