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IPOs and Going Public in Canada

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Contents

Introduction ... 3

Part 1 Key Considerations Before Going Public and Overview of Listing Methods ... 4
- A. Advantages and Disadvantages of Public Listing 4
- B. Methods of Going Public 5
- C. Critical Path Items 7
- D. Other Strategic and Practical Considerations 9

Part 2 Securities Regulation in Canada ... 10

Part 3 Principal Listing Methods in Canada ... 11
- A. Initial Public Offering (IPO) 11
- B. Reverse Take-Over (RTO) 15
- C. Qualifying Transaction (QT) 17

Part 4 Procedure for Listing on the TSX and TSXV ... 19
- A. Listing Requirements 19
- B. Comparison of Listing Rules and Procedures 20

Part 5 The Prospectus ... 24
- A. Prospectus Disclosure 24
- B. Foreign Issuers 27
- C. Prospectus Liability 27

Part 6 The Underwriting or Agency Agreement ... 30
- A. The Engagement Letter 30
- B. Underwriter Due Diligence 30
- C. The Underwriting Agreement 31
- D. Types of Offerings 33

Part 7 Canadian Tax Considerations ... 34
- A. Impact on Corporate Level Taxation 34
- B. Impact on Shareholder Level Taxation 35

Part 8 Post-Listing Reporting Requirements ... 36
- A. Continuous Disclosure Regime 36
- B. Insider Reporting Regime 41
- C. Audit Committee and Governance 42
- D. Secondary Market Liability 43

Fasken Contacts ... 44

Other Fasken Capital Markets & M&A Guides ... 45

Fasken Awards & Rankings ... 46

Client Testimonials ... 47

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Introduction

This Guide provides private companies an overview of the process for obtaining a public listing in Canada and highlights key considerations for the company and its principal stakeholders both prior to and throughout the going public process.

Part 1 outlines various matters that a private company should consider before deciding to go public, and provides a summary of the principal methods of completing a public listing in Canada.

Part 2 describes the regulatory framework in Canada for public companies and how that framework affects a listing and the post-listing reporting requirements.

Part 3 provides an overview of the principal listing methods in Canada, being an initial public offering,
a reverse takeover or a qualifying transaction.

Part 4 details the listing procedures for the Toronto Stock Exchange and the TSX Venture Exchange,
the two principal listing markets in Canada.

Part 5 outlines what a company is required to include in a prospectus or other listing document and the associated liability with the disclosure provided in such documents.

Part 6 provides an overview of a dealer's (i.e., an underwriter's) involvement in a going public transaction and a summary of what a company should expect for an offering of securities completed concurrently with a going public transaction.

Part 7 outlines certain Canadian tax considerations for a company looking to complete a going public transaction in Canada.

Part 8 provides a summary of the Canadian reporting requirements for a company following a public listing on a Canadian exchange.

The decision to go public is one of the most important decisions in a company's development. Fasken has significant experience in guiding market participants in connection with conventional and alternative going public transactions in both the Canadian and cross border contexts. Should you have any related issues or questions about the going public process, please contact any of the authors of this guide (see page 44) or your regular Fasken lawyer.

Part 1

Key Considerations Before Going Public and Overview of Listing Methods

A. Advantages and Disadvantages of Public Listing

Before deciding to pursue a going public transaction, a company should consider the following advantages and disadvantages of a public listing in Canada:

Advantages	Disadvantages
• Increased access to capital (both on initial listing and subsequent financings) can assist a company in pursuing a number of possible business objectives. • Enhanced liquidity for existing shareholders. • Established value for company's securities. • Greater flexibility with ability to offer shares as executive compensation and/or acquisition consideration. • Enhanced visibility and corporate image. • Lower cost of capital compared to debt financing or capital raising as a private company.	• Degree of initial and ongoing public company costs. • Loss of control, exposing the company to risk of a take-over bid or shareholder activism. • Continuous disclosure obligations. • Some loss of confidentiality, e.g., executive compensation. • Increased exposure to shareholder scrutiny and exposure to liability under securities laws. • Need for enhanced management resources. • Escrow requirements and resale restrictions.

B. Methods of Going Public

Stock Exchanges

In Canada, there are presently four main recognized stock exchanges for corporate entities:

Exchange	Operated by
Toronto Stock Exchange (TSX)	TMX Group Inc.
TSX Venture Exchange (TSXV)	TMX Group Inc.
Canadian Securities Exchange (CSE)	CNSX Markets Inc.
Cboe Canada	Cboe Global Markets

The TSX and TSXV are the two most established exchanges in Canada on which most Canadian public companies are listed.

