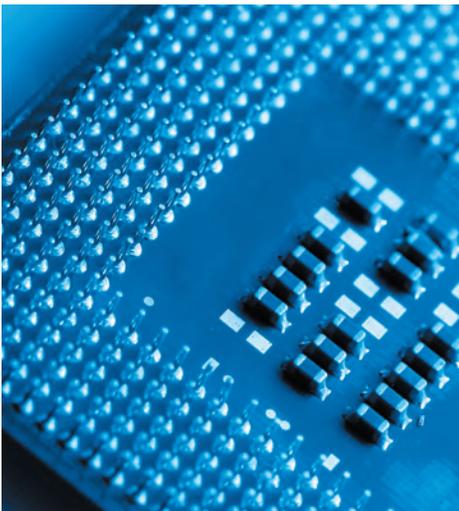


Canadian technology law issues



2011/12





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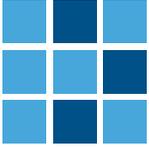
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Foreword

by David W. Pamenter

Gowlings is pleased to present the third edition of *Canadian Technology Law Issues*.

We have tried to provide something of interest for our very diverse audience. For entrepreneurs, you will find basic tips on employment contracts, risks to consider before jumping into cloud computing and common legal pitfalls to avoid. For more mature clients, we provide content on trade-mark due diligence, business method patents and Canada's anti-spam legislation.

For clean technology companies, we explore what is up next for renewable energy in Canada, the opportunities for commercializing our water supply and wastewater treatment, and municipal tax options for financing energy efficiency.

Gowlings' integrated Technology Group provides client-focused legal counsel to Canada's technology industry. We help technology professionals, business executives and the investment community make fact-based decisions on technology investments and strategies.

We hope you will find the articles useful as your technology business continues to grow in the year ahead!



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Trade-mark Due Diligence

by Stuart Ash

Effective due diligence is one of the best ways to avoid costly and disruptive surprises when acquiring or licensing trade-marks, allowing the purchaser or licensor to determine whether it wishes to proceed with the transaction, for what price, and on what terms and conditions. Effective diligence can also identify deficiencies with the target marks and gaps in the target's trade-mark coverage and protection, bringing to light important contractual limitations on the target's use of the marks and potential infringement liabilities.

While general due diligence checklists are often helpful in generating basic information required for trade-mark due diligence, they are generally not designed to address key trade-mark issues and rarely provide answers to specific questions that the purchaser may have regarding the target marks.

Identification of Rights

In an acquisition, the target typically provides a list of trade-mark registrations and applications as part of its disclosure. The accuracy of the target's trade-mark disclosure can often be checked by comparing it against owner searches conducted by trade-mark counsel. In transactions where the target has affiliates or subsidiaries that use the target marks (including foreign subsidiaries and affiliates), care should be taken to ensure that all relevant names are searched.

Searches can also be conducted against key marks if it is suspected that title to the target marks has not been updated in the relevant IP offices. Consideration should also be given to identifying and listing unregistered target marks. Information regarding such marks (and the goods and services they represent) can often be found by reviewing the target's website and printed materials, including product literature, press releases, public filings (for public companies) and annual reports.

Trade-mark counsel should also request a list of the target's domain name registrations (if not provided) and verify the status of such registrations by checking relevant online records.

Ascertaining Ownership

Ensuring that the target owns the assets it proposes to transfer or license is a fundamental task of due diligence. Online databases can often be used for verification, but local counsel may need to be engaged where office records must be searched by hand or where data is only available in a language that trade-mark counsel does not speak. Ownership or attribution statements in the target's online and printed materials can also be useful sources of information regarding ownership of target marks.

Trade-mark counsel may request copies of assignments and other documents on which the target bases ownership of marks acquired from another party. Care should also be taken to clarify ownership of marks where the target has affiliates or subsidiaries that use them: related companies often fail to properly document the ownership and use of "shared" intellectual property. Untangling the ownership of marks in such circumstances can be difficult and often exposes licensing issues.

It is similarly important to ensure that the purchaser acquires title to the target marks free and clear of encumbrances. While some IP offices allow for the recordation of security interests, many jurisdictions do not require (or allow) parties to file security interests against trade-marks or other registered intellectual property. Trade-mark counsel should therefore work closely with transaction counsel to identify any liens, security interests or other encumbrances that might transfer with the target marks (especially in circumstances where the target itself or some assets of the target are not being acquired by the purchaser).



Agreement Review

Agreements establishing trade-mark rights and agreements that may limit or restrict the use of marks should be reviewed to identify ongoing obligations that may be acquired by the purchaser and restrictions or limitations on the target's use of its marks.

Agreements should also be reviewed to ensure that they are transferable to the purchaser (with or without consent) and that the parties to the agreement are in compliance with their obligations. Subject to any materiality thresholds, ongoing obligations (e.g., payment or minimum performance specifications) should be noted and brought to the purchaser's attention. Material restrictions on the target's usage of its marks (including restrictions on the goods and services in association with which the marks can be used, or territorial limitations and restrictions on the manner of use of the marks), and onerous or unusual termination, indemnification or choice of law provisions should also be brought to the purchaser's attention in a timely fashion.

Evaluate Pending Litigation

The target usually provides a list of existing or pending litigation and opposition proceedings as part of its initial disclosure. In many jurisdictions, searches of court and IP office records can be conducted online to verify that there are no further pending claims or proceedings.

In jurisdictions where centralized electronic searching is unavailable, local counsel may need to be retained to search records by hand. The target can be asked to provide a brief description of each pending proceeding (both by and against the target), and to provide the opinion of its counsel regarding its likelihood of success, in addition to key documents relating to proceedings.

The purchaser may also wish to have the target provide information about past litigation and proceedings as well as threatened or anticipated litigation or proceedings. Counsel can review documents regarding the disposition of such proceedings, including judgments and orders (if any), and settlement agreements can be reviewed to identify continuing obligations or restrictions on use or limitations of the marks.

The purchaser should also ask the target to provide information relating to actual or suspected infringements of its marks, and actions it has taken (if any) in response to allegations or complaints of third parties or in respect of potential infringement of the target marks.

Coverage and Enforceability

Where the trade-marks are material to the transaction, trade-mark counsel may wish to review the scope and coverage of the target's marks as well as the enforceability of the target marks. Initial searches of relevant registries and online searching can be helpful in identifying whether there are similar marks registered or in use by others in relevant jurisdictions. Such searches can be particularly useful in identifying potential bars or obstacles to the purchaser's intended use of the marks post-closing.

A review of the target's website and printed materials can confirm whether the target has secured registration of its key marks in relevant markets, and whether its existing registrations cover its current usage of the marks.

Not all of the issues may be relevant or appropriate in all transactions. Every deal is different, and the level of trade-mark due diligence required varies from transaction to transaction. Numerous factors can have an impact on the amount of diligence that is deemed necessary and feasible in any given transaction.

It is always important to keep in mind, however, (in any transaction) that relying on checklists alone (including the issues identified in this article) can lead counsel to miss relevant or important items, or lead to a focus on issues of no importance to the purchaser. Those conducting diligence should always strive for at least a basic understanding of the transaction, and inform themselves about the business of the target and the goals of the purchaser or licensor.

Diligence counsel should also remain actively engaged with transaction counsel throughout the course of the transaction. Due diligence is an iterative process: the target's disclosure of information often leads to further questions, and issues in a transaction (including the structure of the transaction itself) can also change during the course of negotiations. Keeping these points in mind can help trade-mark counsel increase the effectiveness of IP due diligence and add significant value to the transaction.



