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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Blaneys on Business

"All organizations that conduct telemarketing activities on their own behalf or on behalf of a third party need to be aware of, and comply with, the Unsolicited Telecommunications Rules..."

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.

NEW SPECIFICS ACCOMPANY TELEMARKETING RULES ON FIRST ANNIVERSARY

Kelly J. Morris and Jill E. McCutcheon

The Unsolicited Telecommunications Rules - wide-ranging national rules governing unsolicited telemarketing - mark their first anniversary September 30, 2009.

All organizations that conduct telemarketing activities on their own behalf or on behalf of a third party need to be aware of, and comply with, the Unsolicited Telecommunications Rules, which include the National Do Not Call List (DNCL) Rules, the Telemarketing Rules, and the Automatic Dialing-Announcing Device (ADAD) Rules.

In the year that the Unsolicited Telecommunications Rules have been in effect, the Canadian Radio-Television and Telecommunications Commission (CRTC), the federal regulatory authority responsible for them:

- has issued, in the form of information bulletins, specifics on how they apply to the investment, insurance and real estate industries,
- has found that three telemarketers violated the DNCL Rules and issued fines totalling $24,000; and
- has, as of May, 2009 had processed more than 145,000 complaints; conducted more than 700 investigations; and issued 70 warning letters.

Are you a telemarketer?

You are engaged in telemarketing if you use telecommunications equipment such as telephones or fax machines to make unsolicited communications soliciting the purchase of a product or service, whether on your own behalf or on behalf of another party. If you are responding to a client's request for service or information and are not in any way soliciting a sale, you are not telemarketing and the Unsolicited Telecommunications Rules do not apply.

Investment advisors

The CRTC has issued an Information Bulletin setting out how the Unsolicited Telecommunications Rules apply to investment advisors selling securities. The Information Bulletin states that the Rules do not apply to telecommunications made by investment advisors to existing clients because these clients expect to be contacted on an ongoing basis about changes in financial markets or changes in the status of their investment funds. Sales calls made by an investment advisor to prospective or former clients, however, do constitute telemarketing and so the Unsolicited Telecommunications Rules do apply.

"In April, 2009, the registration period for telephone numbers that appear on the National DNCL was extended to five years from three years."

Kelly J. Morris, a partner in Blaney McMurtry's Corporate Insurance Group who advises insurers, reinsurers, and insurance intermediaries, has substantial expertise in regulatory, compliance and market conduct matters; privacy law and money laundering issues.

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Insurance agents and real estate agents

On May 15, 2009, the CRTC issued Information Bulletins on the Unsolicited Telecommunications Rules and the National Do Not Call List Rules as they relate to the insurance and real estate industries. These bulletins state that telecommunications made by insurance agents or brokers and by real estate agents to sell or promote products or services constitute telemarketing and the Unsolicited Telecommunications Rules apply.

If an insurance agent acts for only one insurance company, that insurance company is responsible for registering with the National DNCL operator, becoming a registered subscriber to the National DNCL and paying all applicable fees. If the insurance broker represents more than one insurance company, the broker, or the insurance brokerage that he or she represents, is responsible.

The real estate brokerage that a real estate agent represents is responsible for registering with the National DNCL operator, becoming a registered subscriber to the National DNCL and paying all applicable fees. However, as discussed below, an exemption from the National DNCL Rules may apply in certain circumstances.

National DNCL Rules

The National DNCL Rules establish the National Do Not Call List on which consumers may register their telephone numbers if they do not wish to be contacted by telemarketers. In April, 2009, the registration period for telephone numbers that appear on the National DNCL was extended to five years from three years.(As of May, 2009, approximately 6.8 million telephone numbers had been registered on the DNCL.)

Under the National DNCL Rules:

- a telemarketer shall not initiate telemarketing calls to consumers who have registered their numbers on the National DNCL unless the consumer has expressly consented to being contacted by the telemarketer or client of the telemarketer. In addition, a client of a telemarketer shall make all reasonable efforts to ensure that the telemarketer does not initiate such calls;
- a telemarketer shall not initiate telemarketing calls on its own behalf unless it is a registered subscriber to the National DNCL and has paid all applicable fees. (The current annual subscription fee by area code is $615. For all Canadian area codes the fee is $11,280);
- a telemarketer shall not initiate telemarketing calls on behalf of a client unless the client is a registered subscriber to the National DNCL and has paid all applicable fees;
- telemarketers and clients must use a version of the National DNCL obtained within the 31 days preceding the date that the telemarketing call is made; and
- the telemarketer must keep proof of subscription to the National DNCL, and payment of the subscription fees, both for itself and for its clients, for three years.

