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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Blaneys on Business

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 Corporate/Commercial Group, Stanley Kugelmass at 416.593.3943 or skugelmass@blaney.com.

"Businesses and other organizations that send electronic messages as part of their marketing efforts, or for other uses, will want to conduct a careful review of their practices and evaluate whether they run afoul of the new legislation."

NEW LAW THAT LIMITS SALES TACTICS SCHEDULED TO TAKE EFFECT SOON

H. Todd Greenbloom and Varoujan Arman

New federal law that prohibits businesses from transmitting spam – electronic messages that are not wanted and that have not been requested – is expected to take effect later this year or early next.

Businesses and other organizations that send electronic messages as part of their marketing efforts, or for other uses, will want to conduct a careful review of their practices and evaluate whether they run afoul of the new legislation.

The legislation, known as FISA (*Fighting Internet and Wireless Spam Act*), was passed last December. It will be enforced by three federal agencies – The Office of the Privacy Commissioner of Canada (OPC), the Canadian Radio-Television and Communications Commission (CRTC), and Industry Canada – and will amend other legislation, including related computer privacy matters under the federal Personal Information Protection and Electronic Documents Act (PIPEDA).

One purpose of FISA is to regulate the transmission of commercial electronic messages. The term "electronic messages" has a broad definition and is not limited to e-mails. Text messages, sound, voice, or image messages, "tweets", and instant messages will all be subject to regulation. The Act will prohibit the sending of commercial electronic messages unless recipients have provided their consent, which in some instances can be implied.

Two-way voice communications, fax transmissions sent to a telephone account, or a voice recording sent to a telephone account are excluded from the prohibitions. At this time two-way voice communications, fax transmissions sent to a telephone account or a voice recording sent to a telephone account are covered under the National Do Not Call List (DNCL). Currently, Bell Canada has a contract with the CRTC to maintain the DNCL.

One significant loophole is that the Act only applies where the computer used to send or access the electronic message is located in Canada.

Unlike its American counterpart, which targets predominantly unsolicited spam e-mails, FISA also aims to regulate several other related areas. For instance, it prohibits the unauthorized installation of spyware or other similar software, the alteration of transmission data, the trans-

"Under the Act, when seeking express consent to send an electronic message, a business will be obliged to clearly and simply set out the purpose for which the consent is being sought and identify itself as the party requesting the consent."

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mission of false or misleading information, and the unauthorized access to a user's computer to collect personal information or other e-mail addresses. The latter suggests that the widespread use of cookies, that retain for a vendor personal customer information and that are sometimes used without the consent of the user, may fall under the scrutiny of the new Act.

"Phishing" may also fall under the regulation of FISA. "Phishing" is the attempt to collect personal information by having users enter their information or passwords onto web pages where the user is led to believe the page is from an authentic source, but is not. Because the information is entered voluntarily, one could argue that consent is given and there is accordingly no violation. However, FISA's prohibition on sending false or misleading information may overcome that argument and protect the user.

Under the Act, when seeking express consent to send an electronic message, a business will be obliged to clearly and simply set out the purpose for which the consent is being sought and identify itself as the party requesting the consent.

A best practice for online forms is to always include an opt-out check-box where the user can decline to receive any future communications. Similarly, all messages sent must include an unsubscribe option.

As indicated earlier, FISA contains some exceptions to its rules. The recipient providing consent to receive information is one. Consent might be given or inferred through ongoing subscriptions to a website or blog, or transactions of an ongoing nature where there is an existing relationship. Other more specific exceptions are also provided in the Act.

There are circumstances in which consent to receiving messages need not be given expressly. Businesses and other organizations may be taken to imply consent based on the established relationship described above. The period of implied consent expires after two years from the date of the transaction, dealing, or termination of the relationship.

FISA begins to encounter some inevitable grey areas when it comes to implied consent. For instance, how will the Act treat businesses that advertise through Facebook, Twitter, blogs, or other computer-based billboard-type locations which the user must first actively seek out and then "join," "like", or follow?