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Municipal Taxation as a Means of Stimulating the Green Economy

by Douglas W. Clarke

Following is a discussion of the ways in which rules and regulations relating to municipal taxation might be modified in order to allow for the large scale financing of energy efficiency measures and/or renewable energy among smaller energy consumers.

These days, governments are looking for ways to sensitize citizens to the fight against climate change and the need to manage energy consumption. Through subsidies, the government encourages reduced energy consumption and greenhouse gas (GHG) emissions. Without addressing the energy consumption of existing buildings, it will be difficult for provincial and federal governments to attain their energy efficiency and GHG reduction targets. In Québec, residential, commercial and institutional emissions represented 12.5 per cent of total GHG emissions province-wide in 2008, according to the inventory of the Minister of Sustainable Development, Environment and Parks published in 2010. This constitutes an improvement of 4.8 per cent in relation to 1990 figures. However, despite this positive showing, the percentage of GHG emissions in this sector as it relates to the whole of the province's emissions merits our attention. In Québec, the reduction of domestic electricity consumption frees up pools of electricity for export and helps ensure supply for future demands such as the electrification of transportation services.

Paying for the execution of energy efficiency measures and renewable energy with the savings generated by such measures for large-scale buildings is a proven business model. The problem with renewable energy programs and/or energy efficiency measures on a small scale, is that the initial capital costs are often too high for the potential consumer, even in the presence of subsidy programs such as Rénoclimat in

Québec. Under this program, the incentive for geothermal systems can be up to \$3,000 or just less than 10 per cent of the total cost.

In the absence of sufficient funds to pay for these measures, individuals or small enterprises must borrow, providing security to guarantee the repayment of the loans. This can be problematic for banks and other institutional lenders as the targeted buildings are often already subject to a lien. Furthermore, where security is available, lenders are not amenable to structuring loans based on the energy savings of the building.

A solution to this problem is an instrument designed for municipal governments which allows them to stimulate a local green economy. Energy efficiency and renewable energy projects are financed by funding programs targeting residential and commercial owners in the municipality.

Developed in California in 2009, Property Assessed Clean Energy (PACE) bonds are now permitted by legislation in 25 states in the United States. In some states, laws relating to municipal taxation already allowed PACE bond-type structures, whereas in others, legislative modifications were required. To our knowledge, the only similar programs in Canada are in Vancouver, where the city is planning to offer "On-bill Financing" in 2011, and in Halifax, with its Community Solar project. In both cases, the cities require legislative amendments to allow the programs to be put in place.

The finer details of PACE bond programs may vary, but in general, they function as follows:

- A local government creates an energy efficiency program that extends to the municipality as a whole or to a specified improvement area.



- The local government finds a financial partner that procures the necessary funds either public or private.
- If the funds are private, the municipality will issue a bond to reimburse the money provided by the financial partner. This bond will be guaranteed by a land tax on the buildings within the participating improvement area.
- Participation is voluntary and only those participating are taxed.
- The product of the sale of the bond is then used to finance the renewable energy and/or energy efficiency projects as approved by the technical advisers, which allows for a relatively accurate projection of the energy savings generated, which can be either public or private.
- Where an application for renovation by a landowner is accepted, the city pays a contractor to perform the work and, upon completion, imposes a special land tax on the building in question which appears on the owner's property tax bill.
- The tax payment is fixed and generally structured such that, for a time, the annual payments do not exceed the energy cost savings generated by the energy efficiency measures.
- Like other real estate taxes, in the event of foreclosure this tax is paid before any mortgage creditor on the property: only taxes in arrears are prior.
- There is little or no cost for the landowner and, if the property is sold before the end of the reimbursement period, the new owner inherits, not only the improvements, but also the obligation to pay the tax until full payment is received.

One of the most interesting aspects of a PACE bond-type program is the positive effects it has on all parties.

Landowners benefit from:

- The elimination of cost barriers to improvements to residential or commercial buildings that will result in the adoption of renewable energy and/or improvements to the energy efficiency.
- Loan costs which can be structured to be lower than the cost savings, freeing up revenue for other purposes.
- Lower energy bills and therefore reduced vulnerability to increases in energy prices.
- The transfer of the property tax to the new owner at the time of sale which frees the former owner from the continuing obligation to "pay" for the improvements.

Provinces, cities and municipalities benefit from:

- Immediate job creation and increased business opportunities for the suppliers of small-scale renewable energy and energy efficiency solutions.
- Reduction of GHGs, energy consumption and energy dependence in addition to improved quality of life.
- A program that is a natural complement to the efforts of a municipality to reduce its own GHG emissions, but which does not control those generated by commercial and residential buildings.
- Low or no costs for the municipality.
- Increased capacity of the electric grid to service new technologies (i.e., electric cars).
- The voluntary nature of the program: only participating landowners have payment obligations.

Financiers benefit from:

- Reimbursement that is guaranteed by a tax, where any default will be remedied by a subsequent purchaser.

Paying for the execution of energy efficiency measures and renewable energy with the savings generated by such measures for large-scale buildings is a proven business model.



Municipal Taxation as a Means of Stimulating the Green Economy

(continued)

Existing mortgage lenders benefit from:

- Increased liquidity for the mortgagee, which can reduce the risk of mortgage default.
- Increased value of the secured property in that it is more energy efficient.
- Low levels of prior ranking debt represented by the arrears in the special property tax, which, in the event of default, will represent a marginal amount in relation to the value of the secured property.

In the United States, PACE programs have come up against opposition primarily from the Federal Housing Finance Agency (FHFA), Fannie Mae and Freddy Mac. The FHFA's objection relates to the existence of a new indebtedness that will rank above the mortgage lender's security in relation to the secured property. The FHFA also raises the possibility that the work executed will fail to produce the desired results, which would have a negative effect on the market value of the building. Arguments raised against these fears include the following:

- In the event of a default, only the arrears rank ahead of the mortgage creditor, a situation that already exists for other municipal taxes.
- Programs can be structured to give increased protection around the evaluation of the efficiency or execution of the measures. Guarantees of all kinds, including performance bonds and guarantees, may be used.

Although in many provinces, capability to establish a PACE bond program might be inherent in existing municipal tax regimes, it may be preferable that a separate law be enacted. A specific law would allow the governments to correctively address aspects of these programs which have raised objections in the United States.

