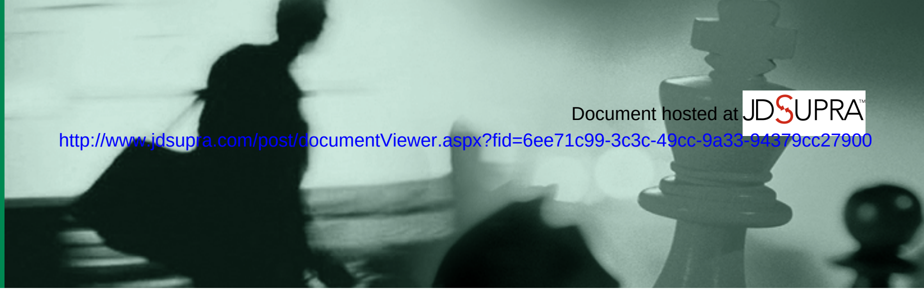
Lang Michener LLP
Lawyers – Patent & Trade Mark Agents



Securities/M&ABrief

Fall 2009

In This Issue

Jeremy Shelford reviews the Ontario Securities Commission reasons for judgment on the HudBay and Lundin matter, and how they will affect the acquisition of any TSX company. John Conway discusses the results of the Canadian Securities Administrators ("CSA") review program of public companies thus far through 2009, and outlines some of the deficiencies noted by the CSA. Sean O'Neill reviews the new registration requirements imposed on firms and individuals who sell securities as set out in National Instrument 31-103, and examines the available exemptions under these new requirements. And finally, Stephen White ponders a proposed policy change with regard to slate director elections set to take effect in 2010.

Update on HudBay and Lundin: TSX Rule Amendments Regarding Shareholder Approval

Jeremy Shelford

Amendments to the TSX Rules

Following the decision of the Ontario Securities Commission (the "OSC") regarding the proposed merger transaction between HudBay Minerals Inc. ("HudBay") and Lundin Mining Corporation ("Lundin"), on September 25, 2009 the Toronto Stock Exchange (the "TSX") adopted amendments proposed April 3, 2009. The amendments will require listed issuers to obtain securityholder approval where they propose to issue securities in connection with an acquisition where the securities to be issued exceed 25% of the listed issuer's outstanding securities. This amendment will result in the deletion of subsection 611(d) of the *TSX Company Manual* (the "TSX rules"), removing the securityholder approval exemption for a listed issuer acquiring a public company.

The new rule will be effective on November 24, 2009 but will not apply to transactions of which the TSX has been notified before that date, whether or not conditional approval has already been granted.

The new TSX rule will likely affect public company M&A transactions in Canada by increasing the risk and costs of completing such transactions. It is worth noting that most major stock exchanges require securityholder approval in dilutive transactions, including the acquisition of a public company.

Background Surrounding the Amendments

On April 28, 2009, the OSC released its reasons for judgment regarding HudBay, with its initial order on the matter issued on January 23, 2009. Contrary to the prior finding of the TSX, the OSC order required approval by HudBay shareholders as a condition for the merger transaction between the two companies to proceed. A minority HudBay shareholder initially brought the application to the

OSC to set aside the TSX ruling that approved the transaction without HudBay shareholder approval, and the delay in the release of detailed reasons by three months was likely due to the expedient nature in which the OSC thought it necessary to address the plight of concerned HudBay shareholders.

The proposed transaction involved the two public companies entering into an arrangement whereby HudBay agreed to acquire all of the outstanding shares of Lundin in exchange for shares of HudBay – which would have diluted existing HudBay shareholder holdings by more than 100%. The transaction was structured as a court-approved plan of arrangement under the *Canada Business Corporations Act* that required the approval of Lundin shareholders (which was obtained on January 26, 2009), while HudBay's special committee of independent directors determined that HudBay shareholder approval was not necessary.

