# Guide to Canadian Private Placements

## Navigating Wrappers, Exemptions and Other Canadian Requirements

By Rob Lando

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# Introduction

In most cases you no longer need a Canadian private placement supplement (or **Wrapper**) to attach to the front of a non-Canadian prospectus or offering memorandum in order to make private placement sales in Canada, thanks to exemptions from a number of Canadian requirements that came into effect on September 8, 2015 (collectively, the **Wrapper Exemption**).

As of September 8, 2015, in most cases you will no longer need a Canadian Wrapper.

However, in some situations you will still need a Wrapper. And even if a Wrapper is not required, it is still necessary to consider and comply with all other applicable Canadian securities law requirements. For example:

- Multilateral Instrument 51-105 (**MI 51-105**) of the Canadian Securities Administrators still applies in most provinces of Canada, although many have adopted exemptions to facilitate private placements of foreign securities. Generally, offers and sales may be made to **"permitted clients"** in the provinces of Ontario, Québec, Alberta and British Columbia (and some other provinces) by a registered Canadian dealer or exempt international dealer without raising concerns. However, an offer or sale of a security in some other provinces may, in the wrong circumstances, still trigger ***permanent public company reporting obligations*** for the issuer.
- If the issuer is an **investment fund** (as defined in Canada), it is still necessary for the "manager" of that investment fund to register as a non-resident investment fund manager, or make filings to claim (and comply with) an exemption, before making sales (and in some cases, even offers) of securities in certain provinces of Canada.
- If the issuer is a **limited partnership**, it must be registered to carry on business as an extra-provincial (foreign) limited partnership before it can distribute securities in Ontario and several other provinces.
- If the issuer is conducting a ***rights offering***, it will be necessary to make sure that all of the Canadian securities law requirements for a rights offering are followed unless all Canadian shareholders are precluded from *receiving* any of the rights being distributed to shareholders generally (note that it is the *receipt of the right* by a shareholder in Canada that gives rise to Canadian compliance concerns, not the *exercise of the right* as in most other countries).

- If the offering is ***undocumented***, the Wrapper Exemption will not be available, and it will still be necessary to disclose certain relationships potentially giving rise to conflicts of interest between the dealers on the one hand, and the issuer or any selling security holder on the other hand. This disclosure requirement may be satisfied through the use of a representation letter or separate notice containing the prescribed Canadian disclosure.
- If there is a ***directed share program*** for employees, officers and directors, assistance from Canadian counsel will be required to prepare a Canadian wrapper for this component of the offering. Note that typically Canadian participation in a directed share program must be limited to employees, officers and directors of the issuer and its affiliates, as the available Canadian exemptions will not generally be broad enough to allow for participation by friends and family members.

Further, in order to rely on the Wrapper Exemption when it is available, you need to make sure that each purchaser in Canada has received a notification with prescribed disclosure to alert the purchaser to the fact that the Wrapper Exemption is being relied on. This requirement can be satisfied through one or more of the following:

- A one-time prospective notice that is delivered to the purchaser before making any Canadian private placement sales, which is intended to cover all sales made by the same dealer going forward. Canadian counsel likely will have previously provided advice to the dealer involved regarding the form and content of this one-time notice;
- A stand-alone supplemental document that is delivered to the purchaser together with a non-Canadian prospectus or offering memorandum for a particular offering, but is not actually attached to the non-Canadian offering document (which we are calling a **Separate Deal Notice**), substantially in the form of Schedule A attached; or
- A notice containing the required Canadian disclosure, embedded in a non-Canadian offering memorandum or prospectus, usually as part of the "Underwriting," "Plan of Distribution" or "Notice to Investors" section (which we are calling an Embedded Notice), substantially in the form of Schedule B attached.

This Guide will help you determine whether you can sell securities into Canada on a private placement basis (that is, in situations when no prospectus is being filed for review by Canadian securities regulatory authorities) without engaging Canadian counsel for assistance before making offers or sales in Canada.

However, you may still need the prior assistance of Canadian counsel in the following cases:

- preparing a Wrapper if the Wrapper Exemption isn't available;
- advising whether sales can be made in Canadian provinces other than just Ontario, Québec, Alberta or British Columbia (and some other provinces,) or by sellers other than registered Canadian dealers or exempt international dealers, without triggering the application of MI 51-105 and causing the issuer to become subject to Canadian public company reporting obligations involuntarily as a result of Canadian private placement offers or sales;

Use this Guide to determine whether you can sell securities into Canada on a private placement basis without engaging Canadian counsel.

- registering a limited partnership as an extra-provincial (foreign) limited partnership in Ontario and certain other provinces before selling securities there;
- making filings in Ontario and/or Québec (and if required, also Newfoundland and Labrador) to qualify a non-resident investment fund manager under an available exemption from investment fund manager registration requirements in those provinces, if the issuer is an "investment fund" as defined in Canada;
- helping to comply with Canadian requirements for distributing securities from Canada into the United States or other countries, if you have an issuer or selling shareholder that has sufficient connections to Canada to trigger the application of Canadian prospectus requirements for "outbound" sales of securities into countries other than Canada that are viewed by the Canadian securities regulators as originating from Canada; or
- addressing a number of other Canadian compliance requirements.

You will almost always need the assistance of Canadian counsel to prepare and file post-closing private placement trade reports, which must generally be filed with the applicable Canadian securities regulatory authorities within 10 days of the settlement date if the offering included any primary component (that is, sales of securities by the issuer itself rather than exclusively resales by one or more selling security holders). We anticipate that many dealers frequently making sales in Canada will have standing arrangements in place with their Canadian counsel to file these reports on a regular, ongoing basis without the need for a deal-specific engagement.

## NOTE REGARDING THE PROVINCES AND TERRITORIES IN WHICH SALES ARE MADE

Prior to the adoption of the Wrapper Exemption, sales of non-Canadian securities made in Canada by dealers qualified as "international dealers" with a Wrapper were typically limited to the provinces of Ontario, Québec, Alberta and British Columbia. This was due, in part, to the lack of demand for such securities in most other provinces and territories of Canada, and certain risks potentially arising under MI 51-105.

Before extending offers and sales of securities into other provinces and territories, please be sure to confirm that the dealers involved are qualified as international dealers in each province, and that their clients have received the required one-time permitted client notice (see **STEP 2**, questions 2 and 7). Please also make sure that offers and sales in other provinces will not give rise to issues under MI 51-105 (see **STEP 8**).

Finally, you should be aware that the statutory liability regimes are different across the various provinces and territories of Canada. In Ontario, the issuer and any selling security holder will be subject to liability for any material misstatement or omission (a **Misrepresentation**) in an offering document. The provinces of Québec, Alberta and British Columbia do not have a corresponding liability regime. The liability regimes in the other six provinces and the three territories are as follows:

### Saskatchewan

There is a statutory right of action for a Misrepresentation in an offering document against the issuer, each selling security holder, and every promoter and director of the issuer and each selling security holder. There is also a statutory right of action against the same group of people **and also** the dealer for a Misrepresentation in any advertising or sales literature. Finally, a purchaser has a right of action against any individual making a Misrepresentation in any oral statement made to that prospective purchaser.

### Manitoba and Newfoundland and Labrador

There is a statutory right of action for a Misrepresentation in an offering document against the issuer and every director of the issuer.

### Nova Scotia

There is a statutory right of action for a Misrepresentation in an offering document against **the "seller"** and every director of the seller. **Note:** It is not clear whether the term "**seller**" might include a dealer acting as a placement agent, underwriter or initial purchaser. If it does, then the directors of the dealer could be subject to personal liability. The same group of people are also subject to liability for a Misrepresentation in advertising or sales literature.

### New Brunswick

There is a statutory right of action for a Misrepresentation in an offering document against the issuer and any selling security holder. There is also a statutory right of action for a Misrepresentation in advertising or sales literature against the issuer, any selling security holder, and every promoter or director of the issuer or selling security holder. There is also a statutory right of action for a Misrepresentation in a verbal statement against the person who made the statement.

### Prince Edward Island, Yukon, Nunavut and Northwest Territories

There is a statutory right of action for a Misrepresentation in an offering document against the issuer, any selling security holder, and every director of the issuer.

# Steps

# Do you need to engage Canadian counsel for assistance with a Canadian private placement?

Please use the steps on the following pages to determine whether or not you should contact Canadian counsel for assistance with a particular offering before making offers or sales in Canada.

We expect these steps will allow you to confirm that assistance from Canadian counsel is not required in most cases, except for any required post-closing trade report filings, as long as:

- the issuer is not a Canadian corporation, or headquartered in Canada, and neither the issuer nor any selling security holder is located in or has significant connections to Canada;
- the issuer is not conducting a rights offering;
- sales in Canada are limited to investors who qualify as both "permitted clients" (as defined in Schedule C attached) and "accredited investors" (as defined in Schedule D attached), and who are not individuals (natural persons);
- sales in Canada are made by Canadian registered securities dealers or by non-Canadian dealers who have taken the necessary steps to rely on the "international dealer" exemption in each province where securities are being sold;
- offers and sales in Canada are limited to the provinces of Ontario, Québec, Alberta and British Columbia;
- there is a concurrent registered or unregistered offering of the same class of securities being made in the United States, with an offering document, and the same offering document is being used in Canada; and
- the Canadian purchaser has received the required notice of the use of the Wrapper Exemption (either through disclosure contained in a previously received one-time notice, or through a Separate Deal Notice, or through an Embedded Notice contained in the offering document itself).