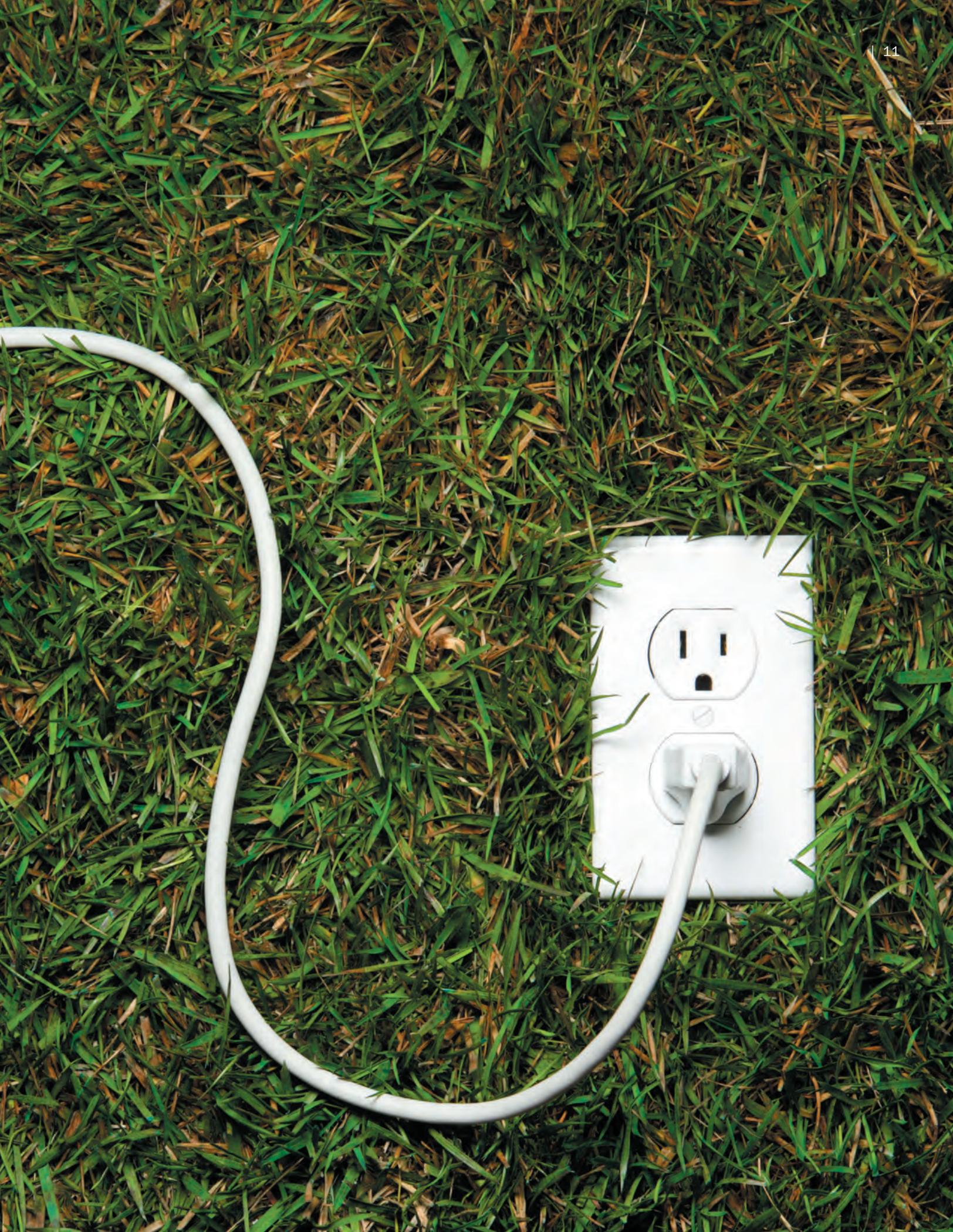
The adoption of the PACE bond program would allow provincial and municipal governments to reduce GHGs created by the use of small commercial and residential buildings, a category where reductions are difficult to achieve due to costs associated with such projects. According to the site www.pacenow.org, the results of a pilot project in Sonoma County, California demonstrated a reduction of 1,900 tonnes of CO₂e equivalent over the 1,148 residences and 22 commercial properties that adhered to program.

In parts of Canada, where our historical wealth of renewable energy might suggest that reductions in electricity consumption do not result in significant reductions in GHG emissions as compared to jurisdictions where energy is created using fossil fuels, a PACE bond program can have a secondary GHG reduction effect in that it will free up renewable energy for export. Also, a reduction in energy generated from fossil fuels would allow the more rapid increase of infrastructure for electric transport (such as, for example, charging posts or stations for electric cars or other modes of electric transportation).

We believe that the adoption of a municipal tax structure facilitating PACE bond programs would allow Canada to distinguish itself internationally in terms of the strength of its support for a green economy. Indeed, the adoption of such measures will open a new pool of customers to contractors offering green building solutions.

The genius of this idea is that it allows provincial governments to create the mechanism whereby a market need can be matched with a financial service, without necessarily creating an additional demand on the financial resources of provincial or municipal governments.







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Business Method Patents: How Prepared are You?

by Aaron Edgar and Grant W. C. Tisdall

Innovative software and business methods are critical to the success of competitive Canadian businesses, especially those involved in financial services and e-commerce. Now more than ever, Canadian businesses must consider how business method and software patents will impact their bottom line. Recent court decisions favouring the patentability of business methods and software include the United States Supreme Court's June 28, 2010 decision in *Bilski v. Kappos (Bilski)* and the Federal Court of Canada's October 14, 2010 decision in *Amazon v. Canada (Commissioner of Patents)*. The position of the courts is in contrast to the widely held misconception that business methods and software cannot be patented. These decisions confirm that, with appropriate limitations, business methods and software are indeed patentable, and these decisions will likely result in an increasing number of similar patents granted by the Canadian and United States patent offices. Considering that the patent and judicial systems of Canada and the United States have always played an important role in the ability of businesses to compete, business method and software patents will also affect the risks and opportunities related to company valuation and conflict resolution strategies.

Business method and software patents are knocking at the door of Canadian businesses and it is time to answer.

The United States Supreme Court decision in *Bilski* was focused on the patentability of a method for hedging risks in commodities trading. It rejected the lower court's rigid application of a machine-or-transformation test that invalidated the risk hedging method since it was neither connected to a particular machine nor did it transform a particular article into a different state. The Supreme Court's opinion

also questioned the applicability of this test in determining the patentability of inventions in the information age. It is important to note that the ultimate rejection of *Bilski's* patent was because the risk hedging method was concluded to be an abstract idea, not simply because the risk hedging method was a business method. In arriving at this decision, the Court noted that its previous precedents setting out exceptions to patent eligibility, including for abstract ideas, are applicable to all traditional subject matter including business methods.

Since the release of the *Bilski* decision, the United States Patent and Trademark Office (USPTO) and U.S. courts have provided further insight into the patentability of business methods. In guidelines for its patent examiners, the USPTO notes that patent claims reciting a particular machine or transformation that provide meaningful limits to the application of a concept can favour a finding of subject matter eligibility. A United States Federal Circuit decision subsequent to *Bilski* further refined the abstract idea exception, noting that "inventions with specific applications or improvements to technologies in the marketplace are not likely to be so abstract that they override the statutory language and framework of the *Patent Act*." Based on the above, U.S. businesses will likely continue to file for and obtain business method and software patents in the United States, something that has become ingrained since the landmark 1998 United States Federal Circuit decision in *State Street Bank and Trust Company v. Signature Financial Group*, where the patentability of business methods was accepted.

The Canadian Intellectual Property Office (CIPO) has not embraced the patentability of software and business methods. This is reflected in a

2009 decision by the Commissioner of Patents that rejected Amazon.com's "one-click" Canadian patent application as an unpatentable business method. (Amazon.com's application claimed a method for facilitating Internet purchases with just a single click and without the need to "check out" or re-enter client details.)

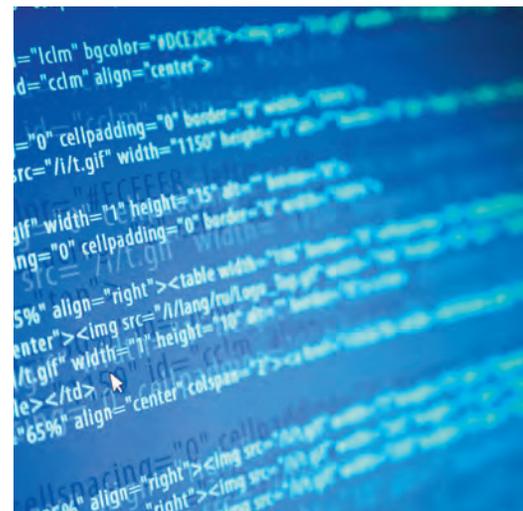
Despite CIPO's policy on business method patents, businesses in the United States and elsewhere remain undeterred from filing business method and software patents in Canada. As a result, a backlog of business method and software patent applications awaits changes to the Canadian patent system before examination can proceed. There is need for patience, as Canadian patents, in granted or application form, have a potential lifespan of 20 years from filing. It is also worth noting that Amazon.com's one-click patent was affirmed by the USPTO in March 2010.