While the TSX and TSXV provide the greatest visibility and liquidity for public companies in Canada, a company may choose to list on the CSE or Cboe Canada[1] for a number of reasons, including listing eligibility, industry-related regulations, cost and timing.

Since the TSX and TSXV remain the two principal listing markets in Canada, the focus of this Guide is in respect of a listing on those exchanges.

Principal Listing Methods

There are three primary methods of going public on the TSX or TSXV — an **initial public offering** (IPO), a **reverse take-over** (RTO) of an existing TSX or TSXV listed company, or a **qualifying transaction** (QT) with a capital pool company (CPC) listed on the TSXV.[2]

The table below sets out the main advantages, disadvantages and key considerations to assess when choosing a listing method. We explore each of the listing methods in more detail in Part 3 of this Guide.

1. Cboe Canada is a privately owned exchange formerly known as the NEO Exchange.
2. Note that IPOs relating to SPACs (Special Purpose Acquisition Corporations) are not addressed in this guide.

Method	Regulatory Approvals	Advantages	Disadvantages	Listing Document
Initial Public Offering (IPO) Company sells securities through an underwriter pursuant to a prospectus filed in one or more provinces or territories of Canada, and obtains listing on a stock exchange upon closing	Canadian securities commissions *and* Stock exchange	• Ability to concurrently raise funds • Potential for broader distribution of company's securities, which can create more publicity and awareness of a company's products and services • Prospectus drafting and regulatory clearance process may help to improve company's strategic focus	• Relatively expensive process with a number of fixed costs and expenses • May be more time consuming than other methods of going public - generally takes a minimum of four months • Subject to the whims of the IPO market	**Long-form prospectus** *Must contain full, true and plain disclosure of all material facts concerning the company and the securities offered.*
Reverse Take-Over (RTO) Typically, shareholders of a private company with a strong business sell their shares to a listed shell company with no active business in exchange for new shares of the listed shell company that represent more than 50% control of that shell company	Stock exchange	• Less dependence on market conditions for timing • Faster process than an IPO • The shell's filing statement document does not typically receive the heightened level of review that one would see with an IPO prospectus • Shell provides public shareholder base that meets distribution requirements	• Private company has less opportunity to publicly tell its story • Requires M&A type negotiations and mutual due diligence	Shell's **management information circular**, if shareholder approval required *or* Shell's **filing statement**, if shareholder approval not required *Each must contain full, true and plain disclosure of all material facts concerning the shell, the private company and the resulting issuer.*
Qualifying Transaction (QT) Capital pool company (CPC) (i.e., a reporting company listed on TSXV with experienced board of directors but no business or assets except up to C$10,000,000 in cash) acquires all of the outstanding shares of or amalgamates with the private company	Stock exchange	• CPC may bring experienced board of directors • CPC provides public shareholder base that meets TSXV distribution requirements • CPC provides interim funding and initial cash reserve for resulting issuer	• Dilution of private company management and shareholders • Requires M&A type negotiations and mutual due diligence • QT's are a TSXV only concept (although the resulting issuer could graduate to the TSX or migrate to another Canadian stock exchange upon closing)	CPC **management information circular**, if shareholder approval required *or* CPC **filing statement**, if shareholder approval not required *Each must contain full, true and plain disclosure of all material facts concerning the CPC, the private company and the resulting issuer.*

C. Critical Path Items

The following elements of the going public process give rise to the longest lead times in planning for a successful listing and should be given priority by the company from the very start of the process:

Critical Path Item	Explanation	Considerations
Financial Statements and Management's Discussion and Analysis (MD&A)	Generally, a company will need to provide in its listing document three full years of audited annual financial statements, plus unaudited interim financial statements for its most recently completed quarter and the comparative quarter in the immediately preceding year, as well as pro forma financial statements in certain circumstances.	• Financial statements must, with some exceptions, be prepared under International Financial Reporting Standards. • MD&A will need to be drafted and reviewed by the company's commercial, legal and accounting team, and all numbers carefully verified by the auditors. • For "emerging-market" companies,[3] Canadian securities commissions have historically demonstrated additional concern over the adequacy of the company's "internal controls" and "disclosure controls" and its ability to comply with Canadian financial reporting requirements. The company may need to demonstrate that its finance staff will have sufficient training and experience to satisfy such concerns.
Board of Directors, Management Team & Compensation	A board of directors with the optimal combination of financial and operational expertise, public company experience and Canadian capital market recognition will need to be assembled, and the full management team engaged.	• Background security checks of the proposed directors and officers by the listing exchange (and separately by the underwriters) can take several months and the required personal information forms for all candidates should be submitted as soon as possible. • Corporate governance structures such as board committees, mandates, policies and stock option and similar compensation plans will need to be put into place. • Compensation schemes for directors and senior management (e.g., salary, options, change of control payments, etc.) and employment agreements will need to be settled.
Due Diligence	The company's directors and underwriters will have liability for any material misstatements or omissions in the listing document unless they can rely on a "due diligence" defence. In establishing this defence, counsel and other advisers to the company and the underwriters will conduct due diligence to ensure the accuracy and detail of the information in the listing document.	• The company will need to make a comprehensive electronic data room available, where all key documents relevant to the company's business and legal affairs will be included and accessible by the working group. Being prepared for the kind of due diligence investigation a public listing entails will help prevent the company from wasting valuable time and resources responding to documentary requests and searching for documents rather than moving the transaction forward. • The company will need to be organized and respond to additional requests from the underwriters promptly. A slow or disorganized process can send negative signals to underwriters and investors, while a smooth, well-run process can create momentum for a successful listing.

3. The TSX assesses the jurisdiction of an issuer on a country-by-country basis, but generally will not consider issuers of Canada, the U.S., the UK, Western Europe, Australia or New Zealand to be emerging market issuers. Review of the following criteria may result in an issuer being designated an emerging market issuer: (i) residency of "mind and management"; (ii) jurisdiction of principal business operations and assets; (iii) jurisdiction of incorporation; (iv) nature of the business; and (v) corporate structure.

Critical Path Item	Explanation	Considerations
Third Party Consents	A company should take care in reviewing its material contracts to determine what consents, if any, will be required to complete a public listing, including any relevant shareholder or investor rights agreements.	• Consents may also be triggered if a company intends to complete a reorganization prior to going public. • In addition, a company should review confidentiality obligations in its material contracts and seek waivers in advance, as appropriate.
Resource Information and Reports	If the company has mineral projects, disclosure in the listing document must comply with National Instrument 43-101 (NI 43-101), the mining disclosure rule of the Canadian securities commissions, including the requirement that all scientific and technical disclosure be based on a technical report or other information prepared by or under the supervision of a qualified person. If the company has oil and gas activities, disclosure in the listing document must comply with National Instrument 51-101 (NI 51-101), the oil and gas disclosure rule of the Canadian securities commissions.	• May require the company to engage a qualified third party to prepare the necessary report(s). Accordingly, preparation of this disclosure and associated reports will be time-consuming and should commence as soon as possible.

D. Other Strategic and Practical Considerations

Completing a public listing will often result in significant changes to a company's management and capital structure. In addition to the critical path items identified above, a number of other important check list items need to be understood and made part of the overall going public planning process, including the following:

Item	Description
Engage the Right Advisers	The importance of selecting the right members of the working group cannot be underestimated. The company's agents, counsel, auditors, technical consultants and other advisers will need to form a cohesive team to achieve success, and this will require not only strong expertise, but also good communication and coordination of efforts. Care must be taken in engaging experienced, practical advisers with strong communication and teamwork skills.
Agree on Company Valuation	Prior to starting a listing process, the company should assess and agree on its expected valuation with its advisors and key stakeholders.
Conduct Business as Usual	The listing process will be an intensive and time-consuming one for the commercial team, but it should be sufficiently separate from the ongoing operations of the company so as to be minimally disruptive to those operations up to the point of completion.
Complete Tax Planning	Canadian and international tax considerations will need to be assessed in making corporate structure decisions. These discussions should be held early in the listing process.
Determine Need for Dual Class Structure	In some cases, the founders may want to reserve control of the company post-listing. To do this, the company may need to establish a dual class share structure. The TSX and TSXV rules require "coattail" provisions for listed companies with dual class voting share structures.[4]
Consider Reorganization Issues	To the extent that a corporate reorganization of the company will be required in preparation for the public listing, the scope of this reorganization should be determined. Assets may need to be transferred, employee benefit plans reviewed or amended, and commitments to third parties assigned from other entities in the broader company group. There may also be a need to reorganize the capital structure of the company so that it aligns with what is traditionally expected of a public company in Canada.
Consider Multiple Stock Exchange Listings	In addition to a listing in Canada, the company may wish to consider (and may already have considered and rejected) the possibility of concurrent listings on other global exchanges.
Determine Stock Exchange & Underwriters' Escrow Requirements	Certain major shareholders as well as senior officers and directors of the company will be subject to typical escrow requirements imposed by the listing exchange and/or Canadian securities laws. It is also typical for underwriters to require a lock-up period for major shareholders and management for a period after closing, to run cumulatively with any regulatory escrow period.
Evaluate Post-Closing Public Company Readiness	Upon completion of the public listing, the company needs to be prepared to address continuous and timely disclosure requirements, and related internal approvals and processes (e.g., any required internal culture adjustments to reflect being a public company, formally instituting investor relations functions, key policies, etc.). Being ready to be a public company requires a significant time investment by management in financial reporting and regulatory compliance processes and systems to ensure satisfactory risk management. *See Part 8 of this Guide for a high level summary of post-listing reporting requirements in Canada.*