The National DNCL must be purchased directly from Bell, the National DNCL Operator. It must not be sold or disclosed to anyone outside of the telemarketer's organization.

"...the National DNCL Rules do not apply to calls made on behalf of Canadian registered charities, political parties and candidates, or to newspapers soliciting subscriptions."

Jill E. McCutcheon, a Blaney McMurtry partner, advises financial institutions on all aspects of the law. She counsels marketers, retailers, employers, sponsors and associations in Canada and has particular expertise in federal and provincial legislation concerning the business of domestic and foreign insurance and reinsurance companies that operate in Canada

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Exceptions to National DNCL Rules

There are a number of exceptions to the National DNCL Rules. The most relevant for most businesses are that these rules do not apply to telemarketing to a business consumer or to a person with whom an organization has an existing business relationship unless that person has made a do-not-call request to the organization.

In addition, the National DNCL Rules do not apply to calls made on behalf of Canadian registered charities, political parties and candidates, or to newspapers soliciting subscriptions. However, the Telemarketing Rules described below do apply.

Business consumers

The Information Bulletin issued by the CRTC on the insurance industry (the Insurance Bulletin) provides that telecommunications made by insurance companies to managing general agencies (MGAs) to promote or sell insurance products, and telecommunications made by MGAs to insurance agents and brokers to promote insurance products, are business-to-business telemarketing and are exempt from the National DNCL Rules.

Existing Business Relationship

The National DNCL Rules do not apply to an "existing business relationship" in which:

- the person has purchased products or services from the organization in the 18 months immediately prior to the telemarketing communication;
- the person has made an inquiry to the organization with respect to products or services in the six months immediately prior to the telemarketing communication; or
- there is a written contract between the person and the organization at the time of the telemarketing communication, or such a contract existed and expired in the 18 months immediately prior to the telemarketing communication.

The existing business relationship exists only between the consumer and the distinct legal entity with which the consumer has dealt. It does not extend to affiliates of that entity unless the consumer has expressly consented to contact by such affiliates.

In the Insurance Bulletin the CRTC states that insurance agents who sell the products of only one insurer may rely on the existing business relationship exemption if the customer has made an inquiry or bought insurance from the insurance company represented by the agent. However, if a customer makes an inquiry about an insurance product from a broker who represents more than one insurer, the existing business relationship only exists between the customer and the broker (and the brokerage, if the broker represents a brokerage), but does not extend to the insurance company unless the customer actually enters into an insurance contract with that company.

The CRTC receives a large number of complaints with respect to the existing business relationship exemption. If you are relying on that exemption when you make telemarketing calls, it is advisable to remind the consumer, at the start of the call, that they are an existing customer.

"The telemarketer must process any do-not-call requests from consumers at the time they are received and must add those names and phone numbers to its own internal do-not-call-list..."

Telemarketing Rules

The Telemarketing Rules apply whether or not the telecommunication is exempt from the National DNCL Rules. The Telemarketing Rules include the following rules:

- all telemarketers conducting telemarketing on their own behalf must register with the National DNCL operator. (Registration is free. As of May, 2009, approximately 6,000 telemarketers had registered);
- telemarketers may telemarket only on behalf of clients who have registered with the National DNCL operator;
- the telemarketer must keep proof of subscription to the National DNCL for itself and its clients for three years;
- all telemarketers and clients of telemarketers must establish and maintain their own internal do-not-call lists.