The TSX rules typically require approval of the shareholders of the acquiring company in an acquisition transaction where the number of securities issued or issuable in payment of the purchase price exceeds 25% of the issued and outstanding securities of the listed issuer (the listed issuer in this case being HudBay). However, the TSX rules include an exemption from this requirement where the company that the listed issuer is acquiring is a reporting issuer having 50 or more beneficial security-holders, and such exemption was applicable to the HudBay/Lundin transaction.

The OSC explained that fair treatment of shareholders is a key factor in considering the quality and integrity of capital markets, and if the transaction were to proceed as proposed, the result would be "manifestly unfair" to the HudBay shareholders.

The TSX will also generally require shareholder approval of a transaction where, in its opinion, the transaction (i) materially affects control of the listed issuer, or (ii) provides consideration to insiders in aggregate of 10% or greater of the market capitalization of the listed issuer and has not been negotiated at arm's length. The TSX rules define "materially affect control" as the ability of any listed issuer's shareholder(s) to influence the outcome of a vote of shareholders. Where a transaction results in one shareholder holding 20% or more of the voting shares of a listed issuer, there is a presumption that the transaction materially affects control. Short of this 20% level, the TSX has no bright-line test for determining whether control is materially affected and, in the case of the HudBay/Lundin transaction, no single shareholder would have owned more than 8.2% of the resulting issuer pursuant to the proposed transaction.

Despite the above-noted exemption, the TSX is cloaked with discretion to impose conditions on a transaction involving the issuance of shares, having regard to the effect that the transaction may have on the "quality of the market-place."

OSC Decision and Reasons

In setting aside the TSX decision to not require shareholder approval for the proposed transaction, the OSC ultimately ruled that, despite the available rules that allow for the transaction to proceed without shareholder approval, the transaction would have a significant and adverse affect on the "quality of the market-place" if HudBay shareholder approval was not required. In reviewing the minutes of the TSX decision-making process regarding the transaction, the OSC noted that the TSX did not undertake an assessment of the impact the transaction would have on the "quality of the marketplace" following the specific factors enumerated in the TSX rules.

In coming to its finding, the OSC concluded that the transaction as proposed exhibited an extreme level of dilution of shares held by HudBay shareholders pre-transaction, and that this would fundamentally affect the economic interests of shareholders, and their voting, distribution and residual rights. The OSC classified the two companies as equals and questioned the decision of HudBay's board to approve the transaction without shareholder approval. The OSC explained that fair treatment of shareholders is a key factor in considering the quality and integrity of capital markets, and if the transaction were to proceed as proposed, the result would be "manifestly unfair" to the HudBay shareholders. The OSC views the quality of the marketplace as a "…broad concept of market quality and integrity" and that "…assessing the impact of a proposed transaction requires a careful consideration of all the relevant facts and circumstances and a balancing of all the relevant considerations that bear on that assessment."

The OSC commented that the factors contained in the TSX rules that pertain to assessment of quality of the marketplace are not exhaustive, but act as a guide. As such, the OSC suggested that an examination of a proposed transaction should "…consider the circumstances under which the transaction is negotiated, the process by which it was negotiated and its impact on shareholders." Further, the discretion available to the TSX in considering such a transaction "…should be assessed based on both the magnitude of the individual factors that could affect the quality of the marketplace and the aggregate impact of all the relevant factors." The OSC stated that "…where a transaction will clearly have a transformational effect on an issuer and its business, that effect is a relevant consideration in assessing… whether shareholder approval of a transaction should be required."

The OSC suggested that an examination of a proposed transaction should "…consider the circumstances under which the transaction is negotiated, the process by which it was negotiated and its impact on shareholders."

Behaviour of the Parties

The OSC did not specifically address the allegations of the HudBay minority shareholder regarding defective or inappropriate behaviour on the part of HudBay's board or special committee and its effect in determining the overall effect of the transaction on the quality of the marketplace, but it did note its concern for some of the matters raised. The OSC's reasons contain reference to the necessity of the TSX having considered and assessed possible questionable behaviour by a board or special committee in the course of an assessment of a transaction, including, among other things, the issuer's governance and disclosure practices, unduly accelerated corporate governance procedures, issues surrounding involvement of insiders, the effect of the transaction on control of the issuer and the existence of competing bids (or lack thereof). While the OSC agreed with the TSX that such issues cannot generally be expected to be addressed or resolved in applying the TSX rules, it is not to say that in other cases "…such matters may not be highly relevant facts that should be addressed if they are raised with the TSX and appear to be real concerns."