4. Note that proxy advisory firms generally recommend against dual-class share structures except in exceptional circumstances.

Part 2

Securities Regulation in Canada

Prior to discussing the laws, rules, policies and regulations applicable to a public listing in Canada, and applicable to a publicly listed company in Canada, it is first necessary to understand the overall Canadian corporate and securities law landscape. In general, a public company in Canada will be required to comply with three separate regulatory frameworks:

Securities Regulation

Securities regulation in Canada falls within the jurisdiction of the various provincial and territorial governments and is therefore not regulated or managed at the federal level. As a result, each province and territory has its own set of securities laws, rules and policies and its own securities regulator. Each company subject to Canadian securities laws is assigned a securities regulator to act as its principal regulator. Each of the provincial and territorial securities regulators have responsibility for: (i) prospectus review and clearance; (ii) continuous disclosure requirements; (iii) enforcement and compliance; (iv) regulation of dealers; and (v) public education.

Although there is a fragmented regulatory regime across the country, the securities regulators from each of the provinces and territories of Canada have worked together to coordinate and harmonize securities regulation through the formation of the Canadian Securities Administrators (CSA). As a result of the formation of the CSA, securities markets in Canada are governed to a significant extent by a number of national or multilateral instruments, which are largely consistent among the provinces and territories.

Stock Exchange Rules

The provincial and territorial securities regulators have also delegated certain regulatory responsibilities to self-regulatory organizations, such as the TSX and TSXV. The rules and policies of these organizations will apply to any potential listing and any listed company on that exchange. In particular, the stock exchanges have set out certain listing requirements and financial standards, each of which are discussed in further detail in Part 4 of this Guide.

Corporate Statute

Finally, any company pursuing a listing in Canada will also need to comply with its governing corporate statute, whether that be a provincial or federal business corporations act in Canada or a non-Canadian corporate statute.

Part 3

Principal Listing Methods in Canada

A. Initial Public Offering (IPO)

The Basics

In an IPO the company sells its securities to the public through an underwriter pursuant to a prospectus filed in one or more provinces of Canada, and upon closing obtains an exchange listing. The majority of this guide is dedicated to the detailed discussion of IPOs.

The Process

The following are the general steps leading up to completion of an IPO.

Step 1 Pre-IPO Planning

The going public process is complex and requires foresight and planning. As mentioned in Part 1, numerous critical path items that have longer lead times should be tackled early while other matters raise strategic and practical considerations that may require particular effort to work through.

Two overarching issues are timing and narrative. The optimal time to go public is an essential decision point that will require consultation with financial and legal advisers. For example, during a general or sector-specific market downturn, financial advisers will often recommend delaying an IPO. Also, companies will often be deliberate in crafting a corporate image in advance of an IPO. The thought is to leverage the company's history and successes to develop a clear "story" regarding its future prospects to increase the attractiveness of the securities being offered.

Step 2 Due Diligence

Due diligence for an IPO is an in-depth process that serves multiple purposes. Importantly, it confirms the accuracy of the prospectus' contents and helps identify any issues requiring disclosure to guard against any incorrect material information or the omission of any material information. As discussed in Part 5, it also provides the company's directors, underwriters and certain other persons with a due diligence defence against liability under securities laws for misrepresentation.