Amazon.com appealed the rejection of its patent in Canada and CIPO's policy against business methods to the Federal Court of Canada. The Federal Court's decision in *Amazon v. Canada (Commissioner of Patents)* reversed the Commissioner of Patents' rejection. The decision stated that in order for an art to be patentable "it must not be a disembodied idea but have a method of practical application," and that Amazon.com's one-click invention is "not simply a scheme, plan or disembodied idea; it is a practical application of the one-click concept, put into action through the use of cookies, computers, the Internet and the customer's own actions." Accordingly, the Federal Court of Canada has affirmed that "there is not, nor has there ever been, a statutory exclusion for business methods in Canada," and that business method inventions should be subject to the same requirements as other inventions under the *Patent Act*, preserving the rarity of exceptions to patentable subject matter. The *Amazon v. Canada (Commissioner of Patents)* decision is currently under appeal, but the Federal Court's condemnation of CIPO's policy against business methods is fairly strong, particularly where the Court notes, "The absolute lack of authority in Canada for a 'business method exclusion' and the questionable interpretation of legal authorities in support of the Commissioner's approach to assessing subject matters underline the policy driven nature of [the Commissioner's] decision."

These court decisions have explicitly stated that business methods are patent eligible and have attempted to clarify required limitations to these types of inventions. Businesses, more than ever, need to carefully consider the importance of business method and software patents when evaluating strategies on conflict resolution related to company product and service offerings, company and technology valuations, and product and service development. Canadian businesses that adapt, understand and account for the ramifications of these court decisions will be better positioned for the future.



Business method and software patents are knocking at the door of Canadian businesses and it is time to answer.





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FISA: Canada's New Anti-spam Legislation and its Impact on Your Business

by Roland Hung

The intent of the *Fighting Internet and Wireless Spam Act* (FISA), which received Royal Assent on December 15, 2010, is to deter the most damaging and deceptive forms of spam in Canada, and to create a more secure online environment. The Act creates a comprehensive regulatory regime of offences, enforcement mechanisms and severe penalties, all designed to protect individuals and businesses engaged in electronic commerce. FISA also extends the provisions of the *Competition Act* concerning false and misleading marketing to electronic messages, and restricts the scope of certain exemptions under the *Personal Information Protection and Electronic Documents Act* (PIPEDA). By addressing a broad range of Internet issues, FISA goes beyond the U.S. legislation, the *CAN-SPAM Act*, which focuses only on email spam.

Anti-spam

FISA covers all "commercial electronic messages," also known as spam. The term is defined broadly to capture any messages with a semblance of commercial activity, regardless of the types of organizations sending them. Further, FISA takes a technology-neutral approach, embracing all media and all forms of messaging. As a result, unsolicited email, text messages, instant messaging and cellphone spam – whether in the form of sound, text, voice or images – are all covered.

FISA prohibits the sending, or causing or permitting to be sent, of a "commercial electronic message" to an electronic address unless:

- The recipient has consented to receive the message; and

- The message complies with required formalities, including information regarding both the actual and beneficial sender of the message, a sender's contact information, and an effective and timely unsubscribe mechanism.

Consent to receive a commercial electronic message may be express or implied. Express consent must be based on the disclosure of prescribed information including the purposes for which consent is sought and the identity of the person seeking consent.

Consent may be implied in limited circumstances where:

- The person who sends the message has an "existing business relationship" or an "existing non-business relationship" with the person to whom it is sent;
- The recipient has conspicuously published their electronic address, without an accompanying statement that they do not wish to receive unsolicited messages, and the message is relevant to their business, role, functions or duties in a business or official capacity; or
- The recipient has disclosed to the sender the electronic address without indicating a wish not to receive unsolicited messages, and the message is relevant to their business, role, functions or duties in a business or official capacity.

In sum, the general rule under FISA is that express "opt-in" consent must be obtained, subject to a proviso that implied consent may be used within specifically defined circumstances. This permission-based, largely "opt-in"



approach to consent goes beyond the U.S. *CAN-SPAM Act* which allows marketing email messages to be sent to anyone, without permission, until the recipient “opts out” by expressly requesting that the messages cease.

Anti-phishing

FISA contains an anti-phishing provision that would prohibit a person, in the course of commercial activity, from altering the transmission data in an electronic message so that the message is delivered to a destination other than or in addition to the destination specified by the sender, without the sender’s express consent. The consent must be informed, and an effective and timely consent withdrawal mechanism must be provided as well.

Anti-malware

The anti-malware provision under FISA prohibits a person, in the course of commercial activity, from installing any computer program on any other person’s computer system, or causing that computer program to send an electronic message from the computer system, without the consent of the owner or authorized user of the computer system. In most circumstances, the required consent must be express and informed, and an effective and timely consent withdrawal mechanism must also be provided. There are limited exceptions that permit implied consent to the installation of legitimate computer software. There is also a three-year transition provision that provides for implied consent to the installation of a software update or upgrade in limited circumstances.

Enforcement and Penalties

FISA gives the Canadian Radio-television and Telecommunications Commission (CRTC) broad powers to investigate and impose substantial administrative monetary penalties up to \$1 million for an individual and up to \$10 million for an organization for violations. In addition, FISA also creates a private right of action that would allow consumers and businesses to take civil action against anyone who violates FISA, including statutory damages of \$200 for each violation of unsolicited electronic message provisions of the Act, up to a maximum of \$1 million each day.

Tips for Businesses

In response to FISA, businesses will have to change their Internet marketing practices. The legislation is broadly drafted to capture all electronic messages sent to, through or from Canada, meaning that it applies to international senders who send commercial electronic messages into Canada.

Here are a few guidelines:

- **Do not use false or misleading information about the subject matter or sender.**
- **Provide recipients with the prescribed information.** Commercial electronic messages will be required to disclose information that identifies the sender, the sender’s contact information and information about the unsubscribe mechanism.
- **Tell recipients how to opt out of receiving future email.** Businesses will be required to ensure that commercial electronic messages are sent only to persons who have previously given express or implied consent to receive the message, and have not opted out of future messages. The message must include a clear and conspicuous explanation of how the recipient can opt out of getting future emails. Further, any opt-out mechanism offered must remain operative for 60 days.
- **Honour opt-out requests promptly.** Businesses must honour a recipient’s opt-out request within 10 days.
- **Monitor third parties.** Businesses will need to ensure that their third-party service providers are knowledgeable about FISA and in compliance with it when assisting with and implementing marketing programs and services.
- **Ensure compliance when distributing software.** Computer software businesses will be required to ensure that any electronic distribution of software (including software updates/upgrades) complies with disclosure and consent requirements.

Although FISA has yet to come into force, businesses should act now to evaluate their current practices and privacy policies to ensure compliance with this critical legislation.



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Permission to speak freely, sir? Canadian Electronic Marketing in the FISA Era

by Eric Gross and Paul Seaman

In this 2011 edition of *Canadian Technology Law Issues*, Roland Hung canvasses the general provisions of the *Fighting Internet and Wireless Spam Act* (FISA), formerly known as Bill C-28. FISA was passed by Parliament and received Royal Assent on December 15, 2010. Jurisdiction over administration and enforcement of FISA is split between three federal branches: the Canadian Radio-television and Telecommunications Commission, the Office of the Privacy Commissioner and the Competition Bureau. FISA is relatively complicated and will likely require significant resources of all three branches. It is therefore reasonable to expect that the Act will not be proclaimed in force as law until at least the summer of 2011. Once FISA is in force, however, it will likely force many Canadian businesses to reassess their marketing and customer retention strategies and make significant changes to ensure compliance.

