

Publisher's Note

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TECHNOLOGY CONTRACTING

This publication provides comprehensive, invaluable information relating to transactions and agreements that technology-oriented companies enter into throughout their life cycle. Each chapter includes a discussion on the law that is relevant to negotiating and drafting particular types of agreements, and practical suggestions for drafting and negotiating clauses and provisions within the agreements. The publication includes key contracts and transactions that are of interest to technology-oriented companies.

This release features the addition of the Competition Bureau's Draft Intellectual Property Enforcement Guidelines, November 1, 2018 as Appendix 28.1 to Chapter 5 (Patent Licensing). This release also includes updates to the *Patent Act* - Amendments to Section 78 of the Act came into force on November 5, 2018. This release also features the addition of case law annotations to *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 in Appendix A - Legislation.

Highlights

- **Competition Bureau's Draft Intellectual Property Enforcement Guidelines** — The Guidelines discuss the circumstances in which the Competition Bureau, would seek to restrain anti-competitive conduct associated with the

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exercise of IP rights to maintain competitive markets. When developing the Guidelines, the Competition Bureau considered the current global economic and technological environment and, in particular, the rapid rate of technological changes occurring in many industries. The document is organized into six parts: Part 2 discusses the purpose of IP laws, lists the various IP statutes, reviews the purpose of competition law and lists the principal provisions of the Act that relate to IP; Part 3 discusses the interface between IP law and competition law; Part 4 outlines the principles underlying the application of the general provisions and section 32 of the Act to business conduct involving IP; Part 5 describes the Bureau's analytical framework, which is sensitive to the particular characteristics of IP; Part 6 discusses the Bureau's mandate to promote competition, which may include intervening in proceedings in which IP rights are being defined, strengthened or extended inappropriately; and Part 7 presents a discussion and a series of hypothetical scenarios to illustrate how the Bureau would apply the Act to a wide variety of business conduct involving IP, including price-fixing; exclusive licensing; contracting; patent pooling; competitor collaborations; refusals to license; product switching and the settlement of patent litigation proceedings in the pharmaceutical industry; the sending of false and misleading claims; and certain forms of conduct in the context of standards development organizations.

- ***Personal Information Protection and Electronic Documents Act — Section 4*** — OPCC received complaints from individuals alleging that links to Canadian court and tribunal decisions containing their personal information were appearing prominently in search results when their names were entered in common search engines. One question to be addressed was whether PIPEDA can apply to activities abroad that have an impact on persons resident in Canada. Section 4 of PIPEDA is silent with respect to the statute's territorial reach. However, there is no language expressly limiting its application to Canada. In the absence of clear guidance from the statute, the Court can interpret it to apply in all circumstances in which there exists a "real and substantial link" to Canada, following the Supreme Court's guidance in *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 CSC 45, 2004 SCC 45, 2004 CarswellNat 1919, 2004 CarswellNat 1920, REJB 2004-66511, [2004] 2 F.C.R. xi, (sub nom. *Socan v. Canadian Assn. of Internet Providers*) [2004] 2 S.C.R. 427, (sub nom. *SOCAN v. Canadian Assn. of Internet Providers*) 32 C.P.R. (4th) 1, 240 D.L.R. (4th) 193, 322 N.R. 306, [2004] S.C.J. No. 44 (S.C.C.). Justice Mosley observed that the Federal Court has applied PIPEDA to a foreign-based organization where there was evidence of a sufficient connection between the organization's activities and Canada. The relevant connecting factors include (1) the location of the target audience of the website, (2) the source of the content on the website, (3) the location of the website operator, and (4) the location of the host server. However, when an organization's

activities take place exclusively through a website, the physical location of the website operator or host server is not determinative because telecommunications occur “both here and there”. The Court was satisfied that the respondent was an “organization” within the meaning of paragraph 4(1)(a) of PIPEDA. The respondent was collecting, using and disclosing Canadian court and tribunal decisions containing personal information of litigants and other individuals named in the decisions. The respondent’s activities were commercial in nature as he generated revenue from advertisements on his website and he charged a transaction fee before agreeing to remove the personal information of concerned individuals: *T. (A.) v. Globe24h.com*, 2017 FC 114, 2017 FC 114, 2017 CarswellNat 184, 2017 CarswellNat 904, [2017] 4 F.C.R. 310, 143 C.P.R. (4th) 483, 407 D.L.R. (4th) 733, 373 C.R.R. (2d) 344 (F.C.)