The telemarketer must process any do-not-call requests from consumers at the time they are received and must add those names and phone numbers to its own internal do-not-call-list, and make all reasonable efforts to ensure the client adds the names and phone numbers to its internal do-not-call list within 31 days of the request and maintain them on such lists for three years and 31 days from the date of the request;

- a telemarketer shall not initiate telemarketing calls to consumers on its own do-not-call list or the do-not-call list of its client, and the client must make all reasonable efforts to ensure that the telemarketer does not initiate any such calls. The internal do-not-call lists allow consumers who are covered by an exemption from the National DNCL Rules, such as the existing business relationship exemption, to ask that they not receive telemarketing calls from an organization that would otherwise be permitted to contact them;
- when the call is answered, the telemarketer must provide the name (or a fictional name) of the person making the call and must identify the telemarketer and the client (if the call is made on behalf of a client);
- on request, the telemarketer must provide a local or toll-free telephone number so that the consumer may ask questions, make comments about the telecommunication or make or verify a do-not-call request. The telephone number must be answered by a live person or a voice mail system that takes messages and the call must be returned within three business days; and
- telemarketing calls may be made only between 9:00 a.m. and 9:30 p.m. weekdays and 10:00 a.m. and 6:00 p.m. on weekends.

The telemarketing rules do <u>not</u> apply to voice-mail broadcasts.

Automatic Dialing-Announcing Device (ADAD) Rules

The ADAD Rules apply even if the telemarketing call is exempt from the National DNCL Rules. ADADs may not be used for telemarketing unless the consumer has provided express consent to receiving ADAD calls from the telemarketer or the client of the telemarketer. However, ADAD calls are permitted if there is no attempt to sell, such as public service calls. The ADAD Rules set out the conditions that apply to the uses of ADADs for telemarketing, including the

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hours at which such calls may be made (if calling-hour restrictions are not set out in provincial legislation), the telephone numbers that may be called, and the message that must be given at the start of the call.

Violation of Unsolicited Telecommunications Rules

The CRTC will investigate consumer complaints of non-compliance with the requirements of the Unsolicited Telecommunications Rules. If a violation has occurred, the CRTC will generally work with the telemarketer to facilitate a corrective action on a voluntary basis. However, if the telemarketer does not voluntarily take corrective action, the CRTC has the power to impose monetary penalties of up to $1,500 for individuals and $15,000 for corporations for each day during which the violation continues.

In August, 2009, the CRTC imposed the first administrative monetary penalties on telemarketers who violated the DNCL Rules. A fine of $4,000 was issued to an individual telemarketer and fines of $10,000 each were issued to two corporate telemarketers. All three had sent fax telemarketing communications to customers who had registered on the DNCL. In addition, the two corporations were not registered subscribers to the National DNCL and had not paid the applicable fees. The CRTC rejected the two corporations' argument that they were not telemarketers and had not sent the faxes, finding that the faxes promoted services provided by such corporations and that the contact number shown on the faxes were registered to the sole director of each of the corporations (who was the same individual in both cases).

Electronic Commerce Protection Act

In April, 2009, the federal government introduced its anti-spam legislation, the *Electronic Commerce Protection Act* (Bill C-27) to regulate 'spam' (unsolicited electronic mail). Bill C-27 includes provisions repealing the sections of the *Telecommunications Act* that create the legislative framework for the National DNCL. If the legislation takes effect in its original form, telemarketers will be prohibited from sending electronic commercial messages to consumers unless the consumer 'opts in' and specifically asks to be called. Submissions from the public on Bill C-27 were due by August 15, 2009.

If you require assistance in complying with your obligations under the Unsolicited Telecommunications Rules, please contact Jill McCutcheon or Kelly Morris. ■

"The most sweeping revamp in a generation of the registration requirements that securities regulators all across Canada impose on investment intermediaries, advisers and managers is scheduled to take effect September 28, 2009."

Patrick J. Cummins focuses on securities law and acts for clients in connection with mutual fund offerings and public company offerings. He provides ongoing advice to public and private companies and mutual fund companies and also services public issuers with respect to regulatory compliance, financing issues, shareholder communications and other regulated matters.

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NEW REGISTRATION RULES ALTER CANADIAN SECURITIES LANDSCAPE SIGNIFICANTLY

Patrick J. Cummins

The most sweeping revamp in a generation of the registration requirements that securities regulators all across Canada impose on investment intermediaries, advisers and managers is scheduled to take effect September 28, 2009.

The new rules are intended to provide greater protections for Canadian investors by stiffening the competency, integrity, solvency and compliance requirements that dealers, advisers and investment fund managers must meet.

