

# Canadian Financing Opportunities for International Mining Companies

## Presentation and Overview

- TSX and TSX.V
- Recent Developments
- Public Offerings
- Legal and Other Considerations
- McMillan Binch Mendelsohn

Annex A - TSX and TSX.V Listing Requirements

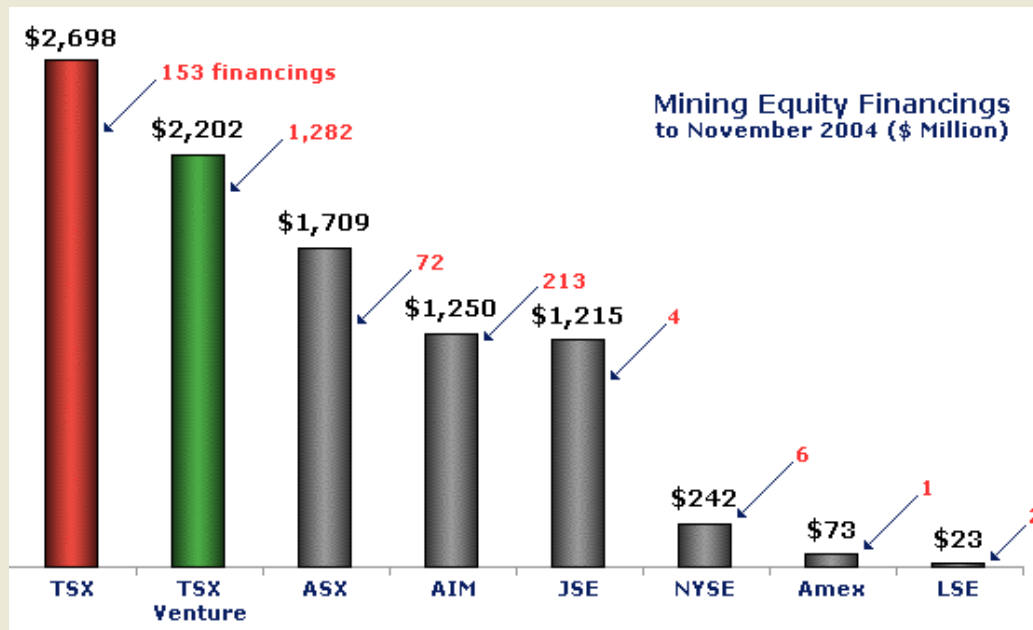
Annex B - Public Offerings in Canada

## TSX and TSX.V

- Canadian stock exchanges: Toronto Stock Exchange (TSX) (*senior market*) and TSX Venture Exchange (TSX.V) (*junior market*)
- In 2004, approximately C\$5 billion was raised for TSX and TSX.V listed mining companies representing approximately 46% of the equity capital raised for mining companies worldwide (*Source: Gamah International*)

## TSX and TSX.V

- Dollar value and number of mining equity financings completed in 2004



## TSX and TSX.V

- TSX: 219 mining companies with a market cap of C\$163 billion (approximately 10% of the TSX's market cap)
- TSX.V: 890 mining companies with a market cap of C\$12.2 billion (approximately 51% of the TSX.V's total market cap)
- In 2004, 37 new mining companies listed on the TSX and 27 on the TSX.V

## TSX and TSX.V

- Mining companies listed on the TSX and the TSX.V have projects located in countries around the world, including South America
- TSX and TSX.V listing requirements are summarized in Annex A

## TSX and TSX.V

- It is possible to list restricted shares (*ie, equity shares that have lesser voting rights than another class of shares*) but the restricted shares may be less attractive to potential investors
- Restricted shares are subject to specific TSX and TSX.V rules (including the requirement that restricted shares be entitled to “coat-tail” protection if a take-over bid is made for the other class of shares)

## Recent Developments

- The Canadian government has announced its intention to repeal, effective January 1, 2005, the limits on “foreign property” (eg, shares of foreign incorporated companies) that may be held by Canadian deferred income plans (eg, pension plans)
- If this change is implemented, there will be no limit on the amount that these plans may invest in the shares of foreign incorporated mining companies listed on most major stock exchanges

# Public Offerings

- Securities regulation in Canada is the responsibility of the ten provincial and three territorial governments
- Securities may not be offered to the public in Canada unless the offeror has first filed and cleared a prospectus with the securities regulatory authorities in the provinces and territories where the offering is to take place
- Public offerings in Canada are described in Annex B

## Public Offerings

- Typical public offering timetable:

Preparation of Preliminary Prospectus .....	1-2 Months
Review of Preliminary Prospectus and Clearance of Prospectus.....	1 Month
Pricing of Offering .....	Clearance of Prospectus
Closing .....	1 week after Pricing

## Legal and Other Considerations

- National Instrument 43-101  
All public disclosure by public companies:
  - with respect to mineral reserves and resources, must be made in accordance with approved industry standard definitions; and
  - with respect to mineral projects, including mineral reserves and resources, must be based on a written technical report prepared by or under the supervision of a a qualified engineer or geoscientist

