

Changing World, Changing Tech: Quick Technology Law Tips

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Contracting for Technology Solutions in a Rush

Monica Sharma, Partner

New Technology Solutions and Little Time

- **Businesses are relying on technology more than ever and will need to procure new solutions on an urgent basis**
- **Even where solutions are provided on a standard form contract basis, users should still review the terms to ensure that the user is protected in certain key areas**

9 Key Points

When time is short and the solution is urgently needed, here are 9 points to keep in mind:

- 1. Who is providing the solution and what if they go under?**
- 2. What are the pricing and payment provisions?**
 - Be aware of fixed term contracts and strict payment requirements
- 3. What is the term and how do I get out?**
 - Consider the term of the agreement and how can the company terminate
- 4. Keep your distance!**
 - Does the agreement need to consider physical distancing requirements?

Continued/...

9 Key Points (continued)

5. **Show me the money!**

- Consider whether the service levels and service level credits make sense

6. **What could possibly go wrong?**

- The trifecta of Force Majeure clauses, business continuity plans and transition plans

7. **Don't get stuck in court**

- Consider alternative dispute resolution

8. **What data will the provider have and what are the provider's security policies?**

9. **Don't get left holding the bag!**

- Assumption of risk and insurance considerations

Final Thoughts

- **Use a rider or addendum to amend easily**
- **Don't forget your existing technology solutions**
 - Review existing contracts for critical business solutions to anticipate future possible issues

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Adopting Remote Working Tools for your Business' New Normal

Jeff Holowaychuk, Associate

Where to from here?

- **“March Madness” had businesses of all sizes scrambling to enable their workforces to work from home**
- **Necessity triumphed over long-term IT- and business-driven strategies**
- **Summer presents a great opportunity to take stock and plan for the future**

Key Considerations for Remote Tool Adoption

1. Identify Organizational Needs

- What are your needs, rather than nice to haves?
- Who will be using it – just employees or customers and clients as well?

2. Do they meet your privacy expectations?

- Review their commitments
- Secondary uses
- Updates to your privacy policy

Key Considerations for Remote Tool Adoption (cont.)

3. What about security?

- Privacy, meet security
- If your information is sensitive, don't compromise
- International certifications, audit reports and reputation

4. After contract signing

- Say goodbye to old tools
- Monitor use of your new tools

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Tips to Protect Licensees from Uncertain Licensors

Zakhir Nathoo, Associate

Protection of Critical Software

- **Contractual/legislative provisions to protect a software license that may be pivotal to the licensee's business**
- **Long-term view required; licensor's personnel and business can change over the term of a license**
- **Development/maintenance needs; access to source code**
- **Scenarios to consider:**
 - Termination for convenience/cause
 - Sale of the licensor's business; and
 - Bankruptcy/insolvency proceedings

Term and Termination

- **Term: automatic renewal vs. fixed term**
 - Notice period for termination
 - Built-in fee increases
- **Termination for convenience**
 - Not an automatic right
- **Termination for cause**
 - Notice requirement
 - Cure period
 - Specify provisions the breach of which are cause for termination

Assignment/Change of Control

- **Protection against sale of the licensor's business**
- **Assignment clause**
 - Customary
 - Applies to an asset sale
 - Notice vs. consent
- **Change of control**
 - Less customary
 - Applies to a share sale
 - Notice vs. consent

Escrow Arrangement

- **Requires that the licensor provide software source code to an escrow agent that is released to the licensee upon certain triggering events**
- **Benefits to licensee:**
 - Certainty; reduction in business interruption
 - Provides access to source code to continue maintenance/development
- **Consider:**
 - Cost
 - Requirement for licensor to provide updated source code
 - Clear release conditions

Legislative Protections: Bankruptcy

- ***Bankruptcy and Insolvency Act and Companies' Creditors Arrangement Act***
 - Licensee can continue to software if agreement is disclaimed by the debtor licensor
- **2019 Amendments**
 - Sale or disposition of intellectual property under the BIA or CCAA does not affect the licensee's rights to continue to use such intellectual property
 - Licensee must continue to comply with the terms of the license agreement

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Surveillance of Employees

Catherine Repel, Associate

Tips and Tricks: Steps Employers Can and Can't Take to Monitor Employees

Sources of Law

Applicable legislation:

- *Personal Information Protection Act* (BC)
- *Personal Information Protection and Electronic Documents Act* (Canada)
- *Privacy Act* (BC)

Video Surveillance

Key Question:

What is the reason for the surveillance?



Case Example

Richardson v. Davis Wire Industries Ltd., 1997 **CarswellBC 702**

- Employee reported to be sleeping on the job
- Surreptitious video cameras set up to determine if sleeping was occurring
- Employee terminated and sought to have video evidence found inadmissible as a breach of privacy

Computer/Online Activity Monitoring

Key question: Is there a reasonable expectation of privacy in the circumstances?

Several Factors to Consider

- Applicable policies
- Ownership of equipment
- Typical use
- Circumstances of monitoring

Case Examples

TeBaerts v. Penta Builders Group Inc., 2015 BCSC 2008

- Wrongful dismissal and breach of privacy claim
- Employer found personal emails on employee's work email
- Court confirmed the totality of the circumstances should be examined to determine whether the employee had a reasonable expectation of privacy in the personal email exchange on her work email account

Best Practices

- **Policies, policies, policies**
- **Ask why monitoring is being done**
- **Recognize the circumstances**
- **Be aware of your obligations as an employer concerning privacy and personal information**

Questions?



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