Business and financial due diligence is led by the underwriters and focuses on the company's financial statements, financial forecasts, reporting procedures and internal controls, among others. This also assists in the valuation process and helps identify contingencies, business plans and similar matters that should be disclosed. Legal due diligence focuses on material aspects of the company's corporate records, contracts and other business. As mentioned in Part 1, a well-prepared due diligence process and data room creates momentum, sends positive signals to the underwriters, and greatly facilitates IPO execution overall.

Step 3 "Testing the Waters" to Determine Market Interest (not a required step)

"Testing the waters" refers to an exemption under securities laws allowing prospective issuers, if they so choose, to determine market interest in advance of a potential IPO by communicating confidentially with accredited investors through investment dealers. The exemption is subject to certain conditions, including: (i) all written material provided being approved by the issuer, marked as confidential, and containing a legend with cautionary text; and (ii) the issuer keeping records relating to investment dealers authorized to act on the company's behalf during this process. The exemption is not intended to allow investment dealers an opportunity to "pre-sell" the IPO or "fill their book" before the company files the preliminary prospectus. In this regard, a "cooling off" period is imposed whereby there is a prohibition on solicitations under the exemption for a period of 15 days before the filing of the prospectus for the IPO.

Step 4 Preliminary Prospectus and Waiting Period

Once approved by the company's board of directors,[5] the preliminary prospectus is filed with the relevant securities commissions. The principal regulator issues a receipt and begins reviewing the preliminary prospectus toward the end of issuing formal comments on the prospectus in the form of a comment letter. The principal regulator may also provide additional comments, including any comments on behalf of other applicable securities regulators. The company responds to regulators' comments by either making the suggested changes or by explaining why it believes such changes are either inappropriate or unnecessary. Once this negotiated process concludes to the satisfaction of the regulators, the company proceeds to the final prospectus.

The filing of the preliminary prospectus commences the "waiting period", and during this time the company and its underwriters may begin marketing the IPO beyond what is permitted in Step 3 (see above). Binding commitments by investors are not permitted until the final prospectus; however, the preliminary prospectus can be used to solicit expressions of interest and begin building a tentative book of orders. Prospective institutional and retail investors may also be given certain "standard term sheets"[6] and "marketing materials"[7], the information in each of which must be disclosed in, or derived from, the preliminary prospectus. Typically, a "road show" is organized for the waiting period so the company and the lead underwriter can meet directly with prospective investors to tell the company's story, promote the securities offering, and answer questions.[8]

Step 5 Final Prospectus and Underwriting Agreement

Following the resolution of regulator comments on the preliminary prospectus, the company prepares a final prospectus for regulatory clearance. Once this and marketing efforts have concluded, the IPO is priced. This requires the company and underwriters negotiating the number and price of securities to be offered based on investor feedback gained through the marketing process as well as the underwriter's tentative book of orders.

The company generally negotiates for the highest price that involves the number of securities that it wishes to offer in light of the total proceeds it seeks to raise. The underwriter generally negotiates for a price that gives it comfort the IPO will be oversubscribed and that a healthy secondary market will result following closing of the IPO. The parties' final decision on pricing is incorporated into the underwriting agreement between the parties, the other typical terms of which are discussed in Part 6.

After the final prospectus is approved by the company's board, it is filed with the principal regulator. The receipt issued allows for the printing and distribution of the prospectus and the confirmation of sales with investors.

Step 6 Closing

The "closing" of an IPO refers to the issuance and sale of the company's securities to the underwriters in return for the offering price. An IPO's specific closing date is negotiated as part of the underwriting agreement. The company and underwriters will typically set the closing date at five days after the filing of the final prospectus to give sufficient time for the "cooling-off period" benefitting investors to expire. This is a period of two business days from the receipt (or deemed receipt) of a final prospectus wherein the investor is permitted to withdraw from its previous agreement to purchase the IPO's securities.

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5. For the required contents of the prospectus, see Part 5.
6. "Standard term sheets" may contain only certain prescribed information regarding an issuer and a distribution, which largely relate to the basic terms of the offering.
7. In contrast to "standard term sheets", "marketing materials" will generally provide more information about an issuer and a distribution and may include statistics that compare the issuer to other issuers.
8. Road shows must be conducted in accordance with various conditions, including record keeping and, depending on attendees, introductory cautionary statements.