## Legal and Other Considerations

- MJDS
  - The Canada-US Multijurisdictional Disclosure System (MJDS) permits substantial Canadian incorporated public companies to offer securities in the US using a Canadian prospectus with prescribed additional US disclosure
  - Except in special circumstances, the Canadian prospectus is reviewed only by Canadian securities regulatory authorities

## Legal and Other Considerations

- Corporate governance
  - Canada has introduced corporate governance rules for Canadian public companies (including foreign incorporated companies listed in Canada)
  - The rules are similar to the US rules introduced in connection with Sarbanes-Oxley
  - Unlike US, most of the Canadian rules are non-prescriptive, other than those dealing with auditors and audit committees

## McMillan Binch Mendelsohn (MBM)

- MBM is a leading Canadian business law firm with approximately 200 lawyers and offices in Toronto and Montreal
- MBM's Mining Group offers a comprehensive range of legal services to mining and processing companies in Canada and internationally
- The Group has strong contacts with law firms and has represented issuers located throughout South America

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# Listing Requirements for Exploration & Mining Companies

Minimum Listing Requirements	TSX Venture TIER 2	TSX VENTURE TIER 1 Exploration	TSX Non-exempt Development Stage or Producing	TSX Non-exempt Senior Producer	TSX Exempt
<b>Property Requirements</b>	Significant Interest in Qualifying Property or at discretion of Exchange, hold rights to earn a Significant Interest in Qualifying Property with \$100,000 expenditures in the past 3 yrs. by applicant issuer	Material Interest in a Tier 1 Property(5)	Advanced Exploration Property(3) Minimum 50% ownership in the property(4)	3-years proven & probable reserves as calculated by Independent Qualified Person (if not in production, a production decision made)	3-years proven & probable reserves as calculated by independent Qualified Person
<b>Recommended Work Program</b>	\$200,000 on the Qualifying Property as recommended by Geological Report	\$500,000 on the Tier 1 Property(5) as recommended by Geological Report	\$750,000 on Advanced Exploration Property as recommended in Independent Technical Report	Bringing the mine into commercial production	Commercial level mining operations
<b>Working Capital and Financial Resources</b>	Adequate Working Capital and Financial Resources including: Work program + 12 mos. G&A(1) + 12 mos. property payments to keep Qualifying Property and "principal properties"(2) in good standing +\$100,000 unallocated	Adequate for: Work program + 18 mos. G&A(1) + 18 mos. property payments to keep Tier 1 Property(5) and "principal properties"(2) in good standing +\$100,000 unallocated	Minimum \$2.0 million working capital, but sufficient to complete recommended programs, plus 18 months G&A, anticipated property payments and capital expenditures. No debt.	Adequate funds to bring the property into commercial production; plus adequate working capital for all budgeted capital expenditures and to carry on the business. Appropriate capital structure.	
<b>Net Tangible Assets Earnings or Revenue</b>	No requirement No requirement	\$2,000,000 No requirement	\$3,000,000 No requirement	\$4,000,000 Evidence indicating a reasonable likelihood of future profitability supported by a feasibility study or historical production and financial performance	\$7,500,000 Pre-tax profitability from ongoing operations in last fiscal year; pre-tax cash flow of \$700,000 in last fiscal yr & average of \$500,000 for past 2 fiscal yrs
<b>Other Criteria</b>	Geological Report recommending completion of work program	Geological Report recommending completion of work program or positive feasibility study or production levels exhibiting a likelihood of positive cash flow program	Up-to date, comprehensive Technical Report prepared by independent QP 18 month projection (by quarter) of sources & uses of funds, signed by CFO	Up-to date, comprehensive Technical Report prepared by independent QP 18 month projection (by quarter) of sources & uses of funds, signed by CFO	Up-to date, comprehensive Technical Report prepared by independent QP
<b>Distribution, Market Capitalization and Public Float</b>	\$500,000 publicly held 500,000 public free trading shares 200 public holders with Board Lots and no Resale Restrictions 10% Public Float min 20% issued and outstanding shares publicly held	\$1,000,000 publicly held 1,000,000 free trading public shares 200 public holders with Board Lots and no Resale Restrictions 10% Public Float min 20% of issued and o/s shares publicly held	\$4,000,000 publicly held 1,000,000 free trading public shares 300 public holders with Board Lots	\$4,000,000 publicly held 1,000,000 free trading public shares 300 public holders with Board Lots	\$4,000,000 publicly held 1,000,000 free trading public shares 300 public holders with Board Lots
<b>Sponsorship</b>	Sponsor Report may be required (not required for IPO's or certain other exemptions for North American properties)	Sponsor Report may be required (not required for IPO's or certain other exemptions for North American properties)	Required (may be waived if sufficient previous 3rd party due diligence)	Required (may be waived if sufficient previous 3rd party due diligence)	Not Required