For a fairness opinion to assist boards and committees in discharging their duties, the fairness opinion must come from a disinterested financial advisor.

Fairness Opinions

In addition, the OSC commented on the appropriateness of financial advice given to the special committee in the form of a fairness opinion that was to be issued by the advisor pursuant to a success fee payable upon consummation of the HudBay/Lundin transaction. In this regard the OSC added that "[s]uch fees create a financial incentive for an advisor to facilitate the successful completion of a transaction when the principal focus should be on the financial evaluation of the transaction from the perspective of the shareholders." In its view, the OSC expressed concern that a fairness opinion prepared by a financial adviser who is being paid a signing fee or a success fee does not assist a special committee of independent directors in demonstrating the due care the directors have taken in complying with their fiduciary duties in approving a transaction. The take-away message from the OSC in this regard is that, for a fairness opinion to assist boards and committees in discharging their duties, the fairness opinion must come from a disinterested financial advisor.

Jeremy Shelford is an associate in the Business Law Group in Vancouver. Contact him directly at 604-691-6854 or jshelford@lmls.com.

CSA Release Results of Continuous Disclosure Review Program

John Conway

The Canadian Securities Administrators ("CSA") have released the results of their continuous disclosure review program of public companies for the 2009 fiscal year. Under Canadian securities law, public companies (reporting issuers) must provide timely continuous disclosure about their businesses and affairs. The continuous disclosure review program was established in 2004 with the goal of improving the completeness, quality and timeliness of continuous disclosure by Canadian public companies.

Using a risk-based approach to select companies for review, 1,094 of the approximately 4,300 Canadian reporting issuers were selected for either a *full review* or an *issue-oriented review* in fiscal 2009. This represented a 28% increase from the number of reviews conducted in fiscal 2008, reflecting the CSA's increased focus on continuous disclosure reviews in response to current market conditions.

Full Review – Common Deficiencies

CSA staff noted that, generally, the deficiencies found in full reviews were either in an issuer's MD&A or financial statements. Common deficiencies included:

CSA staff noted that, generally, the deficiencies found in full reviews were either in an issuer's MD&A or financial statements.

MD&A

- repeating information from financial statements without providing sufficient analysis;
- inadequate disclosure of liquidity and capital resources;
- no or insufficient discussion about the risks and uncertainties expected to affect the issuer's future performance given the current economic conditions;
- insufficient discussion of critical accounting estimates and lack of disclosure of assumptions underlying the accounting estimates;
- lack of quantitative analysis in the results of operations discussion;
- no or limited disclosure of the adoption of new accounting policies;
- inadequate related-party disclosure; and
- non-compliant disclosure of non-GAAP financial measures.

Financial Statements

- failing to appropriately measure financial instruments in accordance with accounting standards (e.g. fair value);
- failing to disclose the credit, liquidity and market risks associated with financial instruments;
- lack of meaningful disclosure of issuer's capital and how it is managed;
- inadequate revenue recognition;
- lack of compliance with required stock-based compensation disclosure;
- non-compliance with segments disclosure, including failing to disclose the revenue allocation method and aggregating or omitting information about major customers; and
- failing to properly identify and account for variable interest entities.

Issue-Oriented Reviews

In fiscal 2009, issue-oriented reviews were conducted and deficiencies noted in areas including disclosure with respect to the current market turmoil and credit crisis, asset-backed commercial paper ("ABCP"), defined benefit pension plans, forward-looking information and mining and oil and gas technical disclosure.

