The private right of action under CASL (Canada’s Anti-Spam Law) comes into force on July 1, 2017. It is a right for private parties to obtain what are characterized as statutory damages for breach of CASL’s anti-spam and computer download prohibitions, as well as the e-mail harvesting/computer hacking provisions under the Personal Information Protection and Electronics Documents Act (PIPEDA) and the prohibitions against false or misleading e-mails under the Competition Act.

While the ostensible purpose of the private right of action is to provide a user-friendly monetary remedy for people impacted by prohibited practices, in reality it will only be well-resourced parties who will be able to initiate a claim. Furthermore, cost-benefit considerations suggest that only class action claims are likely to be made. However, the factors required to be taken into account — focused on compliance — suggest that any global monetary award in a class action must be determined on the same basis as if the matter were subject of regulatory enforcement. To date, we have seen that those factors point to penalties that, while they are not insignificant, do not approach the potential amounts provided for under the private right of action, at least with respect to prohibited e-mails under the commercial electronic messaging (CEM) rules.

Clearly, there could be significant monetary awards in cases of highly egregious matters involving large-scope incidents. However in such circumstances it is more likely that, in light of the statute’s “dual track” prohibition, public regulatory enforcement will intervene with the result that no private right of action application can be entertained. The analysis suggests that the private right of action should be seen as a proxy for regulatory enforcement and not as a practicable means for affected people to claim compensation:

CasL’s dual track prohibition means public regulatory enforcement will most likely intervene

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Private right of action a duplication

CasL’s dual track prohibition means public regulatory enforcement will most likely intervene.
‘Fair and reasonable’ test applied to two M&As

Fraser McDonald

Two recent decisions have shed light on how courts will apply the requirement confirmed by the Supreme Court in BCE Inc. v. 1976 Debentureholders [2008] S.C.R. 560, that an arrangement be fair and reasonable in order to receive court approval.

In the first decision, InterOil Corporation v. Mulacak [2016] Y.J. No. 121, the Yukon Court of Appeal considered the decision of a chambers judge in an application by InterOil to approve an arrangement under Yukon’s Business Corporations Act which would have seen its shareholders exchange their shares for shares of Exxon Mobil Corporation plus a “contingent resource payment” capped at a certain level. Justice Ron Veale initially issued a final order approving the arrangement, but, nonetheless, highlighted a number of issues with the process followed by the directors of InterOil, including the following:

■ The board committee established by InterOil to oversee the transaction did not take a sufficiently active role and allowed management, which had a conflict, to lead the negotiations; and

■ The fairness opinion was deficient in that it was provided by a financial adviser whose compensation was largely dependent on the success of the arrangement, which fact was not disclosed to shareholders, and provided very little by way of backup for its conclusion.

However, consistent with many other situations, the arrangement was approved by Justice Veale on the basis of the overwhelming support (over 80 per cent) of the shareholders.

The Court of Appeal acknowledged that it is for the shareholders to make a final decision. But the court, in making a determination that the arrangement is fair and reasonable, must be satisfied that the shareholders’ decision is based on information and advice that is adequate, objective and not undermined by conflicts of interest. The Court of Appeal, based on the deficiencies identified by the chambers judge, found that the shareholder approval was not so informed and did not approve the arrangement.

The second decision, Smoothwater Capital Corporation v. Marquee Energy Ltd. 2016 ARCA 360, concerned an arrangement proposed by Marquee under Alberta’s Business Corporations Act involving Marquee’s shares being exchanged for shares of Alberta Oilsands Inc., which had been approved by the shareholders of Marquee. The arrangement was to be followed by a vertical short-form amalgamation of Marquee and Alberta Oilsands not requiring any shareholder approval. Smoothwater Capital, a shareholder of Alberta Oilsands, objected on the basis that, by virtue of Marquee proceeding by way of arrangement, shareholders of Alberta Oilsands were deprived of the vote that would have been required for an amalgamation and the resulting dissent rights.

In overturning a lower court decision, which granted the shareholders of Alberta Oilsands a vote on the arrangement and the right to dissent, the Court of Appeal confirmed that “the choice of structure of the transaction should not be taken from the directors without an express statutory provision to that effect.”

This deference will be given to the directors notwithstanding that another structure may have provided additional safeguards to shareholders and the standard of fairness and reasonableness is to be judged from the perspective of the corporation being arranged, in this case, Marquee.