Confidential Pre-Filing

The foregoing is not an exhaustive review of all of the steps in an IPO process and merely touches on major process points for consideration in preparing to go public. For example, additional considerations include the possibility of confidentially pre-filing the preliminary prospectus with the principal regulator prior to publicly filing it. This gives the company the ability to confidentially receive and address regulator comments before publicly launching its IPO process. Canadian securities regulators allow this to give companies greater flexibility and certainty in their capital raising process. Confidential pre-filings are particularly attractive to companies in situations where they (or their legal advisors) anticipate heightened risk of regulatory scrutiny, whether in consideration of the company's particular assets or operations or because the IPO may raise complex or unusual securities laws considerations.

Indicative IPO Timetable

The IPO timeline can run from as little as five months to as much as a year, and will depend on such matters as the company's pre-IPO preparedness, due diligence issues, and the expediency of securities regulators. As mentioned, market conditions will often dictate when the IPO is launched and the securities offering completed.

The following sets out a minimum, indicative timetable for an IPO that assumes a thoroughly IPO-prepared company, a well-run process by all parties involved, minimal unanticipated complications, and no need to delay the IPO for market conditions:

Time Period	Weeks 1 – 12	Weeks 13 – 18	Weeks 19 – 22
Action Items	• Engagement of advisers (e.g., underwriters, legal, auditors) • "Testing the waters", i.e., solicitation of expressions of interest from potential investors by underwriters. • Formation of working groups and preparation of preliminary prospectus. • Financial due diligence of company by underwriters and legal due diligence by counsel. • Approval of preliminary prospectus by board of directors. • Filing of preliminary prospectus with securities regulators and listing application with stock exchange.	• Issuance of news release. • Lead underwriters arrange "road show" and prepare associated marketing materials. • Receipt of first comment letter from principal securities regulator; preparation of company response. • Company and lead underwriter negotiate underwriting agreement except for price and size of offering. • Road shows and marketing conducted; tentative book of orders built. • Conditional listing approval from stock exchange. • Second comment letter from securities regulators; company response; negotiation of outstanding disclosure issues.	• Prospectus finalized. • Underwriting agreement finalized for price and size of offering. • Prospectus and underwriting agreement approved by company board of directors. • Final prospectus filed with applicable securities regulators. • Following issuance of receipt, commercial copies of final prospectus printed. • News release issued. • IPO pre-closing and closing procedures implemented. • Shares issued and trading on stock exchange begins.

B. Reverse Take-Over (RTO)

The Basics

An RTO structure is often used where a traditional IPO is not feasible or practical. Typically, the shareholders of a private company with a strong ongoing business sell their shares to a publicly listed shell company in exchange for new shares of the listed shell that represent more than 50% control of that shell. As such, an RTO is similar in many respects to an M&A transaction.

Although not technically an original listing, RTOs are effectively treated as such by the exchange. That said, an RTO is generally shorter in duration to complete and is more cost-efficient from a professional fees basis than an IPO.

The Process

Step 1 Engage Advisors and Identify the RTO Shell

A company proposing to complete an RTO should engage financial and legal advisors to assist it throughout the process. RTOs can be effected via a number of different structures, including by way of statutory arrangement, amalgamation or share exchange. Choosing among these different structures involves various different considerations, including costs, timing, tax, corporate and securities issues.

A critical aspect of the RTO process for the private company is identifying a suitable listed shell. Attractive characteristics include a listing on the preferred exchange, minimal existing liabilities, sufficient cash to complete the RTO process, and concentration of ownership to facilitate shareholder approval. Financial and legal advisers will be key to evaluating and comparing potential RTO candidates.

Step 2 Due Diligence

Although the publicly listed shell will have minimal assets and operations, the private company will need to assure itself that the listed shell does not house any hidden or inherent liabilities. Also, an RTO often includes a private placement of securities to ensure that, following the RTO, the listed company has sufficient working capital to conduct business post closing as well as to ensure the company satisfies all applicable stock exchange listing requirements. Where this is the case, the underwriters and their legal counsel will conduct extensive due diligence on both the listed shell and the operating private company.

Step 3 Pre-Filing Conference and Exchange Approval

A pre-filing conference with the applicable stock exchange should be held to discuss any specific exchange approval requirements and obtain confirmation as to whether the listing will be exempt from sponsorship.

Exchange approval will typically require confirmation of the resulting issuer's proposed management and directors, detailed information regarding the parties' business plans and the financing of such plans, and various associated documentation and filings. Where sponsorship is required, investment banks are often selected as the sponsor. Sponsors must complete prescribed forms which require the completion of due diligence. If a private placement is conducted in conjunction with the RTO, or there is significant involvement of an investment bank with the RTO, the exchange may exempt the RTO from sponsorship requirements.