Even more unclear would be a situation where a company "tweets" (through Twitter) about something popular but unrelated to its basic business in order to attract and "sign up" a large number of followers, only to then change the use of the account to begin sending or posting advertising or promotional materials. What remains to be determined is what level of informed consent from the recipient will be required to bring an activity within the implied consent exception.

FISA will be good news-bad news for many people who are businessmen and women and consumers at the same time. As individuals, most users of computers and other electronic devices find spam annoying. They will therefore applaud the government and Parliament for the new Act. As people who work in businesses or

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"New rules that make it simpler and cheaper for mining companies to disclose to investors new projects and other significant changes in their circumstances take effect June 30."

organizations that use electronic messaging, however, they may not like the new level of regulation, or the severe penalties that go with it. These penalties range up to a $1 million fine in the case of an individual, and up to $10 million in the case of a corporation.

What can businesses and other organizations do in response to the new legislation? They should become familiar with the Act, understand it, and determine which, if any, of their practices they need to change to ensure compliance with the Act.

As some grey areas already exist and, where a "tie" situation seems likely, businesses should err on the side of caution instead of pushing the envelope.

It remains to be seen how aggressively the three enforcing agencies will pursue offenders. Advice of legal counsel will be of critical importance in establishing and maintaining compliance with FISA. ■

SECURITIES ADMINISTRATORS STREAMLINE DISCLOSURE RULES FOR MINING PROJECTS

Patrick Gervais

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New rules that make it simpler and cheaper for mining companies to disclose to investors new projects and other significant changes in their circumstances take effect June 30.

The new rules align Canada's disclosure standards for mineral projects more thoroughly with current global ownership and operating realities. They are designed to eliminate or reduce the scope of certain disclosure requirements and, at the same time, maintain investor protection, provide greater flexibility to mining issuers and qualified persons, increase the recognition of foreign professional associations and reflect recent changes in the mining industry.

The new rules come in revisions by the Canadian Securities Administrators (CSA) to National Instrument 43-101 (Standards of Disclosure for Mineral Projects), Form 43-101F1 (Technical Report) and Companion Policy (43-101CP).

The new NI 43-101 simplifies the requirements for filing a technical report, provides flexibility as to the content of the technical report, broadens the scope of foreign professional credentials, and clarifies areas where the current NI 43-101 is not having the effect originally intended.

Here are some of the major changes in the disclosure requirements:

1. Obligation to File a Technical Report with a Short Form Prospectus

The new NI 43-101 narrows the circumstances in which technical reports must be filed.

In the current NI 43-101, an issuer must file a technical report with a short form prospectus if that prospectus contains new, material (significant) scientific or technical information not contained in a previously filed technical report, regardless of whether the technical information constitutes a material change in the affairs of the issuer. The current requirements impose high costs on the issuer and lengthen the process of completing a securities offering.

"Industry participants should welcome the new NI 43-101 as it will reduce the scope of certain disclosure requirements while maintaining investor protection."

The new NI 43-101 restricts the application of the technical report trigger for a preliminary short form prospectus to situations where that prospectus discloses, *for the first time*, mineral resources, mineral reserves, or the results of a preliminary economic assessment that constitute a material change in relation to the issuer.

It also restricts the application to situations where the prospectus discloses a change in this information, if the change constitutes a material change in relation to the issuer. (The CSA has determined that first time disclosure of mineral resources, reserves or the results of a preliminary economic assessment on a property material to the issuer constitutes a material change in the affairs of the issuer.)

The deletion of the current short form prospectus trigger will allow issuers to complete an offering without having to file a concurrent technical report, unless the short form prospectus contains, for the first time, new material information that constitutes a material change.

2. Use of Foreign Codes

NI 43-101 expands the acceptance of certain foreign regulatory authorities and foreign standards and includes general guidance regarding an update of the lists of acceptable foreign codes and professional associations.