1

# Is there a trade of securities taking place in Canada?

## WHY IS THIS IMPORTANT?

The *prospectus* requirements of Canadian securities laws only apply to a trade in securities in Canada that constitutes a *distribution* as defined in Canada. The *dealer registration* requirements of Canadian securities laws only apply to a person or company in the business of trading in securities in Canada or holding itself out as being in that business. If there is no trade of securities taking place in Canada, there is no need to comply with the Canadian prospectus, dealer registration or other requirements.

### QUESTIONS:

1. Is the investment decision to purchase the security being made by a decision-maker who is physically present in Canada at the time the decision is made?
2. Were any securities offered to a prospective purchaser physically located in Canada?
3. Did any other acts in furtherance of the sale of the security physically take place in Canada?
4. Is the purchaser an individual (that is, a natural person) who is resident in a province or territory of Canada, even if not physically located in Canada at the time the investment decision is made?

**If the answer to all four of these questions is NO:** Canadian securities law requirements should not apply to the offer and sale of the securities, so you can **STOP HERE.**

**If the answer to any of these questions is YES: Move on to STEP 2.**

## NOTE ABOUT FULLY DISCRETIONARY DECISION-MAKERS OUTSIDE OF CANADA:

If (i) the purchaser of the securities is an investment fund manager or other fully discretionary decision-maker located outside of Canada, purchasing securities for a beneficial owner located or resident in Canada; (ii) the beneficial owner does not exercise any discretion over the investment and does not participate in making the investment decision; (iii) no person located in Canada is involved in the offer or sale; and (iv) **all** acts in furtherance of the trade are taken by the discretionary decision-maker outside of Canada, then you can **STOP HERE** as Canadian securities law requirements should not apply.

2

# Are Canadian dealer registration requirements being complied with?

## WHY IS THIS IMPORTANT?

The *dealer registration* requirements of Canadian securities laws apply to a person or company in the business of trading in securities in Canada or holding itself out as being in that business. If a non-Canadian dealer makes sales of securities in Canada, in most cases that dealer will be viewed as being in the business of trading in securities or holding itself out as such, and must either be registered as a securities dealer in Canada or have made the necessary filings with Canadian securities regulators to be able to rely on an exemption from the dealer registration requirements.

## QUESTIONS:

1. Are the securities "specified debt" securities as defined in Schedule G?

   **If YES, go to STEP 14.** Securities that qualify as "specified debt" are eligible for separate exemptions from Canadian dealer registration requirements, prospectus requirements and potential conflict of interest disclosure requirements. They are also exempt from Canadian trade reporting requirements, as discussed in **STEP 14.**

   **If NO, or if you are uncertain, continue to QUESTION 2.**

2. Are the securities being sold by a Canadian registered salesperson of a Canadian registered securities dealer?

   **If YES, go to STEP 3.**

   **If NO, continue to QUESTION 3.**

3. Are the securities being sold by a non-Canadian securities dealer that has already made the necessary filings with Canadian securities regulatory authorities to allow that dealer to rely on the "international dealer" exemption from Canadian dealer registration requirements in each province where purchasers acquiring securities from that dealer are located?

   **If NO, assistance will be required** from Canadian counsel to help the dealer become qualified as an international dealer in each of the relevant provinces of Canada.

   **If YES, continue to QUESTION 4.**

4. Are the securities issued by an issuer incorporated, organized or formed under the laws of Canada or a province or territory of Canada (a **Canadian Issuer**)?

   **If NO, continue to QUESTION 7.**

   **If YES, continue to QUESTION 5.**

5. Are the securities equity securities of a Canadian Issuer?

   **If NO, continue to QUESTION 6.**

   **If YES, contact Canadian counsel.** The securities can only be sold in Canada by a registered Canadian securities dealer and other Canadian compliance requirements may also apply.

6. Are the securities debt securities of a Canadian Issuer that are being offered primarily outside of Canada? Note that for the securities to be offered primarily outside of Canada, generally (i) Canada cannot be the primary intended market for the securities; and (ii) approximately 80% or more of the securities should be *offered* outside of Canada.

   **If NO,** or if in doubt about whether the offering is "primarily outside Canada," **contact Canadian counsel.** Debt securities of a Canadian issuer that are not offered primarily outside of Canada may only be sold in Canada by a registered Canadian securities dealer and other Canadian compliance requirements may also apply.

   **If YES, continue to QUESTION 7.**

7. Is each purchaser in Canada a "permitted client" as defined in Schedule C attached?

   **If NO, contact Canadian counsel.** The securities may only be sold by a Canadian registered dealer and other Canadian compliance requirements may also apply.

   **If YES, continue to QUESTION 8.**

8. Has each purchaser in Canada already received from the dealer making the sale a one-time "permitted client" notice containing the information prescribed by Section 8.18 of National Instrument 31-103 of the Canadian Securities Administrators, including the name and address of the Canadian agent for service process that the dealer has appointed in each province or territory where purchasers are located?

   **If NO, contact Canadian counsel.** The dealer must prepare and deliver a one-time-only "permitted client" notice to all prospective purchasers in Canada before sales can be made.

   **If YES, continue to STEP 3.**

## NOTE ABOUT SALES BY ISSUERS AND FUND MANAGERS:

The Canadian securities regulators have issued clear guidance stating that an issuer making sales of its own securities may be "in the business" of trading in securities and be subject to the dealer registration requirement, depending on the facts and circumstances. Also, the manager of an investment fund selling interests in the funds it manages may be subject to the dealer registration requirement, depending on the facts and circumstances. There is no automatic exemption from the Canadian dealer registration requirement available to an issuer or investment fund manager.

3

# Does the trade in Canada constitute a "distribution" under Canadian securities laws?

## WHY IS THIS IMPORTANT?

The prospectus requirement of Canadian securities laws only applies to a trade in a security that constitutes a "distribution" as defined in Canada. In Canada, a trade in securities is only a "distribution" if the sale is being made (i) by the issuer; (ii) by a "control person" (as defined in Canada) of the issuer; or (iii) by a holder of securities that were originally sold under a Canadian prospectus exemption and remain subject to ongoing resale restrictions. If the trade in securities does not constitute a "distribution," no further Canadian securities law compliance requirements need be considered (and further, no Canadian trade report filing requirements will apply).

Note that for this step, the seller is either the issuer or a selling security holder. The dealer that is acting as a placement agent, underwriter or initial purchaser is not considered to be the seller for this purpose.

## QUESTIONS:

1. Are any of the securities that are being sold in the offering being sold by the issuer, rather than only by one or more selling security holders?

   **If YES, continue to STEP 4.**

   **If NO, continue to QUESTION 2.**

2. Are any of the securities that are being sold in the offering being sold by a "control person" as defined in Canada, which means any of the following:

   - a holder with more than 20% of the voting rights attached to all outstanding voting securities of the issuer;
   - a holder with 20% or less of the voting rights, but based on the facts and circumstances still holds a sufficient number of voting rights to affect materially the control of the issuer;
   - a holder that is part of a combination (or group) acting in concert that holds more than 20% of the voting rights attached to all outstanding voting securities of the issuer;
   - a holder that is part of a combination (or group) acting in concert that holds 20% or less of the voting rights, but based on the facts and circumstances the combination or group still holds a sufficient number of voting rights to affect materially the control of the issuer?

**If YES, continue to STEP 4.**

**If NO, continue to QUESTION 3.**

**3.** Are any of the securities that are being sold in the offering securities that were originally sold to a purchaser in Canada under a Canadian private placement prospectus exemption and still held by the original Canadian purchaser or another holder in Canada?

**If YES, contact Canadian counsel.** Sales of these securities require the assistance of Canadian counsel to ensure compliance with a number of potentially applicable Canadian securities law requirements, including the requirements for making a distribution of securities from Canada into the United States or other countries.

**If NO, continue to QUESTION 4.**

**4.** Are any of the securities that are being sold in the offering securities that were originally sold to a purchaser outside of Canada by an issuer, "control person" (as defined in Canada) or other security holder in reliance on a Canadian prospectus exemption to permit the "outbound" sale from Canada to the non-Canadian purchaser, which gives rise to a Canadian hold period?

**IF YES, continue to STEP 4.**

**IF NO, then STOP HERE.** There is no need to give any further consideration to compliance with Canadian securities law requirements, and the sales of the securities will not result in Canadian trade report filing obligations.

4

# Does the issuer (or a selling security holder) have certain connections to Canada?

## WHY IS THIS IMPORTANT?

In certain provinces the *prospectus* requirements of Canadian securities laws apply to an issuer or selling security holder with significant connections to that province, even if all of the offers and sales of the securities are being made to purchasers outside of Canada. If the offering is viewed as an "outbound distribution" under Canadian securities laws, offers and sales from Canada into the United States or other countries may violate Canadian securities law requirements unless all sales worldwide comply with the applicable Canadian requirements.

