

To List or Not to List

AFTER YEARS IN THE DOLDRUMS, IPOs LAST YEAR STAGED A COMEBACK. BUT AS BUSINESS OWNERS START TO WEIGH THEIR PROSPECTS, LEGAL ADVISORS WARN THAT THE ORDEAL OF A PUBLIC OFFERING IS NOT FOR EVERYONE BY SANDRA RUBIN

BECOMING A PUBLIC company is not a big event in the life of a business; it's a huge one. The transition from private to public can be out of this world in terms of sheer complexity. But that didn't keep Canadian companies from making the leap in 2017, a year in which the initial public offering (IPO) came back to life. For all of 2017, 38 new issues raised \$5.1 billion on all Canadian exchanges. And corporate finance lawyers suggest many more are in the pipeline for the first half of 2018.

The uptick in new offerings can be attributed to a confluence of factors, starting with pent-up inventory. Deal lawyers interviewed for this story agree that 2016 was a disaster on the IPO front, with just eight new offerings in total — the least in 19 years. Many IPO candidates didn't like the valuations they were getting and, with interest rates so low, decided to stay private longer. But with oil prices finally stabilizing at around US\$50 a barrel last year and with the public looking for more investment diversity, IPOs have started to bubble up again.

Going public, however, is no small feat. Desmond Lee, Co-chair of the Corporate Finance and Securities practice at Osler, Hoskin & Harcourt LLP, says IPOs “remain a really intense experience compared with other types of financings. We tell issuers, ‘Once you get through your IPO, you'll never have to go through that kind of intense experience again.’”

Most business owners who've made that particular journey would probably agree. Raman Grewal, partner in Stikeman Elliott LLP's Corporate Group,



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RAMAN GREWAL
> STIKEMAN ELLIOTT LLP

“If you have a founder-led company, part of what we’d say is, what are your objectives? Yes, you have access to markets and to greater capital if you go public. But on the other hand you have more flexibility and greater control as a private company if you don’t. So part of the exercise is, you have to weigh that.”

calls the transition from private to public “a sea change for clients with no previous public markets exposure,” which is why she feels that job one for their lawyer is to sit down with them and discuss the merits of going public versus doing a private financing or sale.

“We always have that discussion,” says Grewal, who advised Aritzia Capital Corp. in the fashion retailer’s initial public offering at the end of 2016. As the issuer’s counsel, Grewal says it is her job to educate clients about matters such as “the additional compliance framework of not only disclosure, but also the governance framework that applies to a public company, the additional costs associated with that, and the tradeoffs with a private sale where you don’t have those ongoing costs and operational issues to deal with.

“They all factor in. The evolving transition into public-company reporting and governance are always discussed.”

Does she ever try to talk them out of it? Grewal says it’s more like she tries to talk them *through* it. “If you have a founder-led company, part of what we’d say is, what are your objectives? Yes, you have access to markets and to greater capital if you go public. But on the other hand, you have more flexibility and greater control as a private company if you don’t. So part of the exercise is, you have to weigh that.”

Clients new to public markets also need to understand the costs. While they vary based on company, industry, stage or preparedness — including how much work is needed to transition to public-company compensation and governance structures