Issuers incorporated or organized in some foreign jurisdictions or incorporated in Canada with properties located in foreign jurisdictions may make disclosure and file technical reports using mineral reserve and categories of an acceptable foreign code without needing to reconcile foreign resource and reserve categories to those as defined by the Canadian Institute of Mining, Metallurgy and Petroleum.

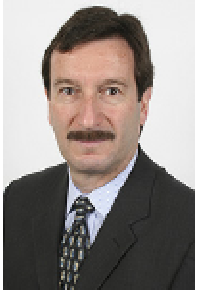
The new NI 43-101 also allows foreign producing issuers listed on a specified exchange to comply with local foreign codes for disclosure requirements. This change removes the need for certain foreign producing issuers to prepare and file NI 43-101 compliant technical reports when becoming a reporting issuer in Canada. It should facilitate the listing of foreign producing issuers in Canada.

3. Changes to Certification and Consent Requirements

Issuers will no longer be required to provide updated certificates and consents for a previously filed, current technical report that continues to meet applicable independence requirements, provided that there is no new material information concerning the property. Under the new NI 43-101, the issuer's own internal qualified person may determine whether or not a technical report is still current. The removal of the updated certificate requirement will facilitate the rapid completion of transactions.

4. Changes Related to Qualified Persons and Qualified Persons Consent

In the current NI 43-101, disclosure of scientific or technical information made by an issuer must be prepared by or under the supervision of a qualified person. Under the new NI 43-101, an issuer can now disclose scientific or technical information taken from a technical report as long as a qualified person employee of the issuer approves the content being disclosed. New NI 43-101 also facilitates qualified person consents by limiting consents to part of the technical reports prepared by the qualified person.



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5. Other Changes to NI 43-101

In the new NI 43-101, the definitions of qualified person and professional association are modified to expand the scope of the person that will qualify. The definition of historical estimates and the calendar date by which estimates made by third parties must be disclosed are also modified.

6. Changes to Form 43-101F1

The form of technical report will now be less rigid and more adaptable, especially for advanced-stage and producing properties. Qualified persons will have more control deciding the scope and level of information to be included in the technical report. They will be permitted to rely on, and disclaim responsibility for, certain information provided by the issuer and quote any information from previously filed technical reports (to the extent the information is still current and provided that the qualified person summarizes or quotes the information in the current technical report and has verified it).

New 43-101F also provides different technical report requirements, depending on the stage of development of the subject property. It contains new guidance regarding a property's history and drilling by previous operators. In addition, a requirement to disclose the results of relevant market studies and similar analysis has been eliminated.

7. Changes to the New Companion Policy

The Companion Policy to NI 43-101 has been amended to include guidance regarding acceptable foreign codes and professional associations. New guidance also has been added for the interpretation of qualified persons and the meaning of demonstrated expertise. The changes to NI 43-101 have also made necessary amendments to NI 44-101 (short form prospectus distribution); Form 51-102F1 (Management's discussion and analysis) and Form 51-102F2 (Annual information form).

Conclusion

Industry participants should welcome the new NI 43-101 as it will reduce the scope of certain disclosure requirements while maintaining investor protection. New deadlines to file a technical report in the case of a short form prospectus and new requirements that allow issuers to go to market without filing a technical report will enable issuers to access markets more rapidly.

Other revisions, such as the acceptance of foreign professional associations, reflect changes in the industry and provide more flexibility to the industry while making Canadian capital markets more attractive to issuers with operations abroad. ■

INCOME SPLITTING GETTING TOUGHER

Paul L. Schnier

We have written before about the benefits of income splitting – structuring one's affairs so that an individual's investment income can be spread among various family members in order to reduce the tax on it to the greatest extent allowable.

Residents of Ontario who are in the highest tax bracket will typically pay tax at rates of roughly 23 per cent on capital gains, 46 per cent on interest income, 28 per cent on dividends from public companies, and 32 per cent on dividends from private companies.

Generally, if this investment income is split among one's spouse and minor children, it is subject to tax at far lower rates. For example, if a minor child has no other income, he or she could receive approximately $10,000 of interest, $20,000 of capital gains or $25,000 of dividends without paying any tax. Similar savings could apply to one's spouse as well.