Purpose of FISA

The strongly worded and politically savvy title notwithstanding, a purposive reading of the Act and a review of relevant passages from Hansard, reveal that the underlying purpose is to promote e-commerce and consumer confidence in e-commerce. FISA aims to accomplish this purpose by discouraging high-volume or deceptive electronic marketing, "phishing" schemes and the unauthorized installation of malware on consumer devices. A contravention of FISA could come at a high price: the enforcement scheme includes stiff administrative monetary penalties, a private right of action and director/officer liability.

Devising a Strategy

With these risks in mind, marketing professionals need to think about FISA now, even before it becomes law. Even though, as Hansard indicates, FISA is not intended to target "legitimate business," clearly it will move electronic marketing in Canada to a permissions-based model. The model will require that businesses have consent from consumers in order to contact them with commercial electronic messages. This change is likely to inspire hand-wringing amongst managers responsible for marketing and retention, as they wonder if they possess or need to obtain the requisite express (or implied) consent to contact clients or potential clients. Fortunately, a common sense approach can be taken to ethically obtain express or implied consent from clients. Consider the following strategic recommendations.

Inventory any existing express consents you have from clients and assess other client situations where you may have implied consent.

Express consent will survive enactment of FISA. As such, you should determine how many of your clients have already granted you express consent to contact them. You should also determine whether you have implied consent of any or all of your clients.

Assess your privacy policy and amend it if necessary.

Generally speaking, privacy policies deal primarily with identifying the categories of personal information your company will collect,



how it will be used and whether your company will disclose it to other entities. If you are collecting information from your clients as they “click through” which will inform future marketing initiatives, then your privacy policy should indicate that one of the uses of your clients’ personal information will be to ascertain their needs and market to them accordingly. If you intend to disclose your clients’ personal information to a third party, this should be stated in your privacy policy as well.

Aggressively (but ethically) pursue express consent from your legacy clients before FISA is in force.

Before FISA is proclaimed in force, you may wish to contact your clients electronically to clarify the nature of their consent for the sake of legal certainty under FISA. To safeguard your reputation, be sure to proceed ethically, i.e., no flooding of email inboxes and always provide a clear, functional opt-out option on all messages.

Devise an ethical manner in which informed express consent may be efficiently obtained from new clients on an ongoing basis.

Personal information should be collected as close to the initial transaction as possible and the process for collecting it should be consistent with how you deal with your clients and how they interact with your products.

For instance, the inclusion of a “product registration” card with a tangible product can encourage the client to register for warranty purposes on a “product service centre” website, which should include clear, functional options for opting in or out of various forms of contact with you.

With software-based or handheld devices, a registration screen can pop up periodically to encourage the user to register on a similar website, where additional information and options for opting in and out are available.

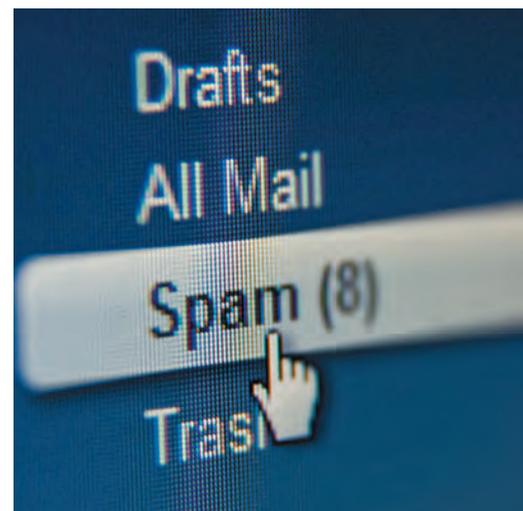
Exemptions from Consent

A notable exemption from consent that is available under FISA occurs where an electronic message “solely ... provides warranty information, product recall information or safety or security information about a product, goods or a service that the person to whom the message is sent uses, has used or has purchased.”

How this exemption may apply to the ongoing common-law duty to warn consumers of unsafe products is uncertain, and the use of the word “solely” is perhaps troublingly narrow. In some instances, especially those involving consumer devices such as firewalls, routers, and smartphones that use confidential consumer data, it may be reasonable to permit regular upgrades of both hardware and software, especially where an unsafe or less-safe device will no longer be regularly supported by the manufacturer. It is also possible that the duty to warn may constitute implied consent within FISA. How FISA may be interpreted in relation to any potential common-law duties remains to be seen.

Permissions-based electronic marketing is poised to become law in Canada in the foreseeable future. As FISA’s proclamation approaches, companies should assess their strategies for adopting this model.

... marketing professionals need to think about FISA now, even before it becomes law.





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Source and Accept Equity Funds Prudently*

by Thomas K. Hunter

It is common for entrepreneurs to receive some modest seed financing from family and friends, but the equity funds which are fueling start-up and early-stage technology companies in Canada today are primarily provided by angel investors, with some government program funding and venture capital injections. Angel investors are generally wealthy individuals who wish to utilize a small portion of their financial resources to invest in startup or early-stage business opportunities. The following comments are intended to assist entrepreneurs in sourcing and closing angel investment.

Fundamentally important to the entrepreneur will be not only closing the amount of desired funding, but closing it with the angel or angels who most enhance the team which the entrepreneur is building. When seeking equity funds entrepreneurs will usually receive advice from multiple sources, but regardless of the source it is a disciplined and structured approach to fundraising that will maximize the chances of raising the desired funds from the right angel investor. As experienced legal counsel in this field, we have acted for hundreds of those seeking and providing equity investment. Some of the recommendations that have stood the test of time in both boom and bust fundraising environments are as follows:

(a) The entrepreneur should prepare a summary of the business plan on 15 pages or less covering the topics of technology (product/service), market, team, finances (request for funds/cash flow/revenue model) and exit strategy. The summary should serve to excite and inform potential angel investors and must be available both in soft copy and as a slide deck for presentation purposes. Key members of the entrepreneur's team must review and sign off on the summary before it is provided to potential investors.

(b) Once finalized the slide deck version of the business plan summary is to be presented to key team members and rehearsed until it can be articulated (not read) in no more than 30 exciting and informative minutes. This process will ensure as much as is reasonably possible that the "pitch" is comprehensive, consistent and exciting. This will in turn maximize the odds that each potential angel investor who receives the pitch for funding has their standard questions and concerns largely addressed prior to their raising them. This will permit the entrepreneur and potential angel investor to engage in a more customized and meaningful discussion about the possibility of an investment "fit."

(c) While the "pitch" is being perfected in (b) above, the appropriate team members should prepare a list of potential angel investors from the team's collective network and research. The team should endeavour to rank the potential investors from most likely to least likely to invest based upon their actual and acquired knowledge of the potential angel investor (i.e., history of investment in technology companies, preferred investment parameters, currently available investment funds, etc.). The most appropriate team member will then approach the first ranked potential angel investor and arrange for execution of a non-disclosure agreement and delivery of a soft copy of the business plan summary. The objective is to arrange an opportunity to pitch the potential angel investor, commence discussions, move to due diligence and the preparation of legal documentation and to ultimately close an equity financing. Multiple potential angel investors are engaged until the desired equity financing is completed.

In our experience abiding by these recommendations will greatly assist in reducing the time required to raise equity funds and increase the chances of closing an acceptable financing from a team enhancing angel investor.

*Excerpt from "The Entrepreneurial Effect: Waterloo," publication date Fall 2011.