Also, if the issuer has certain connections to Canada, the Wrapper Exemption will not be available and a conventional Wrapper will be required.

## QUESTIONS:

1. Is the issuer or any selling security holder participating in the offering headquartered, located, domiciled or resident in any province or territory of Canada, or taking any steps to plan, conduct or complete the offering from a physical location within Canada?

   **If YES, contact Canadian counsel immediately.** The proposed offering may violate Canadian securities laws even if no securities are offered or sold in Canada.

   **If NO, continue to QUESTION 2.**

2. Is the security being offered primarily in a foreign (non-Canadian) jurisdiction?

   **If NO, contact Canadian counsel** to prepare a conventional Wrapper. The Wrapper Exemption is not available for any security that is not being offered primarily in a foreign (non-Canadian) jurisdiction.

   **If YES, continue to QUESTION 3.**

3. Is the security ***issued or guaranteed*** by the government of a foreign (non-Canadian) jurisdiction, and being offered primarily in a foreign (non-Canadian) jurisdiction?

   **If YES, continue to QUESTION 8.**

   **If NO, continue to QUESTION 4.**

4. Is the issuer incorporated, formed or created under the laws of Canada or a province or territory of Canada?

   **If NO, continue to QUESTION 5.**

   **If YES, contact Canadian counsel** to prepare a conventional Wrapper. The Wrapper Exemption is not available for any security of a Canadian issuer.

5. Does the issuer have its head office located in any province or territory of Canada?

   **If NO, continue to QUESTION 6.**

   **If YES, contact Canadian counsel** to prepare a conventional Wrapper. The Wrapper Exemption is not available for any security of an issuer that has its head office in Canada.

6. Are both a *majority* of the issuer's *executive officers* and a *majority* of the issuer's directors ordinarily resident outside of Canada?

   **If YES, continue to QUESTION 7.**

   **If NO, contact Canadian counsel** to prepare a conventional Wrapper. The Wrapper Exemption is not available for any issuer unless it has a majority of both its executive officers and directors, considered as two separate groups, ordinarily resident outside of Canada.

7. Is the issuer a ***reporting issuer*** in any province or territory of Canada?*

   **If YES**, **contact Canadian counsel** to prepare a conventional Wrapper. The Wrapper Exemption is not available for any issuer that is a reporting issuer in any of the 10 provinces of Canada or any of the three territories of Canada, even if offers and sales of securities are not being made in the provinces or territories where the issuer files reports.

   **If NO, continue to QUESTION 8.**

8. Are all offers and sales of securities in Canada being limited to purchasers who qualify as "permitted clients" as defined in Schedule C, even if the sales are being made by fully registered Canadian securities dealers who would normally be permitted to make sales to other, non-permitted client purchasers?

   **If NO, contact Canadian counsel** to prepare a conventional Wrapper. The Wrapper Exemption is not available for any offering unless the purchasers in Canada are limited exclusively to "permitted clients," even if the dealer making the sale would otherwise be permitted to sell to a broader range of investors in compliance with applicable dealer registration requirements or exemptions.

   **If YES, continue to STEP 5.**

## NOTE ABOUT REPORTING ISSUERS:

To find out if an issuer is a reporting issuer in Canada, check to see if it has a profile on www.sedar.com. If a profile appears, then the issuer is a reporting issuer in Canada unless the profile indicates that it is no longer reporting. Unfortunately, a small number of issuers are reporting issuers in one or more provinces or territories but do not file publicly on SEDAR, so the absence of a SEDAR profile does not definitively establish that an issuer is not a reporting issuer in Canada. For absolute certainty, it would be necessary either to have the issuer confirm that it does not file reports in any province or territory of Canada as a reporting issuer, or to check all 13 of the reporting issuer lists maintained by each of the Canadian provincial and territorial securities regulators. For example, the Ontario Securities Commission maintains a list at https://www.osc.gov.on.ca/documents/en/Investors/is_issuers.pdf.

5

# Is there compliance with the Canadian "accredited investor" prospectus exemption?

## WHY IS THIS IMPORTANT?

A distribution of securities in Canada requires either the use of a Canadian prospectus (filed with and approved by the Canadian securities regulators) or the ability to rely on a prospectus exemption. In most cases, the exemption that is relied on for Canadian private placement sales is the "accredited investor" exemption. This requirement is one reason why a *directed share program generally* cannot be extended to participants in Canada, although taking steps to permit employee participation is normally possible (with the assistance of Canadian counsel). The Canadian securities regulators have also recently issued guidance reminding market participants that *reasonable steps* should be taken to verify that a purchaser does in fact qualify as an accredited investor before relying on the exemption. Also, when an individual (natural person) is purchasing securities under the accredited investor exemption, other compliance requirements may apply.

## QUESTIONS:

1. Have *reasonable* steps been taken to verify that each purchaser of securities in Canada qualifies as an "accredited investor" as defined in Schedule D attached, is purchasing the securities as principal (or is deemed to be) and, if relying on subparagraph (m) of the exemption, was not formed and is not being used solely to acquire securities as an accredited investor?

   **If NO, contact Canadian counsel** for assistance in determining what further steps may be reasonable in the circumstances to confirm the status of proposed purchasers as accredited investors. These steps may include requiring the investor to complete a questionnaire, or asking the investor to provide representations and warranties including specific factual information justifying the basis for the conclusion that the investor qualifies as an accredited investor, either in the context of a particular offering of securities, or as part of the dealer's account opening or new client intake procedures, or on an annual basis (or other regular basis). Alternatively, it may be reasonable to conclude that the eligibility of the purchaser is self-evident given the nature of the purchaser and no further verification steps are necessary, especially in light of the dealer's existing familiarity with the investor and past compliance with applicable "know your client" requirements. Canadian counsel may also be able to assist with making sales to purchasers in Canada who do not qualify as accredited investors in certain cases, for example under an alternative exemption that allows securities to be sold to employees, officers and directors of the issuer and its affiliates.

**If YES, continue to QUESTION 2.**

2. Is any accredited investor purchasing securities in Canada an individual (natural person)?

   **If NO, continue to STEP 6.**

   **If YES, continue to QUESTION 3.**

3. Is the individual purchaser both an accredited investor and also a permitted client?

   **If YES, continue to QUESTION 4.**

   **If NO, contact Canadian counsel** for assistance. Any individual (natural person) who qualifies as an accredited investor but does not also qualify as a permitted client must execute a Risk Acknowledgment Form prepared specifically for the transaction *before* purchasing the securities.

4. Is the individual purchaser (who qualifies as both an accredited investor and a permitted client) located or resident in the province of Ontario?

   **If YES, continue to QUESTION 5.**

   **If NO, continue to STEP 6.**

5. Has the Ontario-resident individual purchaser (who qualifies as both an accredited investor and a permitted client) previously received from the dealer making the sale a one-time Collection of Personal Information Notice in a form substantially similar to that set forth in Schedule E?

   **If YES, continue to STEP 6.**

   **If NO,** provide the individual purchaser in Ontario with a Collection of Personal Information Notice containing the required prescribed notification set forth in Schedule E. This notice should be delivered with the offering document, but not included as part of the offering document. It is necessary to provide this notice (unless previously provided by the dealer making the sale) because in order to file the required Ontario private placement trade report post-closing, the dealer who made the sale must **certify that all individual (natural person) purchasers** have received this prescribed notice. It is not necessary to provide a copy of the notice for each separate offering, but it is necessary to make sure that the individual purchaser has received the notice at least once from the dealer making the sale.

6

# Has the purchaser been notified of the use of the Wrapper Exemption?

## WHY IS THIS IMPORTANT?

The Wrapper Exemption is only available if the purchaser has received notice that the dealer making the sale is relying on the Wrapper Exemption.

## QUESTIONS:

1. Does the non-Canadian prospectus or offering memorandum contain the form of Embedded Notice attached as Schedule B in an Underwriting, Plan of Distribution, Notice to Investors or similar section?

   **If YES, continue to STEP 7.**

   **If NO,** either add the Embedded Notice set forth in Schedule B to the non-Canadian prospectus or offering memorandum and **continue to STEP 7, or continue to QUESTION 2.**

2. Has each Canadian purchaser previously received a one-time prospective (forward-looking) notice from the dealer making the sale alerting it to the future use of the Wrapper Exemption by that dealer?

   **If YES, continue to STEP 7.**

   **If NO,** send each Canadian purchaser that has not already received the one-time prospective notice from the dealer a Separate Deal Notice substantially in the form of Schedule A (that is, a deal-specific notice that accompanies, but is not attached to or included in, the non-Canadian offering document). **THEN continue to STEP 7.**

7

# Is there a concurrent U.S. offering with an offering document?

## WHY IS THIS IMPORTANT?

The Wrapper Exemption is only available if the securities are being sold in Canada concurrently with either a registered or unregistered offering in the United States, and a prospectus or offering memorandum has been prepared and is being delivered to investors in the United States.

## QUESTIONS:

1. Are the securities being sold in Canada and other countries in an undocumented offering (that is, an offering where no prospectus, offering memorandum or similar document is being used)?