- (1) "G&A" means general and administrative expenses.
- (2) "principal properties" means any other properties of the Issuer in respect of which 20% or more of the available funds will be spent in the next 18 months
- (3) "advanced exploration property" refers to one on which a zone of mineralization has been demonstrated in three dimensions with reasonable continuity indicated. The mineralization identified has economically interesting grades.
- (4) A company must hold or have the right to earn and maintain a 50% interest in the qualifying property. Companies holding less than a 50% interest, will be considered on a case-by-case basis looking at program size, stage of advancement of the property and strategic alliances.
- (5) "Tier 1 Property" means a property that has substantial geological merit and is:
  - (i) a property in which the Issuer holds a material interest and;
  - (ii) a property on which previous exploration, including detailed surface geological, geophysical and/or geochemical surveying and at least an initial phase of drilling or other detailed sampling (such as trench or underground opening sampling), has been completed and;
  - (iii) an independent Geological Report recommends a minimum \$500,000 Phase 1 drilling (or other form of detailed sampling) program based on the merits of previous exploration results; or an independent, positive, feasibility study demonstrates that the property is capable of generating positive cash flow from ongoing operations.

### Mining Disclosure Standards

National Instrument 43-101 is the Canadian Securities Administrators' ("CSA") policy that governs the scientific and technical disclosure by mining companies and the preparation of technical reports. It covers oral statements as well as written documents and websites. NI 43-101 requires that all technical disclosure be based on advice by a "qualified person". Issuers are required to make disclosure of reserves and resources using definitions approved by the Canadian Institute of Mining, Metallurgy and Petroleum, except for disclosure pertaining to coal.

### Foreign Scientific and Technical Reports

NI 43-101 permits issuers to report resources and reserves under three foreign codes: the JORC Code, USGS Circular 831 and the IMMM system. To report using another foreign code, such as the South African Code for Reporting of Mineral Resources and Mineral Reserves (the "SAMREC Code"), currently the issuer must apply to securities regulators for exemptive relief.

### Technical Reports by Foreign Qualified Authors

Technical reports that accompany a listing application must be prepared by a qualified person who is a member of an approved professional association. Licences, certification or membership in the ASBOG, AIPG, AusIMM; IMMM; AIG; SAIMM; SACNASP; or IGI will normally be acceptable. CSA has published an FAQ that provides details on the "Qualified person" equivalents from other jurisdictions and other resource and reserve definitions that are acceptable with a brief reconciliation

### NI 43-101 is available at:

[http://www.osc.gov.on.ca/en/Regulation/Rulemaking/Rules/noticeRule\\_43101.pdf](http://www.osc.gov.on.ca/en/Regulation/Rulemaking/Rules/noticeRule_43101.pdf) and the Frequently Asked Questions at [http://www.osc.gov.on.ca/en/Regulation/Rulemaking/Notices/csanotices/2003/csan\\_43-302\\_faq-43-101\\_20030124.htm#faq](http://www.osc.gov.on.ca/en/Regulation/Rulemaking/Notices/csanotices/2003/csan_43-302_faq-43-101_20030124.htm#faq)



# Canada

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### Statutes and regulations

- 1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

Securities offerings in Canada are governed by:

#### Canadian securities laws

Securities regulation in Canada is the responsibility of the provincial and territorial governments. Each of Canada's 10 provinces and three territories has its own legislation and securities regulatory authority that regulates, amongst other things, public offerings, disclosure and takeover bids. The provinces of Ontario and Québec have additional rules (including approval by a majority of the minority shareholders and independent valuation of the subject matter of the transaction) designed to ensure fair treatment of minority shareholders in connection with certain types of transactions involving related parties (which include the holders of 10 per cent or more of the voting securities of a company).

The provincial and territorial securities regulatory authorities coordinate their activities through the Canadian Securities Administrators (CSA), a forum for developing a harmonised approach to securities regulation across the country. The CSA has a system of mutual reliance whereby one securities regulatory authority acts as the lead authority for reviewing prospectuses and other regulatory filings of Canadian issuers.

The Ontario Securities Commission (OSC) is generally regarded as the lead securities regulatory authority in Canada.

#### Self-regulatory organisations

There are two principal stock exchanges in Canada: the senior market, the Toronto Stock Exchange (TSX) and the junior market, the TSX Venture Exchange (TSXV). The exchanges set minimum listing standards for companies seeking an initial listing and ongoing rules applicable to listed companies, including prior notification and approval for new issues of securities.

The Investment Dealers Association of Canada (IDA), Market Regulation Services Inc (RS) and the Mutual Fund Dealers Association of Canada (MFDA) prescribe rules for investment dealers involved in the distribution of securities, including capital adequacy and business and trading conduct.

The Canadian Depository for Securities Limited handles equity clearing and settlement functions.