They also streamline and harmonize registration across the country, an important step in simplifying life for market participants around the world who have to deal with only one securities regime in most places but still face 13 in Canada.

The new rules are set out in National Instrument 31-103 *Registration Requirements* and a related companion policy (collectively, the "Rule") published by the Canadian Securities Administrators (CSA) on July 17, 2009. They constitute the final stage of the CSA Registration Reform Project that has been ongoing for a number of years.

The overhaul of the registration of firms and individuals that they represent will have significant implications for Canadian and foreign dealers, advisers and investment fund managers carrying on business in Canada.

Here's a summary of the significant changes resulting from the new Rule:

General Overview

The Rule introduces a new registration regime that provides one-stop shopping for all Canadian registration issues. The significant changes being introduced include the following:

(i) The streamlining of the number of categories of registration for individuals and firms;

(ii) The introduction of a "business trigger" for the dealer registration requirement;

(iii) The requirement that individuals or firms who are in the business of trading in the "exempt market" (where the publication of a costly prospectus accompanying a new securities issue is not required), including those now registered in Ontario or Newfoundland and Labrador as limited market dealers, must be registered as "exempt market dealers" and be subject to the required competency, integrity, solvency and compliance requirements;

(iv) The introduction of a new category of registration for all investment fund managers (which will capture all investment funds);

(v) The elimination of the international dealer and international adviser registration categories which will be replaced by the introduction of registration exemptions for international dealers and international advisers.

Categories of registration

Categories of registration serve two main purposes, namely:

(i) To specify the types of registrable activity a

"Under the existing regime, the dealer registration requirement has historically been triggered by the act of trading in a security. The dealer registration requirement will now be triggered by being in the 'business of trading' in securities as principal or agent."

firm or individual is permitted to conduct, and

(ii) To provide specific requirements for each category.

The Rule introduces a few new categories of registration but, overall, the number of individual and firm categories has been reduced significantly. Under the new regime, the categories of registration are as follows:

Dealers:

- **Investment Dealer** - permitted to trade in any security with any type of investor.
- **Mutual Fund Dealer** - permitted to trade only in securities of mutual funds and, except in Quebec, securities of investment funds that are labour sponsored investment corporations or labour sponsored venture capital corporations.
- **Scholarship Plan Dealer** - permitted to trade only in securities of scholarship plans, educational plans or educational trusts.
- **Exempt Market Dealer (new)** - permitted to trade only in securities eligible for distribution under a prospectus exemption. This new category of registration replaces the limited market dealer category in Ontario and Newfoundland and Labrador.
- **Restricted Dealer (new)** - permitted to carry on business under terms and conditions imposed by the local jurisdiction. This category is intended to accommodate specialized dealers carrying out limited dealing activities that would not necessarily qualify for an unrestricted dealer registration.

Advisers:

- **Portfolio Manager** - permitted to advise any type of investor with regard to any security and includes advisers with or without discretionary authority.
- **Restricted Portfolio Manager (new)** - permitted to advise in specified securities, types or classes of securities or the securities of a class of issuers, subject to the terms and conditions imposed by the local jurisdiction.

Other Category:

- **Investment Fund Manager (new)** - permitted to direct the business, operations or affairs of an investment fund.

Business Trigger Threshold for Dealers and Advisors

Under the existing regime, the dealer registration requirement has historically been triggered by the act of trading in a security. The dealer registration requirement will now be triggered by being in the "business of trading" in securities as principal or agent. This new "business trigger" will likely eliminate the requirement for certain individuals and firms to register as a dealer if they carry out limited trades and are not otherwise "in the business of trading" in securities.

To determine whether a firm or individual is in the "business of trading" in securities, one must consider whether the activities amount to trading and then determine if one is carrying out those activities as a business. The CSA considers factors such as whether an individual or firm is

"With the movement to a 'business trigger' model for both dealer and adviser registration , the dealer registration exemptions currently set out...will no longer be necessary."

holding itself out as being in the business of trading in securities and engaging in activities similar to a registrant, intermediating trades between sellers and purchasers, conducting the activity repeatedly or with regularity or continuity, receiving compensation or soliciting clients. The companion policy to the Rule discusses the application of the business trigger factors for various parties and activities.