While it is difficult to generalize from judicial decisions on plans of arrangement as they tend to be very fact specific, these decisions are instructive in a number of respects. Firstly, they highlight the advantages of proceeding by way of arrangement of: a transaction offering maximum transactional structuring flexibility and enhancing “transactional certainty”; and court approval, meaning that securities issued to U.S. shareholders pursuant to the arrangement will be exempt from registration pursuant to U.S. law and providing some level of comfort to directors.

Secondly, InterOil highlights the importance of the board approval process in establishing that the arrangement is fair and reasonable. The board should ensure that its process is free from conflict and the advice it receives from its financial advisers is adequate and free from conflict. In addressing the latter point, boards may wish to consider obtaining a fairness opinion from a financial adviser whose compensation is not dependent on the success of the transaction or, at a minimum, clearly disclosed to shareholders.

However, there are aspects of the InterOil decision that may mitigate its impact on financial advisers. The fairness opinion followed the “short-form” format typical in the Canadian M&A context and did not set out the underlying basis for the opinion and the significant work done to arrive at same which was disclosed to and discussed in detail with the board. Further, no evidence was placed on the record in the approval proceedings to contradict the expert evidence put forth by the opposing shareholder.

A more fulsome form of fairness opinion and putting more evidence supporting the factual findings before the courts may be required to determine an outcome.

To conclude, these decisions are instructive in a number of ways and offer guidance to those considering obtaining a fairness opinion or bringing their objections forward.

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Liability: Monetary payment provisions characterized as statutory damages

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proper compliance objectives of CASL, particularly in light of the anxiety it is causing within both the business and the non-profit sectors. If its role is merely a proxy for regulatory enforcement, the question should be asked whether its role is needed, or appropriate.

There is concern about the litigation risk posed by the private right of action. The potential remedies are significant—in addition to actual losses or expenses, complainants may recover, without any proof of loss, monetary amounts of $200 for each contra- venation of the anti-spam rules (example, each non-compliant e-mail) or each misleading e-mail, up to $1 million for each day that the contravention occurs or continues and similar maximum amounts for computer hacking or e-mail address harvesting.

These monetary payment provisions have been characterized as “statutory damages,” a legislative tool designed to assist plaintiffs recover losses that otherwise might be difficult to establish. However, one may ask whether this is the true objective of the private right of action since complete protection from an order is provided if the matter is pursued under a regulatory track. Furthermore a court, in hearing any application, must consider factors similar to those under the regulatory tracks for CASL and the Competition Act.

Protection against liability under the private right of action is afforded to a person who has contravened CASL’s CEM or computer download rules if prior to an application being heard they have entered into an undertaking to comply with CASL or have been served with a notice of violation. While similar protection is not afforded for claims of address harvesting, computer hacking or misleading e-mails, the same result could be obtained since the court is required to take into account the compliance purpose of any order.

It may be surmised that a party, faced with a class action claim for potentially millions of dollars, would seek (such as through voluntary disclosure) a resolution of the issue with the CRTC. The recent CRTC decision in the Blackstone Learning Corp. case—in which the CRTC (meaning the commission, not its enforcement staff) reduced the amount sought under a notice of violation from $640,000 to $50,000—is instructive. In that case, the CRTC referred to the factors that CASL requires be considered, including in particular the legislative purpose of encouraging compliance and the offending party’s ability to pay.

The protective rule is one aspect indicative of the private right of action being a proxy for regulatory enforcement. The factors that a court is required to consider when making any order also support this characterization. These factors suggest that an award must be consistent with any monetary penalty that would be imposed under the applicable regulatory rules. The most significant of these factors is the purpose of encouraging compliance. The stipulated factors are almost identical to the factors required to be taken into account in respect of administrative fines for violations under sections 6 to 9 of CASL (the anti-spam and computer download rules) and are consistent with considerations to be taken into account by the Competition Tribunal when imposing administrative penalties in respect of false or misleading e-mails.

In sum, understanding how the private right of action rules will work suggests that the provision is essentially penal in nature, governed by the same criteria as the administrative penalty provisions of CASL and the Competition Act, and that monetary awards, even in class actions, may be limited in scope. Seen in this context, the legislation arguably is duplicative of existing enforcement tools and does not provide additional safeguards to shareholders and the standard of fairness and reasonableness is to be judged from the perspective of the corporation being arranged, in this case, Marquee.

Finally, the decisions highlight a disadvantage of arrangements in that they give shareholders and others who may oppose the transaction a ready mechanism for bringing their objections forward.

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