The people who crafted the *Income Tax Act* are well aware of this opportunity. So, for many years, the Act has contained provisions known as the "attribution rules," which essentially provide that where money is transferred to one's spouse or minor children, the income will be attributed back to the transferor and tax will be paid at that person's (higher) rate. These rules include transfers to a trust where one's spouse or minor children are beneficiaries.

An exception to the attribution rules exists, however, for loans at the prescribed rate of interest.

In a typical income-splitting scenario, one would establish a trust for the benefit of his or her spouse and minor children and lend money to this trust at the rate of interest prescribed quarterly under the Act (currently 1 percent).

So long as the interest is paid to the transferor within 30 days after the end of each year, the balance of any income and/or capital gain earned can be allocated to the spouse or minor children and taxed at their (lower) respective rates without the attribution rules applying. In addition, the prescribed rate of interest in effect at the time the loan is made will prevail for the duration of the loan. So, the current 1 per cent can apply for many years, even if the prescribed rate increases.

This technique of establishing trusts and lending money to those trusts was quite beneficial for shareholders of private companies until several years ago when the "kiddie tax" was introduced. Formerly, rather than owning the shares directly, a shareholder was able to create a trust with his minor children as beneficiaries to own his shares. Provided the attribution rules were satisfied, the children could receive dividends from the private company at substantially lower tax rates. But, under the kiddie tax, such dividends are taxed at the highest tax rate so long as the children are minors.

The one good thing about the kiddie tax was that it did not apply to capital gains so that any capital gains on the sale of the shares could be taxed in the hands of the kids who could also take full advantage of the enhanced $750,000 capital gains exemption.

But, with the re-election of the Conservative government comes, presumably, the reintroduction of a provision originally contained in the federal budget of March 22 that will end this practice. This provision extends the application of the kiddie tax to capital gains included in the income of a minor child when the gain is attributable to a disposition of shares to which the kiddie tax would have applied.

In other words, if shares in a private company

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Daniel Horovitz, a JD/MBA graduate of Western Law and the Richard Ivey School of Business, is completing his articles at Blaney McMurtry and is being called to the bar this spring.

are owned by a minor child or by a trust of which a minor child is a beneficiary, any capital gain arising on a sale of these shares will be taxed at the highest marginal rate for dividends (i.e. 32 per cent - not even at the capital gains rate of 23 per cent).

This eliminates a significant planning tool that was available to small business owners.

The March 22 budget also contained a note of warning to the effect that the government proposes to monitor the effectiveness of the kiddie tax and can be expected to take further action if new income splitting techniques develop.

Clearly, there seems to be an intention to crack down on some of the techniques that have developed to date. Provided that the rules in the Act are followed, however, there will still be opportunities to reduce the family's overall tax burden with careful planning. ■

GRASS ROOTS MARKETING IN THE DIGITAL AGE: BEWARE THE LEGAL PITFALLS

H. Todd Greenbloom and Daniel Horovitz

Video and other digital content created by customers and posted on such social media as Facebook and Twitter to promote goods and services and build brand recognition are being used by businesses increasingly to get their names out and their products known to key demographics.

This "user-generated content" (UGC) marketing technique is powerful, effective and inexpensive. But it is also rife with potential legal pitfalls of which businesses will need to be aware.

For anyone not familiar with the field, the main thrust of UGC is for companies to encourage consumers of their products to create their own media content promoting those products. This type of marketing, by definition, engages users of the products, thereby enhancing brand loyalty among current users and spreading brand reputation to others by going "viral" (through the multiplier effect of social media).

Not surprisingly, UGC entered the mainstream of internet advertising around 2005, coinciding with the rise of such social media as Facebook, MySpace, and YouTube. Because of their communal nature, social media provide companies with major platforms for UGC initiatives beyond the companies' own web pages.