   **If NO, continue to QUESTION 2.**

   **If YES, the Wrapper Exemption will not be available.** However, the Canadian requirement to disclose statutory rights of action in an offering memorandum will not apply, because there is no offering memorandum being used. The Canadian requirement to disclose certain potential conflict of interest relationships between the issuer and/or selling security holders on the one hand, and the dealers on the other hand, will still apply. This requirement may be satisfied by obtaining a representation letter from each Canadian investor containing the required disclosure or by delivering a notice to each Canadian investor in the form of Schedule F before completing the undocumented sale. You may wish to contact Canadian counsel for assistance in preparing the representation letter or notice. However, if Canadian counsel has not been engaged to provide assistance, continue to **STEP 8.**

2. Are the same securities that are being sold in Canada with an offering document (that is, a prospectus, offering memorandum or offering circular) also being concurrently offered for sale in the United States with the same offering document?

   **If NO, contact Canadian counsel** to prepare a conventional Canadian Wrapper, as the Wrapper Exemption will not be available.

   **If YES, continue to STEP 8.**

8

# Will private placement sales make the issuer become subject to Canadian public company reporting obligations?

## WHY IS THIS IMPORTANT?

Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets* (MI 51-105) can make an issuer involuntarily become subject to ongoing Canadian public company reporting and other obligations as a result of Canadian private placements unless sales are limited to the provinces of Ontario, Québec, Alberta and British Columbia (and some other provinces), and in some of those provinces may only made by a registered Canadian dealer or exempt international dealer. Offerings of debt securities can generally be extended into other provinces so long as the issuer does not have any U.S. over-the-counter trading in a class of securities that have been assigned a ticker symbol at the time of the offering. Other exemptions may also be available to allow sales in the other provinces. MI 51-105 will not apply if the issuer has a class of securities listed on a U.S. or Canadian stock exchange. However, there are risks associated with initial public offering (IPO) sales in the other provinces, even if following the IPO the issuer will be listed on a U.S. stock exchange.

## QUESTIONS:

1. Will offers or sales of the securities be made in any province other than Ontario, Québec, Alberta and British Columbia?*

   **If YES, contact Canadian counsel** for advice regarding the potential application of MI 51-105 in order to ensure that the issuer does not become subject to Canadian public company reporting obligations.

   **If NO, continue to QUESTION 2.**

## NOTE ABOUT OTHER PROVINCES:

The provinces of Saskatchewan, Nova Scotia and New Brunswick, and Yukon Territory, have also adopted exemptions from MI 51-105 to allow offers and sales to be made to permitted clients under a Canadian prospectus exemption. However, Canadian private placement sales are not typically made in those jurisdictions, as investor demand is limited and additional liability considerations may apply. See page 5 note regarding the provinces and territories in which sales are made.

**2.** Will any sales be made to a purchaser who is not a permitted client?

**If YES, contact Canadian counsel** for advice regarding the potential application of MI 51-105 in order to ensure that the issuer does not become subject to Canadian public company reporting obligations.

**If NO, continue to QUESTION 3.**

**3.** Will any securities be sold otherwise than through a Canadian registered securities dealer or exempt international dealer?

**If YES, contact Canadian counsel** for advice regarding the potential application of MI 51-105 in order to ensure that the issuer does not become subject to Canadian public company reporting obligations.

**If NO, continue to STEP 9.**

9

# Is the issuer an investment fund (as defined in Canada)?

## WHY IS THIS IMPORTANT?

Offers or sales of securities of an "investment fund" in the provinces of Ontario, Québec or Newfoundland, or active solicitation of investors in those provinces, may subject the investment fund manager to a registration requirement unless it has already taken the necessary steps to rely on the non-resident investment fund manager exemption.

## QUESTIONS:

1. Will any of the securities be offered or sold in any of the provinces of Ontario, Québec or Newfoundland, or will any active solicitation take place in those provinces?

   **If NO, continue to STEP 10.**

   **If YES, continue to QUESTION 2.**

2. Is the issuer of the securities an "investment fund" as defined in Canada?

   An "investment fund" (a **Fund**) may be either a *mutual fund or a non-redeemable investment fund*. An issuer is a mutual fund if its primary purpose is to invest money provided by its security holders and its securities entitle the holder to receive on demand, or within a specified period after demand, an amount computed by reference to the value of a proportionate interest in the whole or in part of the net assets, including a separate fund or trust account, of the issuer. An issuer other than a mutual fund is a non-redeemable investment fund if its primary purpose is to invest money provided by its security holders, unless it invests for the purpose of exercising or seeking to exercise control of an issuer (other than an issuer that is a Fund), or for the purpose of being actively involved in the management of any issuer in which it invests (other than a Fund).

   **If NO, continue to STEP 10.**

   **If YES, continue to QUESTION 3.**

   **If in doubt,** contact Canadian counsel. The determination of whether or not an issuer is a fund is based on the facts and circumstances of the issuer's activities and is heavily informed by guidance given by the Canadian securities administrators. If there is doubt about whether or not an issuer is a fund, you should let Canadian counsel help make this determination.

3. Has the entity that is the "manager" of the Fund (as determined under Canadian securities laws) already taken the necessary steps to qualify as a non-resident investment fund manager?

   **If YES, continue to STEP 10.**

   **If NO, contact Canadian counsel.** It will be necessary to determine which entity is the "manager" for Canadian purposes, and have that entity make the necessary filings to qualify for an exemption from the fund manager registration requirements.

## NOTES REGARDING COMMON SITUATIONS:

An issuer that is considered an "investment company" under the U.S. *Investment Company Act of 1940* is likely to be considered an investment fund in Canada, but will not necessarily be one, as the tests are not the same. The opposite is also true – an issuer may be a Fund in Canada even if it is not an "investment company" under the U.S. definition.

A limited partnership that is created as an investment vehicle will in most situations be a Fund and in most cases its general partner will be considered its "manager" requiring registration or reliance on an exemption.

A conduit that is created to allow for indirect investment in the securities of a different entity that are held by the conduit will most often be considered a Fund.

Most venture capital funds are not considered a Fund in Canada because they typically invest for the purpose of exercising or seeking to exercise control of their portfolio companies.

A hedge fund will almost always be considered an investment fund in Canada.

A real estate investment trust (REIT) may or may not be a Fund in Canada, depending on the nature of the assets it holds in its investment portfolio. If a majority of the assets are actual real estate holdings, it will probably not be considered a Fund. However, if a majority of the assets are investments in securities of non-controlled entities that in turn invest in real estate assets, the REIT will likely be a Fund.

10

# Is the issuer a limited partnership?

## WHY IS THIS IMPORTANT?

Sales of securities of a limited partnership (even if only debt securities and not limited partnership interests) in the provinces of Ontario, Prince Edward Island, New Brunswick or Saskatchewan are deemed to constitute carrying on business and require the issuer to register in those provinces as an extra-provincial (foreign) limited partnership. In addition, the general partner of the limited partnership and other related entities may also have registration obligations.

## QUESTIONS:

1. Is the issuer of the securities a limited partnership?

   **If NO, continue to STEP 11.**

   **If YES, continue to QUESTION 2.**

2. Will the limited partnership's securities be sold in Ontario, Prince Edward Island, New Brunswick or Saskatchewan?

   **If NO, continue to STEP 11.**

   **If YES, continue to QUESTION 3.**

3. Has the limited partnership already registered to carry on business in each of the provinces where its securities will be sold as a result of a prior offering of securities, or for any other reason?

   **If YES, continue to STEP 11.**

   **If NO, contact Canadian counsel** for assistance in making the required limited partnership registrations of the issuer and, if necessary, any required corporate registrations of its general partner or other affiliated entities.

11

# Is the issuer conducting a rights offering?

## WHY IS THIS IMPORTANT?

The distribution of rights in a rights offering by an issuer to its existing shareholders in Canada is a trade in securities that is subject to Canadian prospectus requirements and may only be made under an available prospectus exemption, even though no investment decision is being made by the recipient of the rights. Note that Canadian securities laws effectively regulate only the *original distribution of the right by the issuer to a shareholder in Canada*, as there is an automatic prospectus exemption available for the exercise of a right to acquire a security that was previously granted by the issuer, even though the holder of the right will be making an investment decision and paying to acquire the second security.

## QUESTIONS:

**1.** Is the issuer distributing rights to acquire securities of the issuer to its existing shareholders (that is, conducting a rights offering)?

**If NO, continue to STEP 12.**

**If YES, contact Canadian counsel** for assistance. There are three compliance alternatives available to the issuer:

A. Exclude Canadians from receiving rights – Canadian counsel can provide assistance in ensuring that the rights offering document contains sufficient restrictions to prohibit any distribution of rights into Canada in order to avoid any violation of Canadian securities law requirements relating to the distribution of the rights. Canadian shareholders may be allowed to receive their *pro rata* entitlement to the cash proceeds of the sale of rights that cannot be distributed into Canada and other excluded jurisdictions. Note that if addressed properly, in most cases it will be possible for all discretionary account managers outside Canada to receive and/or exercise rights on behalf of accounts managed for Canadian beneficial holders, so long as no investment decision or other acts in furtherance of the trade take place in Canada.