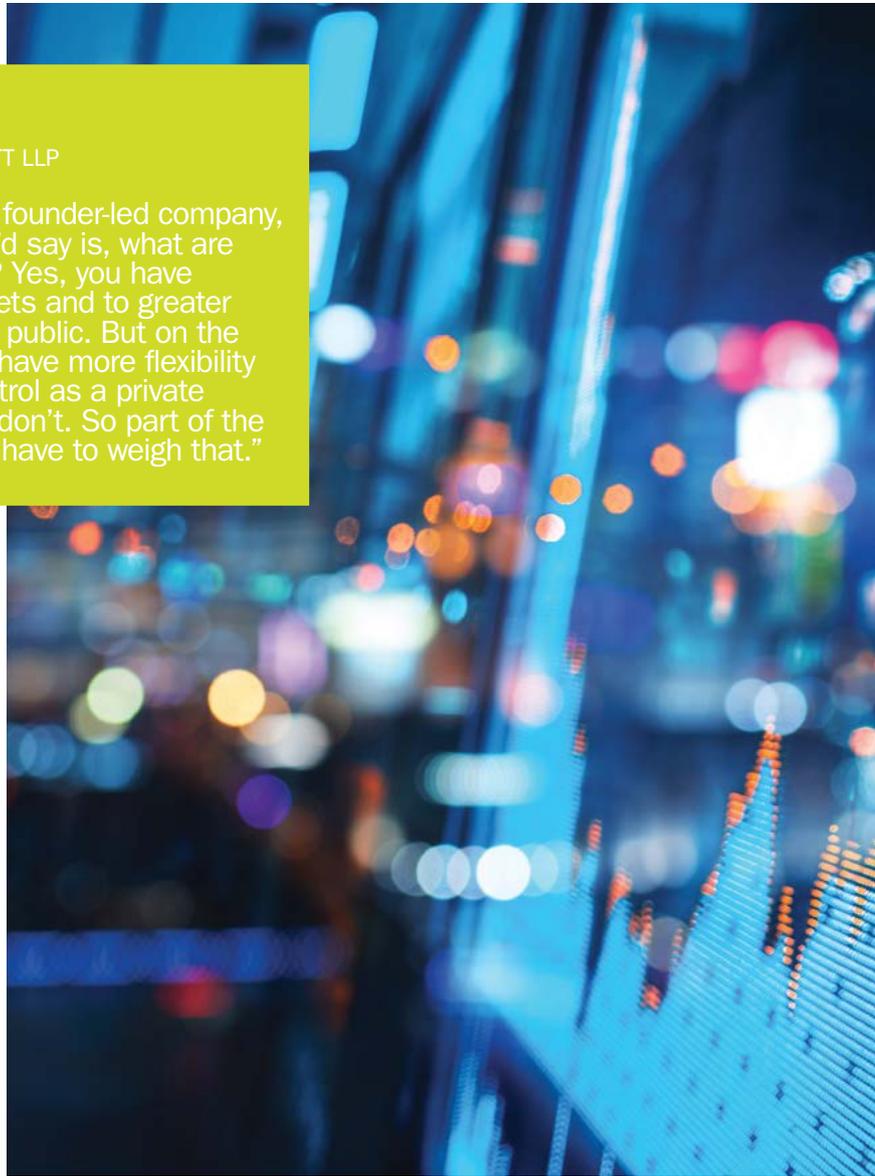
— Grewal says the total legal fees include those for issuer and underwriter counsel, fees for the securities regulator and stock exchange, and marketing and road show expenses, but excludes things such as printing, translation and auditor fees.

Public companies also face ongoing costs, which can include regulatory and exchange fees, legal services, insurance, auditor work, and compensation for directors, she points out. For a private business, “ultimately it’s a question of whether this is the right strategy for them,” Grewal says.

After all the caveats, for businesses owners who aren’t scared off, life starts to get very busy.

Companies going public need to appoint a full management team, including a chief financial officer, if they don’t already have one. Previous years’ audited financial statements need to be lined up, and investor relations covered. They need to assemble a board of directors, including those who meet regulatory requirements for independent directors and those who can sit on the audit committee. Underwriters have to be hired to craft the company’s story and growth plan in a way that will make investors want to buy the stock — but without straying into speculative terrain.

These are just some of the preliminary pre-filing and pre-marketing steps. To get some sense of the complexity, consider





owners. Andrew Parker, co-head of the national capital markets practice at McCarthy Tétrault LLP, which recently did the IPOs for Jamieson Wellness and Fairfax Africa says the workload can become so intense that, at times, the team has to work through the night. He says he likes to send people home for even two or three hours to rest a little “so their brains aren’t too fried the next day.

“Personally, I’ve walked into my house as my kids were going to school, had a shower and gone back to work 45 minutes later.”

In addition to drafting the prospectus and taking care of other legal and regulatory nuts and bolts, Parker says “you have to educate the client about the [securities] rules, disclosure, what’s material, and make sure they’re considering all of that.” Also, in cases where a business person is taking a

stand that what you’re saying is correct and they’re going to follow your guidance.”

Given all the rules, regulatory requirements and costs, some entrepreneurs or longtime business owners get cold feet partway through the process. “There are always things that come up that people may not have understood at the beginning that they have to do,” says Parker, “or issues come up in the middle of it that throws them for a loop. Dealing with the underwriters and their expectations can scare some clients off mid-process.

“Sometimes businesses have an expectation of where they’re going [on pricing] because of what underwriters have said to them at pitch meetings, and all of a sudden that changes halfway through the deal. It’s inevitable that it happens, but sometimes it gets very discouraging for people because they thought it was one thing and then it turns out it’s something entirely different. It’s not necessarily something we can prepare them for, but I always try to tell people there are going to be dips in the road.”

The underwriters may assign an initial valuation on the company’s shares of \$15, for example, but intervening factors — changed market conditions, investor appetite for the sector, or some news about the company itself — can then prompt the underwriters to reevaluate and reprice the shares sharply downward.

“That’s a difficult conversation to have, but sometimes that does happen and sometimes owners decide, ‘Okay, it’s not worth it. I’m not going to do it. I’m going to wait.’ So we put it on the shelf. That’s happened a lot of times.”