#### Multi-jurisdictional disclosure system

Many Canadian companies are able to take advantage of the Canada/US Multi-jurisdictional Disclosure System (MJDS). This unique regime allows eligible Canadian issuers to access US public markets using Canadian disclosure documents (subject only

to review by Canadian securities regulatory authorities) without becoming subject to the US domestic registration and reporting system. Also, in many cases, Canadian continuous reporting documents can be used to satisfy US continuous reporting obligations.

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### Public offerings

- 2 What regulatory or stock exchange filings are required to be made in connection with a public offering of securities? What information is required to be included in such filings and/or made available to potential investors in connection with a public offering of securities?

See 3 below.

- 3 What are the steps of the registration/filing process? Can an offering commence while review of the offering by the applicable regulatory authority is still in progress? How long does it typically take for the review process to be completed?

Under Canadian securities law, unless a statutory exemption is available, or a discretionary exemption has been granted, a person may not distribute securities unless they have filed and cleared a prospectus with the securities regulatory authorities in the provinces and territories where they intend the distribution to take place. Distribution of securities includes issuing previously unissued securities, selling previously issued securities from a holding that materially affects control of the issuer (generally a holding of more than 20 per cent of the outstanding voting securities of the issuer) or reselling securities acquired pursuant to an exemption.

An issuer who wishes to distribute securities pursuant to a prospectus must prepare and file a preliminary prospectus with the applicable securities regulatory authorities. After the preliminary prospectus has been reviewed by the authorities, an issuer must file a final prospectus addressing any deficiencies identified in the review. When it files the preliminary prospectus, the issuer, in accordance with prescribed rules, selects a securities regulatory authority to act as the lead authority to review and clear the preliminary prospectus. After it reviews the preliminary prospectus, the lead authority sends a comment letter to the issuer identifying the amendments that must be made to the preliminary prospectus before a receipt for the final prospectus will be issued. The other securities regulatory authorities may provide additional comments within a prescribed period after the comment letter of the lead authority has been sent. Normally, an offering commences with the filing of the preliminary prospectus.

**Long-form prospectus offerings**

Canadian securities law prescribes the information that must be included in the final prospectus. A preliminary prospectus contains all the information that must be included in the final prospectus but the price of the security being offered and related information.

In general, an issuer of securities is required to provide a complete, accurate and plain description of all information, both positive and negative, that prospective purchasers might reasonably require to make an informed investment decision. This includes:

- a description of the issuer's business and assets;
- a summary of the issuer's capital structure, equity and debt;
- a description of the securities being offered;
- management's discussion and analysis of financial condition and results of operations (MD&A);
- a description of relationships with related parties;
- information relating to directors and officers, including executive compensation;
- a description of the use of proceeds;
- a description of material legal proceedings; and
- risk factors.

Financial statements of the issuer must also be provided, including an income statement, a statement of surplus, a statement of changes in financial position, and a balance sheet for specified periods and at specified dates. In addition, separate financial statements for acquired businesses, or pro forma financial information reflecting business dispositions, may be required if an issuer has made significant acquisitions, or dispositions, during its last three complete financial years.

The long-form prospectus review process typically takes between three and four weeks to complete.

**Expedited prospectus offerings*****Short-form prospectus offerings***

Canadian securities law permits eligible issuers to sell securities more quickly using a short-form prospectus. In general an eligible issuer is an issuer that has been a reporting issuer for at least 12 months (ie has either previously distributed securities pursuant to a prospectus or a takeover bid circular, or whose securities are listed on the TSX or TSXV) and meets specified minimum market value and public float tests.

One of the principal components of the short-form prospectus system is the annual information form (AIF), a disclosure document that reporting issuers must prepare and file annually with the securities regulatory authorities. An AIF contains the same information that the issuer would provide in a long-form prospectus. The securities regulatory authorities usually review the reporting issuer's initial AIF, and may periodically review subsequent AIFs.

Generally, a short-form prospectus contains information about the securities being offered. It also incorporates, by reference, all the information about the business and assets of the issuer contained in the issuer's current AIF, financial statements, MD&A and management proxy circular, as well as all subsequent material change reports from the issuer's public file with the securities regulatory authorities.

The short-form prospectus review process typically takes five working days to complete.

***Bought deal financings***

Issuers that are eligible to use a short-form prospectus often use a technique called the 'bought deal' to issue securities.

Under bought deal financing, the investment dealers commit to purchase securities from the issuer at an agreed price before or when filing a short-form preliminary prospectus (ie without the usual marketing period). Although the underwriter faces more risk than under a traditional marketed offering, the short time frame for reviewing the preliminary short-form prospectus reduces the chances of a significant fall in the market price of the purchased securities between the time the underwriters agree to buy the securities and the time that the securities can be distributed under the final short-form prospectus, (see 12 below).

***Special warrant financings***

Issuers that are not eligible to use a short-form prospectus often use a technique called the 'special warrant' to issue securities.