Typically, for online content to be considered UGC, it must be publicly available – for example, on the company's website, on YouTube, or on a social networking profile page. (Sending advertisements through e-mail to one's friends would not be considered UGC.)

In addition, the consumers themselves must put in effort to create an original piece of work. A video parodying something current in popular culture would count as UGC whereas merely uploading part of some popular artist's music video would not. A typical UGC marketing campaign might involve a competition (with its own set of rules) in which consumers create and upload videos demonstrating and promoting a product's various uses.

"Where user-generated content is concerned, it is clear that a consumer who creates and uploads original work promoting the company's product is the copyright owner..."

The legal issues surrounding UGC are complex and many. Here are some of the more prevalent concerns, including the potential for liability for copyright infringement and civil law suits:

Copyright Infringement

Perhaps the most obvious issue relating to the UGC marketing model is authorship. Ordinarily, the *Copyright Act* (Canada) provides protections for original works. According to the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*, the word "original" means, "if not creativity per se, at least some sort of intellectual effort."

In Canada, an author (or, in the case of video, the maker) automatically receives copyright protection for their original works. There is no need to register. The work is protected for the life of the author plus 50 years. If an original work is created during the scope of employment, the employer is considered to be the owner. By contrast, an independent contractor will own his or her originally created work.

Where UGC is concerned, it is clear that a consumer who creates and uploads original work promoting the company's product is the copyright owner (since the consumer is not the company's employee). Accordingly, businesses actively promoting UGC for future marketing endeavours should ensure that the terms of submission include an assignment of copyright in the company's favour and any necessary permission to distribute, make available, or otherwise use the copyrighted material.

UGC also holds the potential for infringing third party rights. If some consumer uploads an original film that includes copyrighted music or video clips, the business behind the UGC initiative may be liable for a copyright infringement claim from that third party. Ordinarily, when one creates original work that includes third party content, one must obtain a license to use the third party content in order to avoid liability. Most creators of UGC are not sophisticated and therefore not likely be aware of this requirement. Meanwhile, depending on the size of the UGC initiative, it may not be feasible for the business to properly satisfy itself that the creators have obtained the requisite license(s). Effective legal planning can protect businesses from these kinds of licensing and copyright issues.

Tort Liability

Utilizing UGC properly as a marketing technique can be highly lucrative, but companies should ensure that their UGC strategies consider the possibility of liability in tort (fault-based liability).

It is possible, for example, that some UGC uploaded to a company's website includes the personal information of individuals not responsible for making the content, and who did not want their information broadcast online. It is incumbent upon companies to ensure that submitters understand and comply with Canadian privacy laws, especially given that social networking can expressly or implicitly encourage the dissemination of a third party's personal information. As the privacy commissioner pointed out in a speech earlier this year, "A television ad by Rogers, broadcast in 2008, advertised a young person photographing a friend and then sending that image directly to his or her (the photographer's) Facebook album to

"...companies permitting the uploading of user-generated content on their websites and on Facebook pages should be aware of libel and defamation issues."

share it with third parties. Yet such publication of an individual's image without obtaining his or her prior permission is contrary to the directions of the Supreme Court."

On a related note, companies permitting the uploading of UGC on their websites and on Facebook pages should be aware of libel and defamation issues. If submitted content includes libelous or slanderous material, the businesses hosting the UGC could face liability. A company's liability in this area may depend on the level of activity the company has in the UGC initiative. If the business merely publishes or distributes the material via its website, then it may be treated as an "innocent disseminator." In order for this defense to apply, the distributor must prove that it had no knowledge of the defamatory material and no reason to suspect that the material might be defamatory.

Finally, it is worth noting that liability can arise in negligence. A user who becomes injured in the process of creating UGC for a video competition might have a claim against the sponsor of the competition. Likewise, people who injure themselves imitating the UGC might have claims against the sponsor of the competition. Thus, the terms of submission of any UCG initiative should include a Code of Conduct that expressly prohibits dangerous or illegal actions.