“Stress” is a word that keeps coming up in relation to IPOs. Joseph Garcia of Blake, Cassels & Graydon LLP in Vancouver says the keys to helping a client minimize that stress lie in advanced planning and organization. Ideally, he says, the client would start talking to their lawyer about going public a year or so before they plan to go to market. The moments of intense stress generally come when there isn’t enough time, he says, when everyone is trying to rush the process and catch what is perceived to be a limited window.

“There are a whole host of issues that you need to address, and the more time you



JOSEPH GARCIA
 > BLAKE, CASSELS & GRAYDON LLP

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this: the typical working group for an IPO, once the auditors have finished their work, includes company management, their lawyers, the underwriters and the underwriters’ counsel.

Everyone works on the prospectus describing the business and its growth strategy. At large drafting sessions, there may be more than a dozen people in the room all working on the document at the same time, and lawyers say the meetings can be long and sometimes fractious.

It’s not only stressful for the business

company public for the first time, the lawyer’s role includes doing some handholding at times when clients feel overwhelmed. And they will, he says.

Parker says doing an IPO is different than most other types of corporate transactions. “Sometimes it takes lots of reassurance, and making sure they disclose everything to you, and that they understand the rules. That’s true in any IPO. They want to make sure they’re doing the right thing. Your goal as the lawyer is to become the trusted advisor to make sure they under-



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can give executives to plan, to think about it, and to put processes in place to address it, then the smoother it goes,” Garcia says. “For example, the prospectus has certain financial-statement requirements. If you get into drafting the prospectus and you’re a week away from filing it and you say, ‘By the way, do you have your three years of audited financials?’ ‘And they say, ‘You never told us we needed that.’ Well, everybody’s going to be exceptionally stressed out. Or, from the governance perspective, who would qualify to sit on your audit committee? If you don’t address any of those issues until the last moment, how are they going to recruit folks?”

“That’s why successful IPOs often come down to the preparation. If you don’t help the client plan, you might cause delays, you might lose the window to go public.”

In addition to all the prospectus work and drafting sessions, Garcia says the company and its lawyers also need to communicate with existing private shareholders, who will have to agree to amend the company’s articles of incorporation to change it into a public company.

The number of moving parts required to make the transition to a listed public company can be mind-boggling. Just ask Ali Tehrani, President and Chief Executive Officer of Zymeworks Inc. He has seen it close up.

Vancouver-based Zymeworks Inc., the biopharmaceutical company Tehrani co-founded, raised US\$58 million in an IPO and started trading on both the Toronto and New York stock exchanges in April.

Tehrani, who worked closely with Garcia of Blakes on the IPO, says that, despite all the education on public markets and great organization, the experience was “astrophysical, out of this world, both in terms of paperwork and process.”

As a 14-year-old company, Zymeworks had already gone through multiple rounds of angel and venture finance before deciding to tap public markets. “We had a lot of momentum. We had a number of investors who had reached their final [investment] point, so we needed to be able to hand it over to new folks, to a new set of public investors who could hold the stock for two, five or 15 years,” says Tehrani. “Financing is basically like a relay race.”

Tehrani compares the role of lawyers on an initial public offering to that of airplane mechanics who get the aircraft prepared and make sure it’s safe for both the pilots and passengers. The lawyers are there “not only to protect the client, but to protect everyone. They’re there to make sure you’re following the law. There’s a crazy amount of paperwork, an extreme amount of paperwork that’s in very difficult language, and the law has to be followed. So lawyers are tremendously important in making sure the company does not sell an empty dream” to investors.

He adds, lawyers “mediate a very complicated process. They don’t tell your story but they make sure you don’t overemphasize it, or over-hype it, and that all the regulatory rules are being followed properly. If you don’t follow a very complicated set of laws very carefully you can delay your IPO, you can damage your IPO, or do some-

thing you didn’t intend to.”

Lawyers who work in this area say there is at least a three- to four-month process from when you start to draft a prospectus to closing, marketing and then actually going public — with another six months or more of advance planning before that. “It’s very confusing. There’s a lot of work to be done,” says Tehrani. “Joe was there, around the clock, no matter how complicated or how simple the question was. You may have to call your lawyer 25 times a day, at any hour, and it’s not like we’re their only client. When they take the time and give you the attention, it really helps you get through a very stressful period, and we’re very grateful.”

After going through the process, Tehrani is convinced it’s not the right route for everyone. “Going public means you’re completely open, exposed to everyone, and you have to have the right story, a robust story to tell, or a couple of people can tank your company valuation just by trading a couple of hundred shares. So going public is not for everyone.”