Step 4 Transaction Agreement and Disclosure Requirements

As an RTO shares many characteristics with an M&A transaction, the transaction agreement may include various common M&A terms, such as deal protection provisions for the benefit of the private company, including a break fee and non-solicit provisions, as well as deal protection provisions for the benefit of the listed shell, including shareholder lock-ups. The transaction agreement will also set out other key deal terms such as timing, representations and warranties, interim period covenants of the parties, and closing conditions.

Depending on the structure of the RTO, either an information circular or filing statement may be required. Any such disclosure document required in connection with the RTO must contain prospectus-level disclosure,[9] i.e., full, true and plain disclosure of all material facts regarding each of the listed shell and the private company as well as pro forma information (including financial statements) of the resulting issuer. This disclosure document must be filed with the exchange for the exchange's review prior to finalization. The parties may also need to apply to the applicable securities commission for a waiver or exemption from certain securities laws.

Step 5 Shareholder Voting and Approval

Both companies to the RTO will typically be required to hold a shareholder meeting to approve the RTO. The threshold of shareholder approval required will depend on the structure the RTO takes (e.g., statutory arrangement or amalgamation), and could be a simple majority, a special majority, or a special majority together with a majority of the minority of shareholders. Also, if structured as a statutory arrangement, court approval will be required. Generally speaking, an information circular prepared for the purposes of obtaining the approval of the listed shell's shareholders can serve as the basis of the information circular used for the purpose of obtaining the approval of the private company's shareholders.

Step 6 Closing

Upon closing of the RTO, the resulting issuer will issue shares to the (former) shareholders of the private company in exchange for the shares of the private company as provided by the transaction agreement, which issuer shares will be listed on the applicable exchange. These issuer shares will continue to be traded on the exchange, although likely under a new ticker symbol. The resulting issuer will continue to be subject to all continued listing requirements designated by the exchange.

RTO Timetable

An RTO typically takes less time that an IPO to complete,[10] ranging from three to five months.

9. For further discussion of prospectus disclosure, see Part 5.
10. See the Indicative IPO Timetable in Part 3A.

Time Period	Weeks 1 - 6	Weeks 7 - 12	Weeks 13- 18
Action Items	• Engagement of financial and legal advisers. • Identification of suitable listed shell(s). • Determination of optimal transaction structure. • Due diligence of listed shell by private company and its advisers. • Due diligence of listed shell and private company by underwriters where private placement is being conducted in connection with the RTO. • Initial negotiation of RTO transaction agreement among private company and listed shell. • Depending on RTO structure, initial preparation of information circular or filing statement.	• Pre-filing conference with applicable stock exchange. • Where sponsorship is required, selection of sponsor. • Finalization of negotiation of RTO transaction agreement among private company and listed shell. • Filing of information circular or filing statement (as applicable) with exchange for review and comment. • Application to securities commission(s) for waiver or exemption from securities requirements, as may be applicable. • Finalization of information circular or filing statement (as applicable) following exchange review. • Working with underwriter in support of associated private placement (if applicable). • If a statutory arrangement, application to applicable court for Interim Order.	• Shareholder meetings of private company and listed shell to approve RTO. • If a statutory arrangement, application to applicable court for Final Order. • If applicable, completion of associated private placement. • Closing of RTO and trading on applicable exchange under new ticker symbol.

C. Qualifying Transaction (QT)

The Basics

A QT is effectively a reverse takeover (see Part 3B) of a capital pool company (CPC) by an operating business that will access the capital, shareholders and expertise of the CPC's management to obtain a listing on the TSXV. A CPC is a TSXV-listed pooled capital vehicle that has completed an initial IPO under the TSXV's Capital Pool Company Program. The QT must be effected for the CPC to move to a regular listing on the TXSV, and the resulting issuer must meet the TSXV's initial listing requirements.