The existing registration requirement for an adviser is already based on a "business trigger" model so no change in this approach is needed under the new Rule.

With the movement to a "business trigger" model for both dealer and adviser registration , the dealer registration exemptions currently set out in National Instrument 45-106 - *Prospectus and Registration Requirements* (NI 45-106) will no longer be necessary. As a result they are being repealed, subject to limited exceptions in a few Canadian jurisdictions. The prospectus exemptions in NI 45-106 will for the most part remain unchanged.

Introduction of Exempt Market Dealer Category

As noted above, when the new Rule takes effect, the dealer registration exemptions currently available in NI 45-106 will be repealed and accordingly unregistered dealers in the business of trading in the exempt market will be required to register as an exempt market dealer (EMD).

In Ontario and Newfoundland and Labrador, there has been a category of a limited market dealer, a person or firm who acts as a "market intermediary" in respect of trades in the exempt market. With the introduction of the new Rule, the category of limited market dealer will be removed and replaced by the exempt market dealer category. The permitted activities of an EMD are specified in NI 45-106 and the key permitted activities will be restricted to:

(i) trades of prospectus - exempt securities to specified clients, including "accredited investors";

(ii) trades in securities to clients who buy a minimum of $150,000 of a security in one transaction; and

(iii) where permitted, trades in securities distributed under an offering memorandum.

EMDs will be required to meet certain standards of competency, integrity and financial solvency.

The Rule expands these requirements to exempt market dealers and investment fund managers, and changes the requirements for all registrants to reflect a more "risk-based approach".

Introduction of New Registration for Investment Fund Managers

This new category of registration is being implemented to respond to a number of issues identified by the CSA with respect to investment funds including:

- incorrect/untimely calculation of net asset values;
- incorrect/untimely preparation of financial statements;
- incorrect/untimely provision of transfer

"Certain investment fund managers may already be carrying on business in one or more registrable activity, however, and they would be subject to extra registration requirements."

agency or record-keeping services; and

- potential conflicts of interest between an investment fund manager and its clients.

The registration of investment fund managers will allow regulators to regulate the decision-makers – the fund managers – directly instead of imposing restrictions directly on the investment funds.

The new Rule requires that investment fund managers have sufficient competency, integrity and solvency (including prescribed capital) to carry out their functions adequately. Competency or proficiency requirements are aimed at ensuring that only qualified persons deal in securities. Integrity requirements refer to the business conduct requirements and are meant to ensure registered people are held accountable to clients and regulators for securities-related activities. Financial solvency requirements are intended to ensure registered people are financially viable.

The term "investment fund manager" is already defined in Canadian securities legislation as a "person or company that directs a business, operation or affairs of an investment fund".

With the introduction of this new category, managers involved in various types of investment funds will need to be registered, including managers of mutual funds, non-redeemable investment funds, labour sponsored investment funds, scholarship plans, pooled funds or hedge funds.

This new category of registration is distinguishable from other registrable activities, such as individuals or firms that provide portfolio management services or investment advice to the investment fund thereby acting as an adviser and subject to adviser registration requirements.

Certain investment fund managers may already be carrying on business in one or more registrable activity, however, and they would be subject to extra registration requirements. For example, an investment fund manager could ultimately have the triple registration requirement that would go with being an investment fund manager, portfolio manager and dealer. In that case, the most stringent requirements of any of those categories of registration would have to be met.

One interesting development that is not actually reflected in the new Rule (but is in the Official Notice) is the clarification statement that the CSA take the view that investment advice/portfolio management provided to an investment fund will not be considered to "flow through" to the investors in the fund (i.e. the investment fund, not the fund's investors, is the client). The CSA indicate that the adviser to a fund that is constituted in a province must be a registered portfolio manager in that province regardless of where the fund's investors are located. The regulators are agreed that if the fund is established outside a province where a fund's units are sold and the adviser is also located outside the province, the advice to the fund is not given in the province and therefore the adviser does not have to register in that province.

"...international dealers will now be allowed to trade with individuals with net financial assets before taxes in excess of $5,000,000. Under the existing regime no trades to individuals were allowed."