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Cloud Computing: Legal Risks and Pitfalls

by Lisa R. Lifshitz

Cloud computing — for example, providing software as a service over the Internet or over the intranet — is the fastest growing means by which technology companies offer their products today. Cloud computing offers myriad advantages, including the ability to rapidly increase capacity or add capability without investing in new infrastructure, training new personnel or licensing new software. Users have access to the latest technology, whether hardware or software, and organizations no longer need to operate and maintain servers/infrastructure at all hours of the day or night. Cloud computing is often touted as “cheaper” and easier, particularly in the case of public clouds, which are run by third-party cloud providers that manage nearly every detail of the operation.

However, all is not perfect in the world of the cloud. Cloud computing comes with significant legal and business risks. The following article will canvass a few, but not all, such risks.

Data Ownership

Prospective cloud customers should be sure that their cloud agreement states that the customer explicitly owns its data, including in the event of termination, bankruptcy or similar developments. Even so, while a customer may still own its own data, it may not necessarily control it (at least in a public cloud). Once a customer uploads data to a cloud, the cloud provider will assume a fair amount of control over it. Unfortunately, certain security measures that the customer would normally take to protect its own sensitive data are not necessarily guaranteed by the cloud provider’s service level agreement.

Minimal Representations and Warranties/Limitation of Liability

Generally speaking, representations and warranties in cloud agreements are scarce

and will attempt to distance the cloud provider from assurances of quality. Cloud agreements are famous for being “as is” types of agreements and often focus on the provision of service credits to deal with performance concerns. Very often, the agreements do not warrant that the cloud provider’s services will function as described, nor will the services be uninterrupted or error free (shortcomings that could result in loss of data or worse). Additionally, the limitation of liability clauses typically exempt the cloud provider from all kinds of damages (direct, indirect, incidental, special, consequential) and losses may be limited to the amount actually paid by the customer for the services, which will not adequately compensate a customer in the event of data breach or loss of a key proprietary trade secret.

Indemnities

Indemnities in cloud agreements are usually fairly broad and are almost always in favour of the cloud provider. It is not unusual to see references to the cloud provider’s affiliates, licensors, business partners, each of their respective employees, officers, directors and representatives. The customer is often asked to indemnify the above parties for many reasons, including claims arising out of the customer’s use of the services in violation of applicable law, because of user-generated content or other content uploaded by the customer or its employees, for any violation of the cloud provider’s terms of service, or for any third-party intellectual property violation caused by the customer’s data.

Service Levels

Cloud providers tend to provide these in separate documents from the master agreement and will commit to a certain level of functionality at all times, i.e., 99 per cent uptime. Service



credits, if available, may be calculated as a percentage of the fees that the customer has paid, which are returned back to the customer in the event of a service interruption. However, many cloud providers routinely exempt large portions of their service from such calculations, whether for maintenance, emergency maintenance, or Internet interruptions, so largely they do not end up compensating customers for failures. Also, service credits are usually limited to a maximum amount per month or day. Most service level agreements should outline what happens when data is lost due to a service interruption, but many cloud agreements do not. In fact, in some agreements data retrieval issues caused by an inability to access the service provided do not constitute a failure under the service agreement. Additionally, many service level agreements exclude any guarantee of access to data or uptime if there has been a suspension or termination of the customer's right to use the data provided, so customer data can essentially be held "hostage."

Loss of Data

For the most part, the customer owns the data that it uploads into the cloud, but some cloud computing agreements are less clear on ownership rights. For example, a potential customer must ask whether its data will be deleted following termination of the agreement, kept by the cloud provider (locked in), or transferred back in a non-proprietary form to the customer. Many providers refuse to return data unless all fees are paid and are up to date, so what happens in the event of a fee dispute? Some cloud providers will delete customer data upon the termination of an account or unpaid accounts. Customers should negotiate that any disputes over fees will never result in any suspension of data (suspension of use is a better alternative).

Privacy Issues

Perhaps the most problematic aspect of cloud computing agreements are privacy issues. For example, under Canada's federal privacy laws, if companies are collecting personal information and are storing it in the United States, the company will have to disclose this fact to its customers. Additionally, the customer still has legal obligations to ensure that its clients' personal information is adequately protected (through technological, organizational and physical means) by the cloud provider. Depending on the sensitivity of the information, this may also include other access controls, encryption, etc. Customers

need to know that they will not be off the hook for any data that is outsourced and in fact, have a legal obligation to use contractual or other means to ensure that the cloud provider, as the third-party data processor, provides a comparable level of protection while the information is being processed by such third party. The difficulty is that many cloud providers are not very open about their data protection measures/policies. Therefore customers should negotiate into their cloud agreements that the cloud provider will comply with terms and conditions of Canadian privacy laws where applicable.

Additionally, Alberta's *Personal Information Protection Act* (PIPA) was amended in 2010 to require organizations to notify individuals before transferring information to a foreign service provider, including notifying individuals if the service provider is outside of Canada, when the primary organization will be transferring individual's personal information outside of Canada and include information regarding this outsourcing practice in the organization's policies and procedures. Alberta's PIPA also requires that organizations in Alberta are required to notify the Privacy Commissioner if personal information under the organization's control (including data held by its third-party contractors) is lost, accessed or disclosed without authorization. Failure to notify the Commissioner of a breach that may pose a real risk of significant harm to individuals is an offence, so customers must include such notification requirements into their contracts with cloud providers.

Final Tips

Many of the above risks can be addressed through adequate negotiations and amendments to the cloud provider's standard terms. Prospective customers are warned to review their cloud computing agreements carefully before signing them, focusing on areas of key concern to their particular organization. For example, customers should ensure that they can preserve and retrieve their data, regardless of the cause of termination or expiration of the agreement. Customers should find out as much as possible about the cloud provider's reputation, security measures and infrastructure. Before entering into a cloud agreement, prospective cloud customers should evaluate whether the cloud is right for them, as not all data is a good candidate for cloud computing. Mission critical applications and highly sensitive data may be simply inappropriate for placement in a public cloud and in such instance, a private cloud may be more suitable. Weigh the benefits and risks carefully!



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Water Supply and Recycling: IP and Commercialization Issues in Canada

by Daniel R. Polonenko

Reliable and secured sources of water for municipal, industrial and agricultural use, and the recovery and processing of municipal, industrial and agricultural wastewater streams, are increasingly critical issues for governments and businesses around the world. Municipal water management systems focus on the delivery of safe drinking water while ensuring adequate reservoir supplies; facilitating recovery and treatment of wastewater; and maintaining, upgrading, monitoring and protecting water storage and conveyance systems. Industries that require reliable supplies of water for manufacturing and processing include energy, food and beverages, pharmaceuticals, petrochemicals and industrial chemicals, pulp and paper, and electronic components manufacturing. Many industries produce wastewater streams and/or effluents containing contaminants that are hazardous to public health and/or have toxic environmental effects. The production of crops and livestock is dependent on constant supplies of water. Increased crop productivity relies on substantial input of fertilizers. Not all the applied nutrients are taken up by the crops, and run-off into natural waterways can have harmful effects on water quality and aquatic organisms. Livestock production typically results in the extensive production of effluents that pose a danger to natural waterways. Consequently, strict environmental regulations specifying maximum tolerance levels for certain compounds have been imposed in many jurisdictions. The high costs of access to high-quality water and the recovery and treatment of wastewater streams, provide opportunities for development of new devices, apparatus and systems for more efficient water recovery, treatment and recycling.