Under special warrant financing, the issuer issues special warrants (or other forms of convertible securities) for cash in a transaction that is exempt from the prospectus requirements (usually pursuant to the accredited investor exemption described in 7 below). The issuer then prepares and files a preliminary prospectus, and upon issue of a receipt for the final prospectus the special warrants are converted into the underlying securities (typically, common shares). The distribution qualified by the final prospectus is the conversion of the special warrants into common shares so that the common shares are freely tradable. In effect, special warrant financing allows the issuer to carry out a private placement for cash, and to thereafter deliver freely trading securities to the purchasers of special warrants by way of a prospectus.

***Shelf prospectus offerings***

The shelf prospectus system permits issuers who are eligible to use a short-form prospectus to use a shelf prospectus that will allow them to complete a series of distributions of securities over a two-year period. The shelf prospectus system is typically used for offerings of debt securities.

In order to use the shelf prospectus system, the issuer must file a short-form base shelf prospectus containing all of the information required for a short-form prospectus, other than the terms of each particular offering to be made over the two-year period. The base shelf prospectus must also set out the aggregate amount of securities to be offered over the two-year period. To complete a particular offering of securities, the issuer prepares and delivers a prospectus supplement to purchasers, containing the terms of the offering, and files the supplement with the securities regulatory authorities.

**MJDS**

MJDS permits substantial Canadian issuers to offer securities in the US using a Canadian prospectus with certain prescribed additional US disclosure. An MJDS offering may be made as part of an existing Canadian offering or solely within the US. Except in special circumstances, the US Securities and Exchange Commission (SEC) does not review prospectuses for MJDS offerings, and will generally clear such offerings immediately after the prospectuses have been cleared in Canada.

Canadian issuers wishing to use MJDS must meet certain eligibility requirements, including:

- they must be a Canadian corporation;
- they must have been subject to the continuous disclosure requirements of one or more of the Canadian securities regulatory authorities for at least 12 months, and be in compliance with these requirements; and
- they must meet specific minimum market value tests.

**Stock exchange listing**

To obtain a listing on the TSX or TSXV, an issuer must complete and file a listing application on a prescribed form with the exchange. The form requires detailed disclosure of the issuer's history, business, authorised and issued share capital, share distribution, principal shareholders and material properties, investments and subsidiaries. Much of this disclosure may be incorporated from a prospectus. The application will be considered in the context of the exchange's listing criteria.

If accepted for listing, the issuer must agree to enter into a listing agreement with the exchange, pursuant to which it agrees to comply with the rules, regulations and by-laws of the exchange. These include rules requiring the issuer to obtain the exchange's approval prior to the issuing of new securities, to notify the exchange in advance of any declaration of dividends, and to comply with the exchange's disclosure policies.

- 4 What, if any, are the publicity restrictions applicable to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

Canadian securities laws impose strict limitations on the issuer's publicity during the period of a securities offering. The general rule is that securities should be marketed using only the preliminary prospectus. Accordingly, any advertising or marketing activity that could reasonably be considered to be in furtherance of the offering is prohibited until a receipt for a final prospectus is issued. The publication of research reports by an investment dealer participating in the offering must cease either when the dealer is given a mandate to commence work on the offering or when the dealer is invited to participate in the underwriting syndicate.

- 5 Are there any special rules (for example relating to the issuance of new securities or the preferential subscription rights of existing security holders) that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

Generally, there is no distinction between distributions of debt and equity securities or between primary and secondary offerings, except for the type of information required to be provided. Unless specifically required by the articles of the issuer (which is rare), holders of the issuer's securities do not have preferential rights in connection with an offering of securities. Also, the articles of an issuer may permit the issuance of specified classes of securities (eg preferred shares) on such terms as the issuer's board of directors may determine. The liability issues for sellers of securities in a secondary offering are described in 18 below.

- 6 What is the typical settlement process for sales of securities in a public offering?

Public offerings in Canada are typically underwritten (ie a syndicate of investment dealers is formed to purchase the securities for resale to the public). After the preliminary prospectus is cleared by the securities regulatory authorities, and subject to satisfactory pricing terms, the dealers will commit, as principals, to purchase the securities at the public offering price for their own account, and will earn a commission for doing so. The terms of purchase are set out in an underwriting agreement. Following the execution of the underwriting agreement, the final prospectus is filed with the securities regulatory authorities and the closing of the purchase is typically scheduled for five to seven business days after the receipt for the final prospectus is issued. Purchasers have a

statutory right of withdrawal exercisable in the two days after they receive the final prospectus.

**Private placements**

- 7 Are there specific rules for the private placement of securities? What procedures must be implemented to effect a valid private placement?

Canadian securities law provides a number of exemptions from the prospectus requirements and thereby permits private placements in specified circumstances. Generally there are no mandatory procedures that must be implemented to effect a valid private placement, except for a requirement to file notice of the placement and pay the required fee, and as noted in 8 below.

There are two groups of prospectus exemptions: securities-based exemptions and transaction-based exemptions. Of the former, the most important are debt securities of high creditworthy issuers (eg Canadian and foreign governments, banks and trust and insurance companies). Of the latter, the most important (in most provinces and territories) are the accredited investor exemption and the closely held issuer exemption.