Deborah Weinstein of LaBarge Weinstein LLP in Ottawa couldn’t agree more. With the resurgence of initial public offerings in 2017 making headlines, business owners have begun talking to their lawyers about going public. But not every company — and not every client — is suited for the public arena. In fact, she says, with a few notable exceptions, “most pure entrepreneurs are not.”

Many entrepreneurs don’t have formal business training; they come from backgrounds such as engineering, computer technology or marketing, she notes.

“What it takes to be an entrepreneur — a lot of vision, great communication and great building-block skills — is quite different from what you need to run a public company,” she says. “It’s a different kind of communication: to investors, not customers. You also need the ability to scale up and, most importantly, the ability to manage the business short-term for quarterly financial results while maintaining a long-term vision.”

Luckily, she says, 98 per cent of her business clients never intend to go public. Their plan is usually to grow the business and sell when the time is right. But some do want

to do an initial public offering — and occasionally too soon.

In those cases, Weinstein points out, her counsel is of the “tough love” variety. “Most of the time I will tell them straight out, ‘Your business is not ready. If you are a

proach. “I tell them, ‘Your business will not survive one quarter.’ I will absolutely come right out and tell them that. The business needs to have sustainability as a public company.

“I’ll also say — and I’ll say it gently if I think the person is not adequately equipped because of their toolset — ‘Look, you’re going to be on the road almost all the time, and you’re going to be going from one customer base to two. That second base is investors, investment bankers and analysts, and if you’re not comfortable talking about the strategy and how you’re going to grow the business, and if you can’t deliver on what you say you can, becoming a public company is the worst thing you can do.”

Weinstein has taken more than 20 of her clients’ companies public. The lawyers have often worked with the company much longer than the investment bankers and accountants brought in, so she sees one of their main roles as making sure the prospectus — the company’s story and its strategy — is not exaggerated. “Often bankers try to pull you in to, ‘Where is your business going?’ whereas

we want to keep it factual. So our role is to make sure there’s a balance between what the bankers want to do, which is hype the company, and what we want to do, which is protect from liability.”

Not every lawyer working on an initial public offering is advising a client new to public markets. Going public is also a common exit strategy for private-equity firms. Other times, law firms aren’t working for the issuer, but rather the underwriters involved in the IPO.

Each brings its own set of stresses, says Desmond Lee of Osler, who has worked on at least seven IPOs including for the underwriters of Canada Goose Holdings Inc., which was taken public in 2017 by US private equity firm Bain Capital in a dual listing on the NYSE and TSX in March, raising about \$340 million. Stikeman Elliott acted for the company, as well as more recently for the underwriters on the mining IPO of Nexa Resources S.A.

Grewal of Stikeman Elliott says a large part of what the banks do is build and test financial models, the “basis upon which they and sophisticated investors determine pricing and how attractive the investment is in terms of their own and market needs.”

Once the right model has been determined, Lee of Osler, which also advised the underwriters on the Kinder Morgan and Jamieson IPOs, says underwriters’ counsel need to help make sure the company is “preparing itself and focusing on effective investor relations.” That means helping everyone get ready for road shows — rehearsing, preparing for questions, working on effective marketing materials and telling that story on the road. “As underwriters’ counsel we’re typically reviewing the materials, making sure the materials are consistent with what we say in the prospectus.”

So what keeps a business person doing an IPO up at night? Probably just about everything.

What keeps the lawyers up? Is it over-spinning the company’s story to the marketplace? Lee says no, it’s bigger and more basic than that: “In terms of what keeps *me* up at night, it tends to be focused on making sure we have a successful deal and a successful marketing process.”

Sandra Rubin is a Toronto-based writer and strategic consultant.

ANDREW PARKER
 > MCCARTHY TÉTRAULT LLP

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company not generating consistent revenue growth — and I would say that revenue better be growing at 30 per cent or more per year — that will be a very unsuccessful public company.”

Sometimes clients will argue they can do it as a reverse takeover and they have someone who will help them raise the money, but Weinstein is blunt in her ap-

IPO RESURGENCE

> In 2017, after years of inactivity, Canada witnessed the beginnings of a comeback for initial public offerings. Overall, equity markets saw 38 IPOs worth \$5.1 billion. That represents a major turnaround from the \$500 million in new issuances for 2016.

NUMBER AND GROSS VALUE OF IPOs: 2012 TO 2017

Year	TSX		TSX-V		TOTAL	
	#	\$bil	#	\$mil	#	\$bil
2017	17	4.7	10	327.1	38	5.1
2016	3	0.5	0	2.7	8	0.5
2015	13	3.9	2	3.9	22	3.9
2014	8	3.4	5	1.6	14	3.5
2013	18	2.7	10	1.1	30	2.7
2012	12	1.7	44	2.6	62	1.8

SOURCE: PWC SURVEY OF CANADIAN IPO CAPITAL MARKETS