From a geographical perspective, supplies of potable and industrial-quality water are rapidly diminishing in developed parts of the world and are typically scarce in developing parts of the world. Furthermore, rapidly increasing populations in developing countries coupled with the a reduction of land devoted to farming in industrialized countries place increased demands on higher productivity from remaining farmland, and lead to the use of substandard land for food production. Alternatively, with the availability of sufficient water supplies, high volumes of year-round food can be produced through greenhouse cropping. The largest reservoirs of water on the earth are the oceans, which are unsuitable for use due to salinity. However, desalinization technologies could provide relief from current water shortages in many parts of the world.

Typically, extreme potable water shortages follow catastrophic events such as earthquakes, tsunamis and flooding. The lack of potable water can increase the risk of life-threatening diseases, adding to the suffering caused by these catastrophes. Opportunities exist for development of technologies that are capable of rapid production of potable water from ambient water.

Most Canadian institutions and manufacturers with intellectual property associated with water treatment and recycling, focus on securing patent protection in the G7 countries (Canada, France, Germany, Italy, Japan, the U.K., the U.S.). In the 2007 publication "BRICs and Beyond," Goldman Sachs identified two groups which have been emerging as world economic powers since the late 1990s: the BRICs group comprising Brazil, Russia, India and China; and the Next 11 (N11) group comprising





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Back to Basics: Employment Contracts 101

by Melanie A. Polowin

What are employment contracts made of?

Think of an employment contract as a human body. The *skeleton* consists of mandatory statutory laws governing human rights, minimum employment standards, health and safety, and (in some provinces) employee privacy. For most technology sector businesses, the governing laws will be those of the province where the employee primarily works.

The *skin* consists of common law rules and tests established by judges. Be aware that when it comes to (i) termination; (ii) proprietary property; and (iii) post-employment restrictions, the common law rules and tests heavily favour the employee. Employers and employees can contractually agree to override some, but others can never be overridden – notably, whether a contract is valid, whether non-competition and non-solicitation provisions are enforceable, and whether a contractor is really an employee.

Written terms, if any, such as offer letters/employment agreements, confidentiality and proprietary rights agreements, non-competition agreements, incentive plans and policies, are merely *clothing* on the body.

Ultimately, every employment contract consists of a combination of written terms in one or more employment-related documents (the clothing) and certain “invisible” terms (the skin and bones). Beware those “invisible” terms!

Enforceability of Written Contracts

To be enforceable, every contract needs to be:

- Properly signed up (no process gap);
- Well-written (no content crap); and
- Preserved over time (no validity lapse).

Both content and process matter, and the benefit of the doubt always goes to the employee. For example, it can be fatally bad process to extend an oral offer of employment. Once the candidate accepts, an employment contract with “invisible” terms automatically arises. If documents are signed later confirming different employment terms, those documents may be unenforceable. Content problems are equally problematic. For example, if your contract does not properly deal with all aspects of termination of employment, then the “invisible” terms will fill the gap.

Avoiding the Process Gap

You can negotiate some key terms and express an interest orally, but any offer of employment must contain all key terms and must be made in writing. All pre-conditions to hiring must be articulated in the offer. All key agreements should be provided as part of the offer package and all of them must be signed back (after a reasonable deadline) *before* the start date. Ideally, signing deadlines should be at least two clear business days after delivery of the offer. *If you don't follow these process rules, your contracts will be highly vulnerable to enforceability challenges.*

Avoiding Content Crap

To effectively override “invisible” terms, you need written contracts that are clear, understandable, consistent with minimum employment standards and human rights requirements, and very explicit. There is no magical level of formality needed: a plain-language offer letter is just as effective as a formal employment agreement full of legalese. In fact, clear communication is key to enforceability, so the easier to understand, the better. Use sections and headings to enhance comprehensibility.



Good content is critical in these three key areas:

- **“Reasonable notice,” the most painful “invisible” term.** If there are no enforceable written termination provisions, then employees are entitled to a “reasonable notice” period — either advance notice or compensation in lieu or some combination of the two. Compensation in lieu includes all compensation elements, not just base salary. Entitlements are assessed individually, based on a number of factors (key factors being age, length of service and role). The law defaults to reasonable notice, and reasonable notice periods typically exceed the statutory minimums. Courts strongly dislike termination provisions that limit notice and severance to the statutory minimums. Be smart: make sure termination provisions give at least a modest amount over and above the statutory minimums.
- **Proprietary property protection.** The “invisible” protection of confidential information is reasonably strong, but the law gives only limited ownership rights to proprietary property. You must implement a well-written (and properly Canadianized) confidentiality and proprietary rights agreement to secure the most protection possible.
- **Post-employment non-solicitation and non-competition protection.** One “invisible” term imposes a duty of good faith on all employees, barring competitive activities during employment. However, another “invisible” term allows post-employment solicitation by most employees. (Fiduciary employees have modest non-solicitation obligations, but the law does not define these, so you need to!) Furthermore, the “invisible” terms allow all employees, regardless of rank or role, to engage in post-employment competition. Without written terms, you have virtually no protection in this area. Well-drafted and properly signed up non-solicitation restrictions are usually enforceable. However, the law will *not* enforce non-competition restrictions if non-solicitation restrictions suffice to protect an employer’s legitimate business interests. Realistically, non-competition restrictions are not enforceable against many employees, even if the employee agrees to sign them and even if you pay them for it.

Avoiding Validity Lapse: Preserving Enforceability Over Time

Even if you do everything right at the hiring stage, contractual terms can become unenforceable due to changes in status (e.g., part-time to full-time, temporary to permanent); promotions and transfers; significant adverse changes by the employer (e.g., wage reductions, demotions); in addition to mistreatment of employees or mishandling departures. Reduce risks by properly documenting — in advance — all significant changes in status or employment terms; making it clear which contract terms continue to apply; and by treating employees decently during and after employment.

Mind Your Manners!

Aim for clear and timely communications, and fair and reasonable treatment at every phase of the employment life cycle — because this is the most effective way to reduce risks.

Audit Yourself and Seek Advice

When you first set up your Canadian operations, and at least every two years after that, take the time to audit and update your recruitment, hiring and promotion/transfer practices, and related templates, documents, processes, policies and challenges. And remember, your friendly employment law expert can help you clean up any past messes and make sure you do it right in the first place from now on.





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Ontario Blinks: What Next for Renewable Energy Development in Canada?

by Thomas J. Timmins

In a surprise move on Friday, February 11, 2011, Ontario's Ministry of Environment announced a halt to development of all offshore wind projects on the Canadian side of the Great Lakes.

Citing environmental concerns, the Ministry indicated the cancellation of all existing Crown land lease applications for offshore wind development in the Great Lakes that do not yet have an Ontario Feed-in Tariff (FIT) contract with the Ontario Power Authority, including those with Applicant Record status.

This announcement took Ontario's offshore wind energy industry by surprise and it remains unclear what process will be undertaken by the Ontario government to study environmental concerns in the Great Lakes (or what environmental concerns have led to the current policy reversal).

Also unclear are the legal rights which Crown land lease applicants and Ontario FIT Program applicants (and contract holders) may assert as a result of their reliance on Ontario's stated objectives in the establishment of the offshore wind portions of the FIT Program.

Naturally, the surprise cancellation of the Province's offshore wind FIT Program is not seen as a strong signal of stability for renewable energy policy in Ontario. Millions were invested in reliance on the attractive price incentives offered for offshore wind projects under Ontario's FIT Program. Even larger dollar amounts have been invested by the private sector in onshore wind, solar and biogas initiatives.