In general, in addition to governments, banks and trust issuers, and insurance companies, an accredited investor includes an individual who, together with his or her spouse, has net financial assets before taxes in excess of C\$1 million or net income before taxes in excess of C\$300,000 (C\$200,000 on his or her own) and a partnership, trust or company that has net assets of at least C\$5 million.

In general, a closely held issuer is an entity whose shares or equity interests are subject to restrictions on transfer (requiring the approval of the board of directors or shareholders of the entity or their equivalent) and whose outstanding securities are owned by not more than 35 persons, excluding accredited investors and current and former directors, officers and employees of the entity or an affiliate of the entity.

- 8 What information is required to be made available to potential investors in connection with a private placement of securities?

Canadian securities law generally does not prescribe what an offering memorandum should contain. However, if an issuer distributes securities relying on an exemption from the prospectus requirements, and provides an offering memorandum to prospective purchasers (ie a document describing the business and affairs of the issuer) for legal or business reasons, the purchasers are entitled to the same statutory right of action as they would have had if they purchased the securities under a prospectus (see 'Statutory civil liability' in 18 below). Securities law requires the issuer to describe the statutory right of action in the offering memorandum.

- 9 Do any restrictions apply to the transferability of securities acquired in a private placement? Are there any mechanisms used to enhance the liquidity of securities sold in a private placement?

If a person distributes securities relying on an exemption from the prospectus requirement, the securities usually will not be freely tradable in the secondary market unless the issuer of the securities is, or becomes, a reporting issuer, and the purchaser holds the securities for a prescribed period (typically four months). Trades in the securities before the end of the prescribed period may only be made pursuant to a further exemption from the prospectus requirement. See also 'Special warrant financings' in 3 above.

### Offshore offerings

- 10** What specific rules, if any, apply to offerings of securities outside the home jurisdiction in relation to an issuer in your jurisdiction?

Under Canadian securities law, there is currently no equivalent to Regulation S of the SEC dealing with the extra territorial application of the registration requirements of US securities laws. However, the OSC has commented that a distribution outside of Canada by a Canadian issuer might be a distribution in Ontario requiring a prospectus or reliance on an exemption from the prospectus requirements. This is dependent on the connecting factors with Ontario (eg the existence of a trading market in Ontario, the likelihood that the securities will come to rest in Ontario and the method of distribution of the securities). In general, if reasonable steps are taken by the issuer and other participants in the distribution to ensure that the securities come to rest outside Ontario, no prospectus or exemption from the prospectus requirements is required.

The CSA has proposed a multilateral instrument that would address the subject of distributions outside Canada. The instrument is currently the subject of industry review and comment.

### Particular financings

- 11** What special considerations, if any, apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Canadian issuers may offer convertible securities, exchangeable securities, warrants and depositary receipts in addition to other more common types of securities. The methods of distributing these types of securities are similar to those described in 3 above.

Rights offerings are less common in Canada than in jurisdictions where shareholders have preferential rights in connection with offerings of securities. Rights offerings are, however, used in Canada as part of capital reorganisations in financial distress situations or where there is a significant shareholder that wishes to maintain its percentage equity interest.

In a rights offering, shareholders receive rights to subscribe to additional securities of the issuer upon payment of a fixed subscription fee. Rights holders may elect to exercise or sell their rights, which are typically listed on the stock exchange. A rights offering must be open at least 21 days. If a third party has agreed to acquire any securities that are not subscribed for pursuant to the rights offering, rights holders must have an additional subscription privilege before the third party may exercise its rights.

### Underwriting arrangements

- 12** What types of underwriting arrangements are commonly used?

There are two types of arrangements used in connection with Canadian public offerings: agency or 'best efforts' arrangements (where investment dealers agree to use their best efforts to sell the securities on behalf of the issuer at a specified price and pass on the proceeds, net of commission, to the issuer) and underwritten arrangements.

In general there are two types of underwritten arrangements:

- Marketed arrangements: where investment dealers agree to purchase the securities from the issuer at the time of filing the final prospectus (ie after the offering has been marketed) at the public offering price for their own account and at their own risk, and they earn a commission for doing so
- Bought deal arrangements: where investment dealers agree to

purchase the securities from the issuer before the filing of the preliminary prospectus (ie before the offering has been marketed) at the public offering price for their own account and at their own risk, and they earn a commission for doing so

- 13** What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

The underwriting agreement typically contains provisions with respect to indemnity, termination rights and over-allotment options. Success fees are unusual.

### Indemnities

Underwriters are typically indemnified for losses arising as a result of:

- a misrepresentation in the prospectus and related documents. A misrepresentation is an untrue statement of material fact or an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in light of the circumstances in which it was made. A material fact is a fact that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of an issuer's securities;
- non-compliance with securities law; and
- any order or investigation based on a misrepresentation or alleged misrepresentation in the prospectus and related documents.