B. Allow all Canadian holders to participate – Counsel may seek approval from the Canadian securities regulators to allow the rights offering to be extended to all shareholders in Canada, even including those existing Canadian shareholders who are not accredited investors. This approval can normally be obtained so long as the issuer only has a minimal percentage of its shares held in Canada and the required filings are made with the Canadian regulators at least 10 days before any of the rights are distributed into Canada.

C. Allow only Canadian accredited investors to participate – Canadian counsel can prepare the necessary private placement materials to allow participation in the rights offering (that is, the receipt of rights) only by accredited investors in Canada. Typically this will include a Canadian Wrapper for the rights offering document with supplemental information and documentation for use by Canadian shareholders. The offering document would be revised to indicate that Canadian shareholders may participate if eligible as accredited investors, but otherwise will be restricted from receiving rights. The materials prepared using this alternative typically also contemplate and provide the necessary disclosure to allow any dealers acting as underwriters (or backstop commitment providers) for any shares not subscribed for in the rights offering (that is, unallocated or "rump" shares) to be offered and sold to institutional investors in Canada (although in most cases the Wrapper Exemption should be available for Canadian private placement sales of the "rump" shares).

## NOTE ABOUT UNALLOCATED ("RUMP") SHARES:

The requirements described above relate to the issuer's responsibility for ensuring compliance with the Canadian requirements for distributing the rights themselves, not for the sales of unallocated (or "rump") shares by dealers acting as underwriters of the rights offering. However, we would not advise dealers to participate in Canadian private placement sales of unsubscribed (or "rump") shares in a rights offering without first confirming that the issuer has obtained Canadian legal advice to ensure that no Canadian securities law requirements have been or will be contravened by the distribution of the rights into Canada, so as to avoid becoming involved in a potential violation of Canadian securities law requirements by the issuer.

12

# Will there be another distribution of securities into Canada later as a result of the current offering?

**WHY IS THIS IMPORTANT?**

An offering of securities may involve a subsequent distribution of securities later. For example, in a registered exchange offer (i.e., Exxon Capital or A/B exchange offer), the issuer will conduct a second, U.S.-registered offering of securities to satisfy its obligation to exchange the original unregistered securities for registered securities. That second distribution must also comply with Canadian securities law requirements if any of the securities will be distributed into Canada. Another example is a security that is exchangeable for a security of a different issuer, whether by the holder, by the issuer or automatically. In each case an exemption from Canadian prospectus requirements must be available, and complied with, at the time of the exchange if any securities will be distributed in Canada as part of the exchange. There is no Canadian prospectus exemption automatically available in these circumstances, even if the exchange is mandatory or automatic and does not involve a new investment decision by the security holder.

**QUESTIONS:**

1. Will there be a subsequent registered exchange offer (that is, is the offering an Exxon Capital or A/B exchange offer)?

   **If NO, continue to QUESTION 2.**

   **If YES,** advise the issuer that it will be required to obtain assistance from Canadian counsel when it completes the exchange offer in order to ensure that Canadian securities law requirements are complied with at the time of the exchange offer. **THEN continue to STEP 13.**

2. Are the securities exchangeable for securities of a different issuer, whether pursuant to the exercise of an exchange right by the holder, the original issuer or the second issuer, or on an automatic or mandatory basis?

   **If NO, continue to STEP 13.**

   **If YES, obtain further advice from Canadian counsel.** It may not be practical to offer this security into Canada, as the issuer may not be willing or able to take the necessary steps to ensure compliance with Canadian private placement requirements at the time of the exchange.

## NOTE ABOUT CONVERSION RIGHTS:

There is an exemption from the prospectus requirement of Canadian securities laws for a conversion of a security of an issuer into another security of the same issuer pursuant to conversion rights contained in the original security, and no private placement trade report is required to be filed regarding the conversion. The concern raised in question 2 above only applies where the issuer of the second security is a different legal entity, whether a parent or subsidiary of the issuer of the first security, or an unaffiliated entity.

13

# Are there any other issues to be concerned about?

## WHY IS THIS IMPORTANT?

There may be other regulatory requirements applicable to a distribution of securities into Canada in addition to Canadian securities law requirements. There may also be special requirements under the securities laws that apply only in specific circumstances or to specific types of issuers.

## QUESTIONS:

1. Is the security a debt security of a bank or other financial institution that is being sold directly by the issuer or through a dealer acting as a placement agent, rather than by a dealer acting as an underwriter or initial purchaser who first acquires the security as principal?

   **If NO, continue to QUESTION 2.**

   **If YES, contact Canadian counsel** for advice regarding Canadian banking regulatory requirements. The sale of debt securities of a bank or other financial institution directly by the issuer, or through a dealer acting as a placement agent rather than an underwriter, may be viewed as deposit-taking activity by the issuer, triggering the application of Canadian banking regulations.

2. Is the security a "catastrophe bond" or similar instrument?

   **If NO, continue to QUESTION 3.**

   **If YES,** make sure that the transaction participants have previously obtained advice about the potential application of Canadian insurance regulations to the transaction or similar types of transactions. The need to consider this requirement is similar to the need to obtain state insurance law "blue sky" surveys in order to ensure compliance with U.S. state insurance laws in connection with these types of offerings.

3. Is the security novel or unusual, with the possibility of unanticipated burdensome Canadian tax consequences?

   **If NO, continue to QUESTION 4.**

   **If YES,** consider whether Canadian investors may be in need of transaction-specific tax disclosure in respect of the Canadian tax consequences to Canadian holders. If so, it may be appropriate to engage Canadian counsel to conduct a review of the offering document from the perspective of Canadian investors and provide transaction-specific tax advice for Canadian investors.

**4.** Is the issuer of the security a mining company?

**If NO, continue to STEP 14.**

**If YES,** it is necessary to avoid making any "public disclosure" of reserve and/or resource information about a mining company that does not comply with Canadian securities law requirements for such disclosure. There is an exemption for non-compliant disclosure of reserves and/or resources contained in an offering memorandum distributed only to accredited investors, so long as no "public disclosure" of that information is made in Canada.

## NOTE REGARDING OIL & GAS ISSUERS:

The restriction on "public disclosure" of reserve and/or resource information by mining companies does not apply to oil and gas companies, which are only subject to corresponding requirements for reserve and resource reporting if they are reporting issuers in Canada.

14

# Is a trade report required?

## WHY IS THIS IMPORTANT?

In most cases, even if the Wrapper Exemption was relied on, sales of securities must be reported to Canadian securities regulators within 10 days of the closing (settlement date) of the offering. Longer filing deadlines may apply to securities of a fund. However, trade reports are not required for sales of securities: (i) that qualify as "specified debt"; or (ii) that are made to eligible financial institutions.

## QUESTIONS:

1. Were any sales of securities actually made in Canada in an offering consisting wholly or partially of securities being sold by the issuer?

   **If NO, STOP.** No reporting is required if no sales were made in Canada, or if the entire offering was made by one or more selling security holders rather than the issuer.

   **If YES, continue to QUESTION 2.**

2. Was the security a "specified debt" security? (See Schedule G for an explanation of how to determine whether or not a security qualifies as "specified debt.")

   **If YES, STOP.** No reporting is required for securities that qualify as "specified debt."

   **If UNSURE, contact Canadian counsel** to assist with this determination if the cost of doing so will be justified by the potential savings in the cost of preparing a trade report, and the related filing fees, that would otherwise apply.

   **If NO, continue to QUESTION 3.**

3. Was the sale made to a "Canadian financial institution"? (See Schedule H for the definition of this term.)

   **If YES, STOP.** No reporting is required for a sale made to a Canadian financial institution (although you must still report all other sales made in Canada to other types of purchasers).

   **If NO, please contact Canadian counsel** for assistance in filing the required post-closing private placement trade reports with the applicable Canadian securities regulatory authorities, and paying the required filing fees. Trade report filing requirements for the provinces of Ontario, Québec, British Columbia and Alberta are set out in Schedule G.

# Schedules

A

# Disclosure to accompany (but not to be included in) a non-Canadian prospectus or offering memorandum

(a Separate Deal Notice)

*[name of dealer]* is delivering this notice to you because we intend to rely on the exemption in section 3A.3 or 3A.4, as applicable, of National Instrument 33-105 *Underwriting Conflicts* (NI 33-105) from the underwriter conflicts of interest disclosure requirements of NI 33-105 for any distribution to you in the future of an eligible foreign security, as defined in NI 33-105.

If, in connection with a distribution of an eligible foreign security, as defined in Ontario Securities Commission Rule 45-501 *Ontario Prospectus and Registration Exemptions*, or as defined in Multilateral Instrument 45-107 *Listing Representations and Statutory Rights of Action Disclosure Exemptions*, we deliver to you an offering document that constitutes an offering memorandum under applicable securities laws in Canada, you may have, depending on the province or territory of Canada in which the trade was made to you, remedies for rescission or damages if the offering memorandum (including any amendment thereto) contains a misrepresentation, provided that the remedies for rescission or damages are exercised by you within the time limit prescribed by the securities legislation of your province or territory. You should refer to any applicable provisions of the securities legislation of your province or territory for the particulars of these rights or consult with a legal advisor.