By coincidence, Ontario's offshore moratorium announcement came just a few days after the opening of the State of Virginia's Offshore Wind Technology Center in Chesapeake, and the announcement by the U.S. Federal Government of \$50.5 million in development funding for

projects that support offshore wind energy deployment and the creation of several high-priority wind energy areas in the mid-Atlantic.

As offshore wind energy developments get underway in Québec, Nova Scotia, New Brunswick, British Columbia, Newfoundland and Labrador, New York, Illinois, Pennsylvania, Ohio, Michigan, Minnesota, Indiana and virtually all other coastal jurisdictions in Canada and the United States, Ontario has ceded an early lead in this particular renewable energy arena.

That said, the FIT Program did give Ontario an excellent head start in the renewable energy sector more generally.

Although offshore developers will need to settle up with the government on offshore matters in the coming months, other subsectors of the renewable power generation industry are moving forward from project planning stages through to financing and development quite nicely. Furthermore, although both onshore wind and solar developers have experienced not insignificant law and policy uncertainty over the past few months, it does appear that Ontario may see through the construction of more than 3,000 MW of carbon-free, clean and renewable energy generating assets.

This is a commendable achievement for a sub-national government in a province with a population of less than 15 million.

Of course, given the Ontario FIT Program's pending metamorphosis over the coming months, and given Canada's generally well-deserved reputation as being politically and economically stable, out-of-country investors may ask, "Where else in Canada can we invest our renewable energy dollars to mitigate the political and policy risk in Ontario?"



At this stage, the truth is that no other jurisdiction in Canada or the U.S. has yet established a renewable energy off-take program with power purchase commitments as attractive over the longer term as those which have been offered by the Ontario government. Unfortunately, the Ontario FIT Program is: (a) due for review in 2011; and (b) may, in fact, be cancelled and/or entirely revamped (and, certainly, rebranded) if the Ontario Liberal Party fails in its bid to be re-elected as the majority government in the October 6 elections.

Traditionally, Ontario has managed to respect its commitments to energy project developers as governmental policy priorities have shifted and changed. As the FIT Program continues to evolve, we expect that the Province will again endeavour to honour its commitments.

However, several other provinces in Canada also merit serious attention: British Columbia, for instance, has made it clear that wind energy will form an important part of its future energy and economic development plans. Although close to 90 per cent of its electricity already comes from hydro, the introduction of B.C.'s *Clean Energy Act* underscores an orientation towards clean, renewable energy. BC Hydro's 2010 competitive call for clean power is expected to result in the construction of six projects totalling 534 MW of capacity.

Similarly, Nova Scotia's 2010 energy policy sets a mandatory target of supplying 25 per cent of the province's electricity needs from renewable sources by 2015. Nova Scotia's ComFIT program differs from others in North America and Europe by making feed-in tariff rates available only to community-owned projects. It will also be the first in North America to specifically pay for community-owned tidal power plants.

Hydro-Québec recently announced the results of its tendering process for First Nations and regional municipalities that will help meet the Province's goal of 4,000 MW of wind energy by 2015.

Finally, the governments of Saskatchewan, New Brunswick, Manitoba, and Newfoundland and Labrador also continue to develop policies oriented toward clean, renewable energy generation.

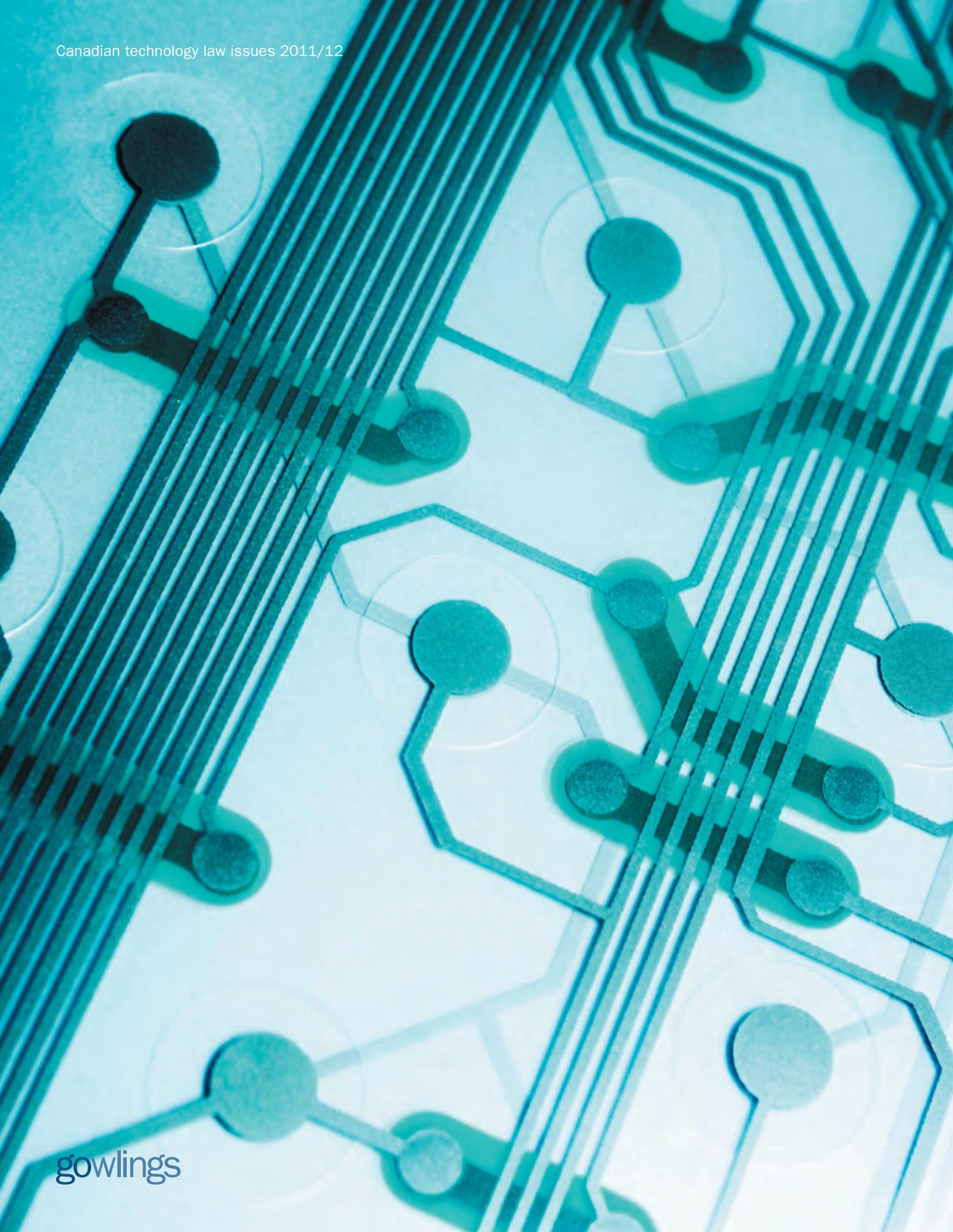
As a result, we believe that prospects for Canada's renewable energy industry over the next few years are very promising and that renewable energy in Canada is only in its infancy.

With more than 1,000 MW of renewable energy generating assets expected to be installed across Canada this year, 2011 will be a record year for the industry. And, although Ontario's FIT Program may undergo significant changes in the coming months, the fact is that renewable energy generation has entered the fabric of the Canadian energy sector. Renewable energy will form an essential part of the evolution of the sector as smart grid opportunities, electric vehicle demands, and transmission and centralized generation capacity constraints transform the energy sector in coming years.

This, in combination with Canada's stature in the world as a great place to invest, makes Canada's renewable energy sector an excellent target for investment in the foreseeable future.

... Ontario has ceded an early lead in this particular renewable energy arena.





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