The enforceability of the underwriters' indemnity has not been tested in Canada. Courts in the US have, however, held that the underwriters' indemnity is not enforceable in circumstances of willful misconduct or negligence on the part of the underwriters. For this reason, Canadian underwriting agreements have followed the US practice of introducing a contribution clause, which attempts to apportion responsibility for losses between the underwriter and the issuer on the basis of the relative benefit received by them, and, in some cases, the relative fault between them. The contribution clause applies only if the underwriters' indemnity is determined not to be enforceable.

### Termination rights

Underwriters typically retain the right to terminate an underwriting agreement in the following circumstances:

- An investigation or order that prevents or restricts the distribution of the offered securities or trading in securities of the issuer
- New legislation or any occurrence of national or international consequence that, in the judgment of the underwriters, will seriously affect either the financial markets or the issuer's business (the so-called 'disaster out')
- The state of the financial markets is such that, in the judgment of the underwriters, the offered securities cannot be profitably marketed (the so-called 'market out')
- The occurrence of a material change (ie any change in the issuer's business, operations or capital that would reasonably be expected to have a significant effect on the market price or value of the issuer's securities), or a change in a material fact that, in the judgment of the underwriters, will materially and adversely affect the market price or value of the offered securities (the so-called 'material change out')

Other typical 'outs' include a change in the rating of debt securities, and a change in the expected tax treatment of the securities offered.

In the case of bought deal underwriting agreements, termination rights do not typically include the market out.

The inclusion or exclusion of the disaster out and the market out clauses may affect the underwriter's margin requirements applicable to their underwriting commitment.

#### Over-allotment options

Underwriters may also be given the right (an over-allotment option or 'greenshoe') to purchase additional securities (up to 15 per cent of the securities offered under the prospectus) for market stabilisation purposes and to cover over-allotments (ie sales in excess of the number of securities that the underwriters are obliged to purchase pursuant to the underwriting agreement).

#### 14 What additional regulations, if any, apply to underwriting arrangements?

The IDA, RS and MFDA prescribe certain rules for investment dealers involved in a distribution of securities, including capital adequacy and business and trading conduct.

### Ongoing reporting obligations

#### 15 In what instances does an issuer of securities become subject to ongoing reporting obligations?

An issuer of securities becomes subject to ongoing reporting obligations when it distributes securities pursuant to a prospectus or takeover bid circular or lists its securities on the TSX or TSXV (ie becomes a reporting issuer).

#### 16 What information is a reporting company required to make available to the public?

#### Annual and quarterly reports

Reporting issuers are required to prepare, file with the securities regulatory authorities and publicly disclose interim quarterly unaudited and annual audited financial statements and related MD&A. They are also required to prepare and file with the securities regulatory authorities an annual AIF setting out all material information with respect to their business, operations or capital that would reasonably be expected to have a significant effect on the market price or value of their securities.

#### Material change

Reporting issuers are required to make immediate public disclosure of any material change, followed by a filing with the securities regulatory authorities.

#### Shareholder meetings

Reporting issuers are required to prepare a management information circular in connection with the solicitation of proxies for the annual meeting of shareholders. In addition to information regarding the business to be concluded at the meeting (eg information with respect to nominees for election as directors), the circular must include prescribed information with respect to:

- compliance with corporate governance best practices prescribed by the CSA;
- shareholdings of significant shareholders; and
- director and senior officer compensation and indebtedness to the issuer, including a report of the board, or the board compensation committee, on executive compensation.

#### Insiders

Insiders (ie directors, senior officers and shareholders owning 10 per cent or more of the voting securities) of a reporting issuer are required to disclose changes in their share ownership.

#### Liability for ongoing disclosure

Currently, reporting issuers and their directors do not have any statutory liability for misrepresentations in the issuer's continuous disclosure documents, unless they are incorporated, by reference, in a prospectus or other offering document. See, however, 'Liability for misrepresentations in public disclosure documents' in 20 below.

#### Foreign reporting issuers

Reporting issuers incorporated or organised in certain foreign jurisdictions (eg Australia, France, Germany, Italy, the Netherlands, Spain, Sweden, Switzerland and the UK), may use their home country disclosure documents to comply with Canadian ongoing reporting obligations if less than 10 per cent of their shareholders are resident in Canada.

### Anti-manipulation rules

#### 17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

Throughout the period of distribution of securities by an issuer, underwriters may not bid for or purchase any of the securities offered by the issuer. This restriction is subject to certain exceptions, provided that the bid or purchase is not engaged in for the purpose of creating actual, or apparent, active trading in the securities or raising their price. The exceptions include: a bid or purchase permitted under the rules of the TSX or the TSXV and the Universal Market Integrity Rules for Canadian market places relating to market stabilization; passive market making activities; and, a bid or purchase made for, or on behalf of, a customer where the order was not solicited during the period of distribution. Pursuant to the first exception, the underwriters may over-allot or effect transactions that stabilise, or maintain, the market price of the securities at levels other than those that might otherwise prevail on the open market.