Outcomes

The CSA works with issuers to ensure that issues identified during the review are resolved in a timely and appropriate manner. Following the review of an issuer, the CSA (i) informs the issuer that it does not need to make any changes in its next filing; (ii) instructs the issuer to make certain changes in its next filing; (iii) alerts the issuer, based on its particular risk profile, to certain disclosure enhancements that should be considered in its next filing; (iv) instructs the issuer to amend or refile certain continuous disclosure documents; or (v) adds the issuer to a default list, issues a cease trade order or refers the issuer to the enforcement branch.

Looking Forward – Fiscal 2010

The CSA has indicated topics that may receive greater attention for fiscal 2010 include:

- valuation of goodwill, intangibles and asset impairments;
- going concern issues;
- disclosure relating to executive compensation;
- disclosure of IFRS changeover plans in the MD&A;
- disclosure and valuation of restructured ABCP notes;
- material contract requirements; and
- certification of disclosure in issuers' annual and interim filings.

Issuers should be mindful of the continuous disclosure deficiencies noted by the CSA and alert to those areas that will attract greater scrutiny in the future.

John Conway is a partner in the Corporate Finance/Securities Law Group in Toronto. Contact him directly at 416-307-4222 or jconway@langmichener.ca.

Ed.: *John would like to thank **Gabriella Farcas-Chan**, student-at-law, for her assistance with this article.*

New Registration Requirements and Exemptions in Canada for Investment Dealers, Advisors and Fund Managers: *National Instrument 31-103 Registration Requirements and Exemptions*

Sean P. O'Neill

The New Requirement

The new National Instrument 31-103 *Registration Requirements and Exemptions* ("NI 31-103") expected to take effect across Canada on September 28, 2009 is intended to harmonize Canadian registration requirements for firms and individuals who sell securities (and exchange contracts in some jurisdictions), offer investment advice, or manage investment funds. Specifically, it prescribes the registration requirements and exemptions for firms and individuals engaged in activities such as:

- an investment dealer;
- an investment advisor; or
- an investment fund manager.

Firms currently engaged in prospectus-exempt trades as market intermediaries or in managing investment funds will have 12 months (until September 28, 2010) to become registered as an "Exempt Market Dealer" ("EMD") or "Investment Fund Manager" ("IFM"), respectively, unless they qualify for an applicable exemption. There is no such transition period for new firms. Firms commencing activity as a market intermediary or investment fund manager after September 28, 2009 are required to register themselves before commencing such activities unless they are otherwise exempt. However, individuals and firms will still be able to rely on the dealer registration exemptions currently available in National Instrument 45-106 until March 28, 2010, when such exemptions are removed from NI 45-106.

> *Firms currently engaged in prospectus-exempt trades as market intermediaries or in managing investment funds will have until September 28, 2010 to become registered unless they qualify for an applicable exemption.*

Available Exemptions

Effective March 28, 2010, there will be an exemption in Alberta, British Columbia, Manitoba, Yukon, NWT and Nunavut to the EMD registration requirement for prospectus-exempt trades to accredited investors, friends, family and business associates, under the $150,000 minimum investment, and trades pursuant to an offering memorandum. To qualify for the exemption, certain conditions must be met, such as having a signed Risk Acknowledgement form and filing an Information Report with the applicable Securities Commission within 10 days after the trade. There is no such exemption in Ontario, where the EMD registration requirement merely replaces the Limited Market Dealer registration requirement.

Unless subject to an exemption, a firm that issues or trades in its own securities may be required to register as a dealer if it frequently trades in securities, performs activities similar to a registrant, actively solicits investors, or acts as an intermediary by investing client money in securities. However, a firm with an active non-securities business does not generally require registration if it does not carry on such activities.