The ***[securities]*** described in the accompanying ***[prospectus/offering memorandum]*** (including any amendment thereto) may be sold only to purchasers purchasing, or deemed to be purchasing, as principal that are accredited investors, as defined in National Instrument 45-106 *Prospectus Exemptions* or subsection 73.3(1) of the *Securities Act* (Ontario), and are permitted clients, as defined in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*. Any resale of the ***[securities]*** must be made in accordance with an exemption from, or in a transaction not subject to, the prospectus requirements of applicable securities laws.

B

# Disclosure for insertion in a non-Canadian prospectus or offering memorandum

(an Embedded Notice)

The ***[securities]*** may be sold only to purchasers purchasing, or deemed to be purchasing, as principal that are accredited investors, as defined in National Instrument 45-106 *Prospectus Exemptions* or subsection 73.3(1) of the *Securities Act* (Ontario), and are permitted clients, as defined in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*. Any resale of the ***[securities]*** must be made in accordance with an exemption from, or in a transaction not subject to, the prospectus requirements of applicable securities laws.

Securities legislation in certain provinces or territories of Canada may provide a purchaser with remedies for rescission or damages if this ***[prospectus/offering memorandum]*** (including any amendment thereto) contains a misrepresentation, provided that the remedies for rescission or damages are exercised by the purchaser within the time limit prescribed by the securities legislation of the purchaser's province or territory. The purchaser should refer to any applicable provisions of the securities legislation of the purchaser's province or territory for particulars of these rights or consult with a legal advisor.

Pursuant to section 3A.3 (or, in the case of securities issued or guaranteed by the government of a non-Canadian jurisdiction, section 3A.4) of National Instrument 33-105 *Underwriting Conflicts* (NI 33-105), the ***[underwriters]*** are not required to comply with the disclosure requirements of NI 33-105 regarding underwriter conflicts of interest in connection with this offering.

C

# Permitted clients under the international dealer exemption

("Permitted clients")

The term **"permitted client"** means any of the following:

(a) a Canadian financial institution or a Schedule III bank;

(b) the Business Development Bank of Canada incorporated under the *Business Development Bank of Canada Act* (Canada);

(c) a subsidiary of any person or company referred to in paragraph (a) or (b), if the person or company owns all of the voting securities of the subsidiary, except the voting securities required by law to be owned by directors of the subsidiary;

(d) a person or company registered under the securities legislation of a jurisdiction of Canada as an adviser, investment dealer, mutual fund dealer or exempt market dealer;

(e) a pension fund that is regulated by either the federal Office of the Superintendent of Financial Institutions or a pension commission or similar regulatory authority of a jurisdiction of Canada or a wholly owned subsidiary of such a pension fund;

(f) an entity organized in a foreign jurisdiction that is analogous to any of the entities referred to in paragraphs (a) to (e);

(g) the Government of Canada or a jurisdiction of Canada, or any Crown corporation, agency or wholly owned entity of the Government of Canada or a jurisdiction of Canada;

(h) any national, federal, state, provincial, territorial or municipal government of, or in any foreign jurisdiction, or any agency of that government;

(i) a municipality, public board or commission in Canada and a metropolitan community, school board, the Comité de gestion de la taxe scolaire de l'île de Montréal or an intermunicipal management board in Québec;

(j) a trust company or trust corporation registered or authorized to carry on business under the *Trust and Loan Companies Act* (Canada) or under comparable legislation in a jurisdiction of Canada or a foreign jurisdiction, acting on behalf of a managed account managed by the trust company or trust corporation, as the case may be;

(k) a person or company acting on behalf of a managed account managed by the person or company, if the person or company is registered or authorized to carry on business as an adviser or the equivalent under the securities legislation of a jurisdiction of Canada or a foreign jurisdiction;

(l) an investment fund if one or both of the following apply:

(i) the fund is managed by a person or company registered as an investment fund manager under the securities legislation of a jurisdiction of Canada; and/or

(ii) the fund is advised by a person or company authorized to act as an adviser under the securities legislation of a jurisdiction of Canada;

(m) in respect of a dealer, a registered charity under the *Income Tax Act* (Canada) that obtains advice on the securities to be traded from an "eligibility adviser" (which means a person registered as an investment dealer and authorized to give advice with respect to the securities, and in Saskatchewan and Manitoba also includes certain lawyers and accountants, provided that certain conditions are met), or an adviser registered under the securities legislation of the jurisdiction of the registered charity;

(n) in respect of an adviser, a registered charity under the *Income Tax Act* (Canada) that is advised by an eligibility adviser, as defined in section 1.1 of National Instrument 45-106 *Prospectus and Registration Exemptions*, or an adviser registered under the securities legislation of the jurisdiction of the registered charity;

(o) an individual who beneficially owns financial assets (being cash, securities, contracts of insurance, deposits or evidence of a deposit) having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds C$5 million;

(p) a person or company that is entirely owned by an individual or individuals referred to in paragraph (o), who holds the beneficial ownership interest in the person or company directly or through a trust, the trustee of which is a trust company or trust corporation registered or authorized to carry on business under the *Trust and Loan Companies Act* (Canada) or under comparable legislation in a jurisdiction of Canada or a foreign jurisdiction;

(q) a person or company, other than an individual or an investment fund, that has net assets of at least C$25 million as shown on its most recently prepared financial statements; and

(r) a person or company that distributes securities of its own issue in Canada only to persons or companies referred to in paragraphs (a) to (q).

D

# Eligible Canadian private placement purchasers

("Accredited investors")

Those entities that are eligible to purchase securities as "accredited investors" as defined in National Instrument 45-106 (NI 45-106) are the following, provided that in each case, except where indicated to the contrary, such entity is purchasing as principal:

(a) either:

  (i) a Canadian financial institution, which means

    (A) an association governed by the *Cooperative Credit Associations Act* (Canada) or a central cooperative credit society for which an order has been made under section 473(1) of that Act; or

    (B) a bank, loan corporation, trust company, trust corporation, insurance company, treasury branch, credit union, caisse populaire, financial services cooperative, or league that, in each case, is authorized by an enactment of Canada or a jurisdiction of Canada to carry on business in Canada or a jurisdiction in Canada;

  (ii) or a Schedule III bank, meaning an authorized foreign bank named in Schedule III of the *Bank Act* (Canada);

(b) the Business Development Bank of Canada incorporated under the *Business Development Bank of Canada Act* (Canada);

(c) a subsidiary of any person referred to in paragraphs (a) or (b), if the person owns all of the voting securities of the subsidiary, except the voting securities required by law to be owned by directors of that subsidiary;

(d) a person registered under the securities legislation of a jurisdiction of Canada as an adviser or dealer;

(e) an individual registered under the securities legislation of a jurisdiction of Canada as a representative of a person referred to in paragraph (d);

(e.1) an individual formerly registered under the securities legislation of a jurisdiction of Canada, other than an individual formerly registered solely as a representative of a limited market dealer under one or both of the *Securities Act* (Ontario) or the *Securities Act* (Newfoundland and Labrador);

(f) the Government of Canada or a jurisdiction of Canada, or any crown corporation, agency or wholly owned entity of the Government of Canada or a jurisdiction of Canada;

(g) a municipality, public board or commission in Canada and a metropolitan community, school board, the Comité de gestion de la taxe scolaire de l'île de Montréal or an intermunicipal management board in Québec;

(h) any national, federal, state, provincial, territorial or municipal government of or in any foreign jurisdiction, or any agency of that government;

(i) a pension fund that is regulated by the Office of the Superintendent of Financial Institutions (Canada), a pension commission or similar regulatory authority of a jurisdiction of Canada;

(j) an individual who, either alone or with a spouse, beneficially owns financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds C$1 million;

(j.1) an individual who beneficially owns financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds C$5 million;

(k) an individual whose net income before taxes exceeded C$200,000 in each of the two most recent calendar years or whose net income before taxes combined with that of a spouse exceeded C$300,000 in each of the two most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year;

(l) an individual who, either alone or with a spouse, has net assets of at least C$5 million;

(m) a person, other than an individual or investment fund, that has net assets of at least C$5 million as shown on its most recently prepared financial statements, but not a person that is created or used solely to purchase or hold securities as an accredited investor;

(n) an investment fund that distributes or has distributed its securities only to

  (i) a person that is or was an accredited investor at the time of the distribution;

  (ii) a person that acquires or acquired securities in the circumstances referred to in sections 2.10 [Minimum amount investment] or 2.19 [Additional investment in investment funds] of NI 45-106; or

  (iii) a person described in paragraph (i) or (ii) that acquires or acquired securities under section 2.18 [Investment fund reinvestment] of NI 45-106;

(o) an investment fund that distributes or has distributed securities under a prospectus in a jurisdiction of Canada for which the regulator or, in Québec, the securities regulatory authority, has issued a receipt;

(p) a trust company or trust corporation registered or authorized to carry on business under the *Trust and Loan Companies Act* (Canada) or under comparable legislation in a jurisdiction of Canada or a foreign jurisdiction, acting on behalf of a fully managed account managed by the trust company or trust corporation, as the case may be;