### Liabilities and enforcement

#### 18 What are the most common bases of liability for a securities transaction?

#### Criminal liability

A person who makes a misrepresentation in a prospectus is guilty of an offence unless the person did not know, and, in the exercise of reasonable diligence, could not have known that they had made a misrepresentation. The offence is punishable by a fine of not more than C\$5 million and/or imprisonment for a term of not more than five years less a day. Any director or officer of the person who authorises, permits or acquiesces to the making of the misrepresentation is also guilty of an offence, and on conviction is liable to the same penalties.

#### Statutory civil liability

A purchaser of securities under a prospectus that contains a misrepresentation is deemed to have relied on the misrepresentation and has a right of action for damages against the issuer, the selling security holder (in the case of a secondary offering) the underwriters and the directors of the issuer and the officers of the issuer

who signed the prospectus, or a right of rescission against the issuer, the selling shareholder or the underwriters.

The right of rescission must be exercised within 180 days after the date of the purchase. An action for damages must be commenced by the earlier of 180 days after the purchaser first becomes aware of the misrepresentation and three years after the date of the purchase.

The underwriters, the directors and the officers of the issuer are not liable for damages for a misrepresentation in a prospectus unless they either believed that there had been a misrepresentation or they failed to conduct such reasonable investigation as to provide reasonable grounds for a belief that there had been no misrepresentation (the so called 'due diligence defence'). In determining what constitutes reasonable investigation, the standard is that of a prudent person in the particular circumstances.

Any liability for damages may not exceed the purchase price paid for the securities.

#### Common law liability

A purchaser of securities may also have a right of action for common law damages against any person whose misrepresentation induced the purchase, whether the misrepresentation was made in a prospectus or otherwise. This right of action, which has been rarely used, is not subject to the limitation periods contained in securities law.

**19** What are the main mechanisms for seeking remedies and sanctions for improper securities activities (for example, civil litigation, administrative proceedings or criminal prosecution)?

The main mechanisms for seeking remedies and sanctions for improper securities activities are administrative proceedings, initiated by the securities regulatory authorities, and civil litigation, by way of class action proceedings. Criminal prosecution is rare.

#### Current proposals for change

**20** Are there current proposals to change the regulatory or statutory framework governing securities transactions?

#### Corporate governance

The CSA has introduced a series of national instruments and policies (CSA Rules) that affect the corporate governance of reporting issuers. The CSA Rules closely follow the US Sarbanes-Oxley Act of 2002 and the consequential rules and guidelines established

by the SEC and US stock exchanges. The CSA Rules deal with:

- oversight of external auditors, including pre-approval of audit and non-audit services, prohibited services, audit partner and audit review partner rotation and cooling off periods for hiring employees of external auditors;
- CEO and CFO certification with respect to the accuracy of public disclosure and filings (eg annual and interim financial statements and related MD&A), disclosure controls and procedures and internal control over financial reporting;
- composition, authority and responsibilities of audit committees, including the requirements that reporting issuers have an audit committee (composed of at least three directors, all of whom are independent and financially literate), and an audit committee charter giving the audit committee responsibility for, amongst other things: appointing the external auditors and setting their compensation (subject to shareholder approval); overseeing the work of the external auditors, including the resolution of disagreements between management and the external auditors; pre-approving audit and non-audit services; reviewing all public disclosure of financial information; and establishing procedures for dealing with complaints with respect to accounting or auditing matters and whistleblowing;
- continuous disclosure obligations including earlier filing of interim and annual financial statements and related MD&A, and expanded interim and annual MD&A; and
- disclosure of whether reporting issuers have adopted the non-prescriptive corporate governance best practices recommended by the CSA (and, if not, how their practices nonetheless meet the objectives of the best practices), including: having a majority of independent directors; appointing a chair who is an independent director or, where this is not possible, a 'lead' director who is an independent director; adopting a charter setting out the responsibilities and operating procedures of the board of directors; adopting a written code of business conduct and ethics; and, establishing compensation and nominating committees composed entirely of independent directors and charters for those committees.

Most of the CSA Rules are currently in effect. The remainder will come into effect in 2005 and 2006. Public companies listed on the TSXV are exempt from some of the CSA Rules.

#### Liability for misrepresentations in public disclosure documents

The province of Ontario intends to amend Ontario's securities

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law to make reporting issuers and their directors statutorily liable, subject to a due diligence defence for directors, for misrepresentations contained in the issuer's continuous disclosure documents. Currently, reporting issuers and their directors are liable only for misrepresentations contained in prospectuses and other offering documents.

**Restrictions on foreign property held by tax-exempt investors**

In its recent budget, the federal government has proposed removing, effective 1 January 2005, the limits on foreign property that may be held by Canadian pension and other retirement plans (which represent a significant pool of capital in Canada). If the proposed changes are made, Canadian pension and other retirement plans may invest freely in the securities of foreign companies listed on recognized stock exchanges outside Canada.