> *The requirement for registration does not always fit into a bright-line test but is often more dependent on the circumstances, especially in the category of "investment fund manager."*

Unfortunately, there is no similar regional exemption for the IFM registration requirement. All firms and individuals in Canada that manage the business and affairs of any "investment fund" must register as an IFM. An "investment fund" is an entity that invests funds received from its securityholders. However, REITs and business income trusts are not considered "investment funds" because they issue securities that entitle the holder to net cash flows generated by the underlying real estate or business owned by the trust. In some circumstances, venture capital and private equity funds may also fall outside the definition of "investment fund" if the fund takes active involvement in managing the business and affairs of the subject investee business or property. Accordingly, the question of whether a limited partnership, trust, mortgage investment corporation (or "MIC") or other such entity is an investment fund whose manager will be subject to registration is presently a matter for determination on a case specific basis.

What This Means

Under NI 31-103, registered firms and individuals will be subject to oversight and regulation by the applicable Securities Commission in the firm's jurisdiction. Such firms must meet minimum requirements for working capital and insurance/bonding, and regularly provide certain other periodic financial information (depending on the category of registration) including: audited annual financial statements, unaudited interim financial statements, reports on working capital, and reports on changes in net asset value calculations, as the case may be. Registered firms must have registered individual representatives, an ultimate designated person and a chief compliance officer, all of whom must meet certain prescribed qualifications of experience and credentials.

The question of whether a firm must be registered as a dealer or advisor is an analysis of the "business triggers" test – whether the firm's business activities trigger registration, whereas the question of whether a firm must be registered as an investment fund manager is an analysis of whether the firm manages an "investment fund" as discussed above. Consequently, the requirement for registration does not always fit into a bright-line test but is often more dependent on the circumstances, especially in the new category of "investment fund manager."

Please do not hesitate to contact us if you would like additional information or assistance concerning NI 31-103 or how it may impact you or your firm.

Sean P. O'Neill is associate counsel in the Securities Group in Vancouver. Contact him directly at 604-691-6855 or soneill@lmls.com.

Proposed Director Election Policy Change

Stephen White

In a recent open letter to all companies listed on the Toronto Stock Exchange ("TSX"), RiskMetrics Group announced a proposed change to its policy with respect to director elections.

Pursuant to the proposed policy change, beginning in 2010, where director nominees of TSX-listed issuers are presented to shareholders for election as a slate, rather than individually, RiskMetrics, on that basis alone, may issue a recommendation to withhold votes from the entire slate of directors. The proposed change is based on RiskMetrics' view that slate director elections, though permitted by corporate laws, are "unacceptable from a corporate governance perspective" because they tend to insulate individual directors from shareholder disapproval and work against director accountability.

It should be noted that individual director voting policies are usually accompanied by a director resignation policy, pursuant to which any director who, in an uncontested election, has more votes "withheld" than "for" him or her, is required to tender his or her resignation. Although the adoption of a director resignation policy was identified only as a best practice in the open letter, we expect that it will be a part of RiskMetrics' policy change when fully developed.

In a recent open letter to all companies listed on the Toronto Stock Exchange, RiskMetrics Group announced a proposed change to its policy with respect to director elections.

At this time, it appears that the proposed policy change will not apply to venture issuers. However, if it becomes RiskMetrics' policy, it may have a significant effect on those non-venture issuers who continue with slate voting and have institutional or other shareholders who, for policy or other reasons, follow RiskMetrics' recommendations. For those issuers that adopt individual director voting and resignation policies, individual directors should take care to ensure that they do not inadvertently fall off-side of RiskMetrics' other policies that could result in a "withhold" or "no" recommendation (such as non-attendance at board and committee meetings).

We anticipate that further particulars as to RiskMetrics' proposed policy change will become available towards the end of 2009.

Stephen White is an associate in the Corporate Finance/Securities Law Group in Toronto. Contact him directly at 416-307-4143 or swhite@langmichener.ca.

News and Deals

News

Mark Skwarok Listed in *Best Lawyers in Canada* 2010

Mark Skwarok, a partner in our Vancouver office, is among 22 Lang Michener lawyers who have been recommended in the *Best Lawyers in Canada* 2010. Mark Skwarok was listed as a leading Securities lawyer by his peers.