Introduction of Registration Exemptions for International Dealers and International Advisors

The new Rule introduces the following significant changes for international dealers and international advisers:

(i) Registrations of all international dealers expire on September 28, 2009;

(ii) Registrations of all international advisers expire one year later, September 28, 2010;

(iii) dealer registration exemptions, including the accredited investor exemption currently available under NI 45-106 in all Canadian jurisdictions other than in limited cases in Alberta, British Columbia, Manitoba, North West Territories, Yukon and Nunavut, are repealed;

(iv) new international dealer exemptions are introduced. The exemptions require that notice of certain matters be sent to clients and the firms must file by October 28, 2009 with each province a Form 31-103F2 - Submission to Jurisdiction and thereafter an annual notice of reliance on the exemption. In Ontario, annual fees will continue to be payable under Rule 13-502 for unregistered exempt international dealer firms; and

(v) new international adviser exemptions are introduced. The exemptions require certain specified conditions to be met, including a Submission to Jurisdiction Form 31-103F2 filing in each Province (along with, thereafter, annual notices of reliance) and certain disclosures are made to clients, although compliance with those requirements for registered International Advisers is deferred one year. In Ontario, filing fees will still be required to be paid under Rule 13-502 annually by exempt international advisers.

The practical effect of all the above noted changes is that the list of Canadian investors with whom an international dealer is permitted to trade on an exempt basis has been narrowed in certain cases and broadened in others.

For example, an international dealer may rely on the new international dealer exemption to trade with "permitted clients," which is a new definition under the new Rule and is a subset of accredited investors under NI 45-106 when trading foreign securities and certain Canadian debt securities. If international dealers wish to trade with accredited investors outside the permitted client subset, they will be required to obtain registration as exempt market dealers in order to trade with such full range of accredited investors.

In another example of the narrowing of existing rules, international dealers currently registered in Ontario and Newfoundland and Labrador will no longer be permitted to trade with a corporate entity with assets in excess of $5,000,000. The new threshold is $25,000,000.

Also, an international dealer in Ontario and Newfoundland and Labrador will no longer be able to trade with an investment fund that is not advised by a person registered as a portfolio manager or managed by an investment fund manager registered in a jurisdiction in Canada.

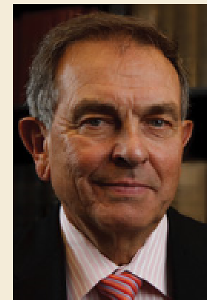
For an example of how permitted trades have been broadened with the introduction of the new Rule, international dealers will now be allowed to trade with individuals with net financial assets before taxes in excess of $5,000,000. Under the existing regime no trades to individuals were allowed.

Conclusion

This article highlights some of the main features of the new Rule. It is in no way a complete overview or summary of the Rule. There are a number of specific features of the Rule which will be applicable to various market participants. There are also various transition periods which will delay or defer the implementation of certain requirements of the Rule to allow certain market participants time to comply with the new Rule. Blaney McMurtry LLP has experience assisting firms and individuals in complying with their obligations under the new Rule. If you have any questions about the new Rule, please contact Patrick Cummins. ■

Blaney McMurtry LLP is pleased to announce

Richard H. Krempulec, Q.C., LL.M. (ADR)



has recently joined ADR Chambers as a mediator, arbitrator and neutral evaluator.

Richard has a practice at Blaney McMurtry LLP as a civil litigator that has spanned over 45 years, specializing in resolving insurance and corporate/commercial disputes of various categories including class action and directors and officers' lawsuits.

Richard's many years in settling insurance and other commercial disputes has been based upon encouraging the parties to critically analyze the strength of their case and that of the other party. He has found that this approach best enables the parties to achieve a settlement. His style is proactive in offering suggestions and different approaches to settlement without being intrusive.

Richard is available through the Toronto office of ADR Chambers at: 416.362.8555 or adr@adrchambers.com.

You may also contact Richard directly at: 416.593.3942 or rkrempulec@blaney.com.

Blaneys on Business is a publication of the Corporate/Commercial Group of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.

We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Chris Jones at 416 593.7221 ext. 3030 or by email to cjones@blaney.com. Legal questions should be addressed to the specified author.

EXPECT THE BEST

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