(q) a person acting on behalf of a fully managed account managed by that person, if that person is registered or authorized to carry on business as an adviser or the equivalent under the securities legislation of a jurisdiction of Canada or a foreign jurisdiction;

(r) a registered charity under the *Income Tax Act* (Canada) that, in regard to the trade, has obtained advice from an eligibility adviser or an adviser registered under the securities legislation of the jurisdiction of the registered charity to give advice on the securities being traded;

(s) an entity organized in a foreign jurisdiction that is analogous to any of the entities referred to in paragraphs (a) to (d) or paragraph (i) in form and function;

(t) a person in respect of which all of the owners of interests, direct, indirect or beneficial, except the voting securities required by law to be owned by directors, are persons that are accredited investors;

(u) an investment fund that is advised by a person registered as an adviser or a person that is exempt from registration as an adviser;

(v) a person that is recognized or designated by the securities regulatory authority or, except in Ontario and Québec, the regulator as an accredited investor; or

(w) a trust established by an accredited investor for the benefit of the accredited investor's family members of which a majority of the trustees are accredited investors and all of the beneficiaries are the accredited investor's spouse, a former spouse of the accredited investor or a parent, grandparent, brother, sister, child or grandchild of that accredited investor, of that accredited investor's spouse or of that accredited investor's former spouse.

E

# Collection of personal information notice to individuals in Ontario who are permitted clients

(To be delivered as a separate notice together with, but not included in, the non-Canadian offering document)

By purchasing the ***[securities]***, described in the accompanying *[prospectus/offering memorandum]*, the purchaser acknowledges that personal information such as the purchaser's name will be delivered to the Ontario Securities Commission (the OSC) and that such personal information is being collected indirectly by the OSC under the authority granted to it in securities legislation for the purposes of the administration and enforcement of the securities legislation of Ontario. By purchasing the ***[securities]***, the purchaser shall be deemed to have authorized such indirect collection of personal information by the OSC. Questions about such indirect collection of personal information should be directed to the OSC's Administrative Support Clerk, Suite 1903, Box 55, 20 Queen Street West, Toronto, Ontario M5H 3S8 or to the following telephone number: 416.593.3684.

F

# Notice regarding certain relationships between an issuer (or selling security holder) and the dealers

(To be delivered as a separate notice to Canadian investors purchasing securities in an undocumented offering)

As a prospective purchaser of the ***[securities]*** (the "Securities") of ***[issuer]*** (the "Issuer") located or resident in Canada, you are hereby notified that: [Note to draft: Provide a full description of the basis of the relationship between any of the underwriting syndicate members, initial purchasers or placement agents, or any of their respective affiliates or representatives, and the Issuer and/or selling security holder, which triggers a connected or related issuer disclosure requirement.][1] **Accordingly, the Issuer [and/or selling security holder] may be considered a "related" or "connected" issuer of [Note to draft: Name the applicable underwriting syndicate members, initial purchasers or placement agents] for the purposes of applicable Canadian securities laws.** [Note to draft: Prior sentence must be in boldface type.] The decision to offer the Securities was made solely by the Issuer

[1] Under the Canadian "related and connected issuer" disclosure rules, disclosure must be made to investors on the first page of an offering memorandum or other document relating to the offering where there is any direct or indirect relationship between any of the dealers and the issuer of the securities, or a selling security holder, that would lead a reasonable purchaser to question if the dealers are independent. The disclosure on the first page must include a statement in bold type naming the relevant dealers, and that the Issuer or a selling security holder may be a connected issuer or a related issuer of those dealers in connection with the Offering. The first page disclosure requirement is intended to alert prospective purchasers to any relationship that may represent an actual, potential or perceived conflict of interest. In an undocumented offering, the first page disclosure requirement should be satisfied by including the required disclosure on the first page of this representation letter. These additional disclosure requirements are triggered where the Issuer or a selling security holder is or may be considered to be a "related issuer" or a "connected issuer" of a dealer. A "related issuer" relationship is created primarily as the result of cross-ownership between an issuer or selling security holder (the "other party") and a dealer. Such a relationship would include any of the following: (A) where the dealer controls the other party by virtue of: (i) holding direct or indirect beneficial ownership of more than 20% of the other party's voting securities; (ii) has the power to direct the voting of more than 10% of the other party's voting securities; or (iii) otherwise exercises control of the other party, OR (B) where the other party has any such a relationship with a dealer, OR (C) where the other party and the dealer have any such relationship with a third party. The other party would be a "connected issuer" of a dealer where it has some other relationship with a dealer or its affiliate, such as indebtedness to it, any "related issuer" of that dealer or a director, officer or partner of any of them, that may lead a reasonable prospective purchaser of the securities to question if that dealer and the other party are independent of each other for purposes of the offering. The most common situations where there will be a disclosure requirement triggering the requirement to include this paragraph in the representation letter are (i) one or more dealers having affiliated lenders of the other party, especially if they are being fully or partially repaid out of the proceeds of the offering; and (ii) one or more dealers, or their affiliates, having a significant equity interest in the other party. However, you should also consider other relationships that may be material to investors.

[and/or selling security holder] and the terms upon which the Securities are being offered were determined by negotiation between the Issuer [and/or selling security holder] and the [underwriting syndicate members/initial purchasers/placement agents]. [Note to draft: If the basis of the relationship involves indebtedness, add the following statement or modify as applicable: "The Issuer [and/or selling security holder] is currently in compliance with the credit facilities described above, and no breach thereof has been waived by any of the [underwriting syndicate members/initial purchasers/placement agents] or their affiliates since the execution of such facilities."]

By purchasing the Securities you hereby acknowledge and confirm that you have not received any "offering memorandum" in connection with the offer or sale of the Securities to you. For the purposes of this paragraph, the term "offering memorandum" means a document purporting to describe the business and affairs of the Issuer that was prepared primarily for delivery to and review by a prospective purchaser so as to assist the prospective purchaser to make an investment decision, but excludes a document setting out current information about the Issuer for the benefit of a prospective purchaser familiar with the Issuer through prior investment or business contacts.

The Securities may be sold only to purchasers purchasing, or deemed to be purchasing, as principal that are accredited investors, as defined in National Instrument 45-106 Prospectus Exemptions or subsection 73.3(1) of the Securities Act (Ontario), and are permitted clients, as defined in National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations. Any resale of the Securities must be made in accordance with an exemption from, or in a transaction not subject to, the prospectus requirements of applicable securities laws.

# Specified debt

A security qualifies as specified debt if it is:

(i) a debt security issued by or guaranteed by the Government of Canada or the government of a jurisdiction of Canada;

(ii) a debt security issued by or guaranteed by a government of a foreign jurisdiction if the debt security has a ***designated rating*** from a ***designated rating organization*** or its ***DRO affiliate***;

(iii) a debt security issued by or guaranteed by a municipal corporation in Canada, or secured by or payable out of rates or taxes levied under the law of a jurisdiction of Canada on property in the jurisdiction and collectable by or through the municipality in which the property is situated;

(iv) a debt security issued by or guaranteed by a Canadian financial institution or a Schedule III bank, other than debt securities that are subordinate in right of payment to deposits held by the issuer or guarantor of those debt securities;

(v) in Ontario, a debt security issued by or guaranteed by a loan corporation, trust company, trust corporation, insurance company, treasury branch, credit union, caisse populaire, financial services cooperative, or league that, in each case, is authorized by an enactment of a jurisdiction of Canada other than Ontario to carry on business in a jurisdiction of Canada, other than debt securities that are subordinate in right of payment to deposits held by the issuer or guarantor of those debt securities;

(vi) a debt security issued by the Comité de gestion de la taxe scolaire de l'île de Montréal; or

(vii) a debt security issued by or guaranteed by a permitted supranational agency if the debt securities are payable in the currency of Canada or the United States of America.

For the purposes of the definition of specified debt, "**permitted supranational agency**" means:

(a) the African Development Bank, established by the Agreement Establishing the African Development Bank, which came into force on September 10, 1964, that Canada joined on December 30, 1982;

(b) the Asian Development Bank, established under a resolution adopted by the United Nations Economic and Social Commission for Asia and the Pacific in 1965;

(c) the Caribbean Development Bank, established by the Agreement Establishing the Caribbean Development Bank, which came into force on January 26, 1970, as amended, that Canada is a founding member of;

(d) the European Bank for Reconstruction and Development, established by the Agreement Establishing the European Bank for Reconstruction and Development and approved by the *European Bank for Reconstruction and Development Agreement Act* (Canada), that Canada is a founding member of;

(e) the Inter-American Development Bank, established by the Agreement establishing the Inter-American Development Bank, which became effective December 30, 1959, as amended from time to time, that Canada is a member of;

(f) the International Bank for Reconstruction and Development, established by the Agreement for an International Bank for Reconstruction and Development approved by the *Bretton Woods and Related Agreements Act* (Canada); and

(g) the International Finance Corporation, established by Articles of Agreement approved by the *Bretton Woods and Related Agreements Act* (Canada).