James Bond Elected President of the CBA British Columbia Branch

Lang Michener is proud to announce that James Bond, a Partner in the Vancouver office, has recently been elected President of the Canadian Bar Association (British Columbia Branch). James assumed the role at the CBA Canadian Legal Conference in Dublin, Ireland, and is the youngest ever president of the CBA B.C. Branch.

Deals

Fralex Therapeutics Inc. Completes Plan of Arrangement

On June 1, 2009, Fralex Therapeutics Inc., was purchased by Baylis Medical Company Inc., pursuant to a court-approved plan of arrangement involving Fralex, Baylis and Attwell Capital. Each Fralex common share was exchanged for one common share of Attwell Capital Inc. and cash consideration of C$0.0001. Baylis acquired from Attwell all of the issued and outstanding shares of Fralex and its current business of developing Complex Neural Pulse ("CNP") therapy in exchange for C$900,000. Attwell acquired Fralex's non-CNP related assets, including all its cash, and assumed all of Fralex's liabilities. Fralex and Attwell were represented by a team at Lang Michener LLP, including **John Andrew** (business/corporate), **John Conway**, **Andrew Tam**, **Stephen White** and **Christos Gazeas** (securities/corporate), and **Brent McPherson** (litigation).

Teck Resources Limited Completes US$4.225 Billion Note Offering

On May 8, 2009, Teck Resources Limited completed a private placement offering in the U.S. and Canada of US$4.225 billion in aggregate principal amount of senior secured notes. J.P. Morgan Securities Inc., Banc of America Securities LLC and Citigroup Global Markets Inc. acted as joint book-running managers for the initial purchasers of the notes. The net proceeds of the note offering were applied by Teck to repay borrowings under its existing bridge credit facility. Teck was represented in-house by Peter Rozee, Senior Vice-President, Commercial Affairs, and Nick Uzelac, Corporate Counsel, and in Canada by Lang Michener LLP with a team in Toronto that included **Hellen Siwanowicz**, **Andrew Tam**, **Denno Chen**, **Stephen White**, **David Mendicino** and **Christos Gazeas** (securities/corporate), and **Bob Cranston** and **Eric Friedman** (banking); and a team in Vancouver that included **Peter Botz** and **Christine Man** (tax), **John Morrison** (banking), and **Amandeep Sandhu** and **Corin Bowman** (securities/corporate).

Davis + Henderson Income Fund Acquires Resolve Business Outsourcing Income Fund

On July 27, 2009, 2206997 Ontario Inc., an acquisition company formed by Davis + Henderson Income Fund, completed the acquisition of Resolve Business Outsourcing Income Fund on the basis of 0.285 of a Davis + Henderson unit for each unit of Resolve. The total enterprise value for the transaction was approximately C$200 million. Resolve was represented by Lang Michener LLP with a team that included **Mark Richardson**, **Daniel Rowntree** and **Shannon Seitz** (corporate), and **Hellen Siwanowicz** and **Denno Chen** (securities/corporate). **James Musgrove** and **Janine MacNeil** represented both Davis + Henderson and Resolve in competition matters.

Securities/M&ABrief

Editor: Tom Theodorakis
604-691-7492
ttheodorakis@lmls.com

RETURN UNDELIVERABLE CANADIAN ADDRESSES TO:

Lang Michener LLP
Brookfield Place
181 Bay Street, Suite 2500
P.O. Box 747
Toronto ON M5J 2T7
Tel.: 416-360-8600 Fax.: 416-365-1719
e-mail: info@langmichener.ca

Publication Mail Agreement Number 40007871

Lang Michener LLP
Lawyers – Patent & Trade Mark Agents

Toronto
Brookfield Place
181 Bay Street, Suite 2500
P.O. Box 747
Toronto, ON M5J 2T7

Vancouver
1500 Royal Centre
1055 West Georgia Street
P.O. Box 11117
Vancouver, BC V6E 4N7

Ottawa
Suite 300
50 O'Connor Street
Ottawa, ON K1P 6L2

Hong Kong
1106, Tower 1
Lippo Centre, 89 Queensway
Hong Kong SAR