Conclusion

UCG is already one of the major forms of viral marketing. It is a relatively cheap and effective way for businesses to engage their customer base – to transform buyers of their products into promoters of those products – in order to build brand loyalty and spread brand recognition.

From a legal perspective, a number of serious issues must be considered, some of which have been addressed here. In addition to copyright and tort concerns, businesses thinking about UCG campaigns should also consider contract-related concerns, sector-specific legislation, and other practical matters.

Effective legal guidance in this growing area of law is the surest way to avoid liability issues on the path to any lucrative viral marketing campaign. ■

BLIND CASH POOLS: EXPANDING ROLE IN BUSINESS FINANCING?

Nadim Wakeam

With the economy showing signs of recovery from large setbacks in recent years, entrepreneurs, business owners and investors are starting to search for new enterprises that will thrive in the coming phases of the business cycle.

In this context, blind cash pools, which are financing vehicles that take growth enterprises public, may well come into broader use.

Blind cash pools have been adopted increasingly by stock exchanges around the globe. Generally, they involve shell companies that are created to raise money publicly and then use the funds to track down and acquire an undetermined business or asset.

The shell companies are formed solely for this purpose; they contain no prior assets or existing operations.

"Blind cash pools have been adopted increasingly by stock exchanges around the globe."

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Opportunities exist for financiers, investors, experienced public directors or officers, and entrepreneurs to benefit from blind cash pools: promoters are able to take an equity stake and manage the growth of a junior company; investors are able to participate in speculative private equity-type deals; and private enterprises are able to go public earlier in their life cycle, without the costs and risks associated with conducting their own initial public offering (IPO).

The Toronto Stock Exchange currently offers two forms of blind cash pools – the Capital Pool Company (CPC) program on the TSX Venture Exchange (TSXV) and the Special Purpose Acquisition Corporation (SPAC) program on the TSX itself.

Capital Pool Companies

Originally called "junior capital pools" and listed through the Alberta Stock Exchange beginning in the 1980s, these companies were formed to finance speculative exploration opportunities in the oil and gas industry. Since moving to the TSX Venture Exchange, however, they have been utilized in a variety of sectors, including mining technology and pharmaceuticals.

The TSXV promotes the CPC program as a unique listing vehicle providing an alternative introduction to the capital markets. The CPC program brings together investors who have experience in the financial markets and entrepreneurs who need both capital and public company management expertise for their growing ventures.

The CPC program involves a two-stage process: the creation and listing of the CPC followed by the qualifying transaction (QT) with a target acquisition.

The process begins when a minimum of three individuals incorporate the shell company and contribute seed capital to the company in exchange for shares. The total amount of seed capital raised from the directors and officers of the CPC must be between $100,000 and $500,000. The TSXV requires that these directors and officers collectively possess the appropriate experience, qualifications and history to ensure its success.

The founders of the CPC then prepare a prospectus and file it with the TSX Venture Exchange and the relevant securities commission(s) and also apply for a listing on the TSXV. Once the prospectus is approved and the application for filing is accepted, the CPC closes its initial public offering of shares. Then, trading in those shares begins on Tier 2 of the TSXV (with the designation ".P" beside the stock symbol to indicate that the issuer is a CPC).

The gross proceeds from the initial public offering of the Capital Pool Company's shares must be between $200,000 and $4,750,000. Upon completion of the IPO, the CPC must have a minimum of 200 shareholders with each shareholder owning at least 1,000 shares issued at a minimum price of 10 cents. The CPC may issue additional shares through private placements, where it approaches select investors directly instead of through the open market. Nevertheless, the gross proceeds raised through the seed capital, IPO, and private placement processes, taken together, are not allowed to exceed $5 million.

"An increased interest in blind cash pools could... play a role in creating greater market stability through the development of tomorrow's growth enterprises."

Once listed, the CPC has 24 months in which to complete a qualifying transaction. During that time, the gross proceeds realized from the sale of all shares issued by the CPC may be used only to identify and evaluate assets or businesses and obtain shareholder approval for a proposed QT. If the TSXV does not accept a QT within the required time period, the TSXV may suspend the CPC from trading or delist its shares.