***"Designated rating"*** means, for a security or instrument, a rating issued by a designated rating organization, or its DRO affiliate, that is at or above one of the following rating categories, or that is at or above a category that replaces one of the following rating categories, if

(a) there has been no announcement by the designated rating organization or its DRO affiliate of which the investment fund or its manager is or reasonably should be aware that the rating of the security or instrument to which the designated rating was given may be downgraded to a rating category that would not be a designated rating, and

(b) no designated rating organization or any of its DRO affiliates has rated the security or instrument in a rating category that is not a designated rating:

| Designated Rating Organization | Commercial Paper/ Short-Term Debt | Long-Term Debt |
|---|---|---|
| DBRS Limited | R-1 (low) | A |
| Fitch, Inc. | F1 | A |
| Moody's Canada Inc. | P-1 | A2 |
| Standard & Poor's Ratings Services (Canada) | A-1 (Low) | A |

***"Designated rating organization"*** means

(a) each of DBRS Limited, Fitch, Inc., Moody's Canada Inc., Standard & Poor's Ratings Services (Canada), including their DRO affiliates; or

(b) any other credit rating organization that has been designated under *[Canadian]* securities legislation.

***"DRO affiliate"*** means an affiliate of a designated rating organization that issues credit ratings in a foreign jurisdiction and that has been designated as a DRO affiliate under the terms of the designated rating organization's designation.

## DESIGNATIONS CURRENTLY IN EFFECT

### 1. DBRS Limited

DBRS Limited and certain of its affiliates have been designated under the following order:

Re DBRS Limited (31 October 2012), 35 OSCB 10322:
https://www.osc.gov.on.ca/en/SecuritiesLaw_ord_20121115_222_dbrs-ltd.htm

The designated affiliates of DBRS Limited, as specified in the order, are:
DBRS, Inc. (DBRS US)
DBRS Ratings Limited (DBRS UK)

### 2. Fitch, Inc.

Fitch, Inc. and certain of its affiliates have been designated under the following order:

Re Fitch, Inc. (31 October 2012), 35 OSCB 10317:
https://www.osc.gov.on.ca/en/SecuritiesLaw_ord_20121115_221_fitch.htm

The designated affiliates of Fitch, Inc., as specified in the designation order, are:
FITCH RATINGS LIMITED (England)
FITCH CENTROAMERICA, S.A. (Panama)
FITCH COSTA RICA CALIFACADORA DE RIESGO, S.A. (Costa Rica)
FITCH RATINGS COLOMBIA, S.A. SOCIEDAD CALIFICADORA DE VALORES (Colombia)
FITCH RATINGS CIS LIMITED (England)
FITCH RATINGS ESPANA S.A.U. (Spain)
FITCH ITALIA S.P.A. (Italy)
FITCH DEUTSCHLAND GMBH (Germany)
FITCH POLSKA S.A. (Poland)
FITCH FRANCE (France)
FITCH RATINGS FINANSAL, DERECELENDIRME HIZMETLERI A.S. (Turkey)
FITCH SOUTHERN AFRICA PTY LIMITED (South Africa)
FITCH NORTH AFRICA SA (Tunisia)
FITCH ARGENTINA CALIFICADORA DE RIESGO S.A. (Argentina)
FITCH URUGUAY CALIFICADORA DE RIESGO, S.A. (Uruguay)
FITCH RATINGS BRASIL LTDA (Brazil)
FITCH CHILE CLASIFICADORA DE RIESGO LIMITADA (Chile)
FITCH MEXICO S.A. DE C.V. (Mexico)
FITCH VENEZUELA, SOCIEDAD CALIFICADORA DE RIESGO, S.A. (Venezuela)
FITCH REPUBLICA DOMINICA S.R.L. (Dominican Republic)
FITCH AUSTRALIA PTY LIMITED (Australia)
FITCH RATINGS (BEIJING) LIMITED (China)
FITCH RATINGS SINGAPORE PTE LTD. (Singapore)
FITCH HONG KONG LIMITED (Hong Kong)
FITCH RATINGS (THAILAND) LIMITED (Thailand)
PT FITCH RATINGS INDONESIA (Indonesia)
FITCH RATINGS JAPAN LIMITED (Japan)

### 3. Moody's Canada Inc.

Moody's Canada Inc. has been designated under the following order:

Re Moody's Canada Inc. (31 October 2012), 35 OSCB 10329:
https://www.osc.gov.on.ca/en/SecuritiesLaw_ord_20121115_224_moodys-canada.htm

This order deems the ratings of Moody's Investors Services, Inc. and its subsidiaries, as well as the other subsidiaries of Moody's Corporation that provide ratings services, to be ratings of Moody's Canada Inc. As a result, effectively all affiliates worldwide that provide ratings are designated.

### 4. Standard & Poor's Ratings Services (Canada)

Standard & Poor's Ratings Services (Canada) has been designated under the following order:

Re Standard & Poor's Ratings Services (Canada) (31 October 2012), 35 OSCB 10325:
https://www.osc.gov.on.ca/en/SecuritiesLaw_ord_20121115_223_standard-poors.htm

This order deems the ratings of the other worldwide components of Standard & Poor's Ratings Services, and McGraw-Hill's other subsidiaries that provide ratings services, to be ratings of Standard & Poor's Ratings Services Canada. As a result, effectively all affiliates worldwide that provide ratings are designated.

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# Canadian financial institutions

It is not necessary to file a private placement trade report or pay the filing fees for any distribution of:

(i) a debt security; or

(ii) an equity security issued concurrently with the distribution of a debt security;

if in the case of either (i) or (ii) above the purchaser is a Canadian Financial Institution or a Canadian Schedule III Bank.

The term Canadian Financial Institution means:

- an association governed by the *Cooperative Credit Associations Act* (Canada) or a central cooperative credit society for which an order has been made under section 473(1) of that Act; or
- any bank, loan corporation, trust company, trust corporation, insurance company, treasury branch, credit union, caisse populaire, financial services cooperative, or league that, in each case, is authorized by an enactment of Canada or a jurisdiction of Canada to carry on business in Canada or a jurisdiction of Canada.

# Trade report filing requirements and fees

The trade report filing requirements applicable to an offering of securities by way of private placement in the provinces of Ontario, Québec, British Columbia and Alberta are set out below.

Notwithstanding the filing requirements set out below, a Fund is permitted to file a single trade report covering all trades made during the year on an annual basis.

**Please note that some provinces may also charge additional late filing fees.**

**Ontario**

Trade Report: Form 45-106F1

Filing Requirement: No later than 10 days following the completion of the distribution (settlement date).

Filing Fee: There is a C$500 filing fee.

Offering Document Filing: Yes, one copy is "delivered" with the trade report.

**Québec**

Trade Report: Form 45-106F1

Filing Requirement: No later than 10 days following the completion of the distribution (settlement date).

Filing Fee: 0.025% of the gross value of the securities distributed in Québec, subject to a current minimum of C$272.

Offering Document Filing: Yes, one copy is "filed" with the trade report.

**British Columbia**

Trade Report: Form 45-106F1, assuming that: (i) the issuer of the securities is not a reporting issuer in the province of British Columbia; (ii) sales of the securities in British Columbia are limited only to "permitted clients" as defined in National Instrument 31-103 of the Canadian Securities Administrators; and (iii) Item 2 of Form 45-106F1 is supplemented to add the following additional statement: "The filer of this form is relying on the exemption in paragraph 6 of BCI 45-533."

Filing Requirement: No later than 10 days following the completion of the distribution (settlement date).

Filing Fee: The greater of 0.03% of the aggregate gross proceeds realized from purchasers in British Columbia and C$100.

Offering Document Filing: No.

**Alberta**

Trade Report: Form 45-106F1

Filing Requirement: No later than 10 days following the completion of the distribution (settlement date).

Filing Fee: The greater of 0.025% of the gross proceeds realized in Alberta and C$120.

Offering Document Filing: No.

## AUTHOR

**Rob Lando**
Partner, Corporate

**rlando@osler.com**
212.991.2504

Rob is a cross-border corporate and securities lawyer with significant practice experience in the United States and Canada. He provides concurrent advice on both the U.S. and Canadian law aspects of structuring, planning and executing public and private cross-border corporate finance and M&A transactions. Osler is consistently recognized as one of Canada's leading corporate finance firms. Our clients include major Canadian corporations, well-known multinationals, entrepreneurial and growth oriented businesses and Canadian and global investment banks engaged in capital markets activities in Canada, the United States and internationally.

The information contained in this Guide does not constitute legal or other professional advice or opinions on the points of law discussed herein. We invite you to contact the author of this publication to discuss the legal issues outlined in this publication.

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Osler is a leading law firm with a singular focus – your business. From Toronto, Montréal, Calgary, Ottawa, Vancouver and New York, we advise our Canadian, U.S. and international clients on an array of domestic and cross-border legal issues. Our collaborative "one firm" approach draws on the expertise of over 450 lawyers to provide responsive, proactive and practical legal solutions driven by your business needs. For over 150 years, we've built a reputation for solving problems, removing obstacles, and providing the answers you need, when you need them. It's law that works.

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