Once the QT closes and the target business is acquired, the resulting issuer is no longer considered a CPC. The new TSXV company begins trading as a regular Tier 1 or Tier 2 issuer with a new name and new stock symbol without the ".P" designation.

Special Purpose Acquisition Corporations

Following up on the success of the TSXV CPC program, and taking a cue from the abundance of SPACs in the US markets, the TSX introduced its SPAC program in December 2008.

Although similar in design and intention to the Capital Pool Companies program, there are some fundamental differences present in the Special Purpose Acquisition Corporations program.

The most obvious of these is that a SPAC is listed on the TSX itself as opposed to the TSXV, thus enhancing the listing status of the issuer. In addition, SPACs are larger than CPCs, as they are required to raise a minimum of $30 million in the IPO through the sale of at least one million securities to 300 or more shareholders at a minimum cost of $2 per share or unit.

Once listed, the SPAC has 36 months to seek out businesses and assets with which to complete a qualifying acquisition. The SPAC is required to obtain majority shareholder approval prior to completing a qualifying acquisition, and any dissenting shareholders are entitled to convert their securities for the pro-rata portion of their funds.

If it does not succeed in completing a qualifying acquisition within the permitted time, the SPAC is liquidated and the remaining funds (after accounting for the SPAC's administrative expenses as well as any taxes and costs associated with the liquidation) are distributed to its shareholders.

Blind Opportunities

The introduction of the SPAC program to the TSX coincided with the peak of the economic downturn and it has therefore gone unused since its inception. In addition, some critics have held that the smaller size of the Canadian capital markets as well as the lower volume and size of IPOs in Canada make this country unsuitable for launching SPACs. However, the required market capitalization of the Toronto Stock Exchange's SPAC program is much smaller than that of its American and European counterparts and, as such, tangible interest could emerge as the economic recovery takes hold.

An increased interest in blind cash pools could not only result in entrepreneurs and investors taking advantage of the opportunities presented by an economic expansion but it could play a role in creating greater market stability through the development of tomorrow's growth enterprises. ■

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CASE UPDATE: *ITRADE FINANCE INC. V. BANK OF MONTREAL*

Laura McLennan

In our March 2010 issue, we discussed the Ontario Court of Appeal case *Bank of Montreal v iTrade Finance Inc.* This was a case about fraud, and the rights of innocent parties to the proceeds. Webworx Inc., and its principal, Mr. A., successfully perpetrated a fraudulent scheme to obtain funds from iTrade Finance Inc. ("iTrade"). These funds were subsequently used by Mr. A and his spouse Ms. R to purchase shares, which shares were held in an investment account. In exchange for an increased credit limit on their credit card, Mr. A and Ms. R. granted a pledge of the shares held in the investment account to BMO. When the fraud was discovered, iTrade sued and was granted a tracing order for the funds. The tracing order permitted iTrade to trace the funds into the hands of persons other than "bona fide purchasers for value without notice".

The issue was whether iTrade or BMO was entitled to the funds in the investment account. The Court of Appeal found BMO to be a bona fide purchaser for value without notice, and was consequently entitled to the funds. (See our March 2010 article for a discussion of the Court of Appeal's reasons.)

iTrade appealed, and the Supreme Court of Canada released its judgment in May. The Supreme Court affirmed the decision of the Court of Appeal, concluding that BMO fell within the exception in the tracing order, defeating any interest in the funds asserted by iTrade. BMO was a "bona fide purchaser for value without notice" because (i) it was a "purchaser", as it acquired an interest in the property by way of a valid pledge, (ii) it had given value, in the form of an increased credit limit to Mr. A and Ms. R, and (iii) it had no notice of the fraud at the time the security interest was obtained.

Since iTrade's interest in the funds held in the investment account derived from the tracing order, and the tracing order expressly excluded BMO (since it was found to be a bona fide purchaser for value without notice), BMO was entitled to the investment account funds.

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