The Process

Step 1	Engage Advisors and Identify the CPC
	As with an RTO, the implementation of a QT is similar to an M&A transaction. First steps include engaging advisers and identifying and choosing among suitable CPC candidates, and towards this end a CPC's IPO must have been for a minimum of C$300,000 and a maximum of C$10,000,000. A key negotiation point will be that of "price" and how much equity of the resulting issuer will remain with the CPC shareholders and how much will be acquired by the private company shareholders.
Step 2	**Transaction Agreement and Exchange Requirements**
	The parties will typically first enter into a letter of intent establishing the material terms and conditions of the QT, and thereafter issue the prescribed news release announcing the QT. Similar to an RTO, a pre-filing conference with the TSXV is also typically held. Each party conducts due diligence on the other and the parties proceed toward a definitive transaction agreement. Initial submissions to the TSXV must be filed within 75 days of the news release, including Personal Information Forms (PIFs), a corporate opinion and a sponsor report from a TSXV "member" (unless the transaction has been exempted from this requirement by the exchange). Industry-specific requirements may also apply, such as geological reports for mining companies.
Step 3	**Concurrent Financing**
	Similar to an RTO, a concurrent financing is typically arranged, e.g., to satisfy closing payments to sellers or initial listing requirements regarding working capital and financial resources. This is usually implemented at the private company level with the securities of the private company exchanged for shares of the CPC at closing. This facilitates free tradability under Canadian securities laws. Funds raised are typically held in escrow and released upon closing of the QT. Should the QT not be completed within a set time period, the funds are returned.
Step 4	**Shareholder Approvals and Required Disclosure**
	As with an RTO, a QT can take one of various structures, including a plan of arrangement, a share exchange, an amalgamation or an asset purchase. The approvals required and applicable voting thresholds will depend on the structure adopted, the requirements of the CPC's governing corporate legislation, and whether the QT is a non-arms length transaction. If the QT is a non-arms length transaction, the CPC must prepare an information circular, hold a shareholders meeting, and obtain the approval of a majority of the minority of the shareholders of the CPC. If the QT is not a non-arms length transaction, CPC shareholders approval may not be required provided the CPC submits a filing statement or a prospectus. In either scenario, the specific disclosure document must provide prospectus level disclosure regarding the resulting issuer and be approved by the TSXV.[11]
Step 5	**Closing**
	Upon closing, the shares of the resulting issuer will be traded on the TSXV and the resulting issuer will be subject to all continued listing requirements established by the exchange.

QT Timetable

The timetable for a QT is similar to that for an RTO,[12] ranging from three to five months.

11. For further discussion of prospectus disclosure, see Part 5.
12. See also the Indicative RTO Timetable in Part 3B.

Part 4

Procedure for Listing on the TSX and TSXV

A. Listing Requirements

To secure a listing of its securities on the TSX or TSXV, a company that does not already have securities listed on the exchange must complete a listing application which, together with supporting data, must demonstrate that the company is able to meet the minimum listing requirements of the TSX or TSXV, as applicable. Listing requirements for the TSX and TSXV are sector and development-stage specific. The sectors include:

Mineral Exploration and Mining	Oil and Gas	Industrial	Research & Development	Technology	Investment Funds and Structured Products	Real Estate (TSXV only)

In addition, certain industry segments are divided by the TSX and TSXV into the following tiers based on the company's the stage of development, historical financial performance and financial resources:

Exchange	More Established	Less Established
TSX	Exempt	Non-Exempt
TSXV	Tier 1	Tier 2

Companies applying for listing must be able to show evidence of a successful operation, or, where the company is relatively new and its business record is limited, there must be other evidence of management experience and expertise. In all cases, the quality of management of an applicant company shall be an important factor in the consideration of a listing application.

Another important listing consideration is the distribution of a company's securities. Evidence must be supplied to the TSX or TSXV indicating that there are enough public security holders to ensure an adequate market.

B. Comparison of Listing Rules and Procedures

Item / Issue	Initial Public Offering (IPO)	Reverse Takeover (RTO)	Qualifying Transaction (QT) with a Capital Pool Company (CPC)
Listing Document[13]	**Long-form prospectus** (full, true and plain disclosure of all material facts concerning the company and the securities offered).	Shell's **management information circular**, if shareholder approval required (full, true and plain disclosure of all material facts concerning the shell, the private company and the resulting issuer). *or* **Filing statement**, if shareholder approval not required – substantially the same as CPC filing statement.	CPC **management information circular**. *or* CPC **filing statement** (full, true and plain disclosure of all material facts concerning the CPC, the private company and the resulting issuer).
Applications and Approvals Required	TSX/TSXV 1. Application for listing (apply before filing preliminary prospectus). 2. Conditional listing approval (required before closing, preferably before filing preliminary prospectus). 3. Final listing approval (on closing).	TSX/TSXV 1. Application for approval of RTO and re-listing of resulting issuer (apply before mailing information circular for shell shareholders' meeting). 2. Conditional RTO and re-listing approval (required before mailing information circular for shell shareholders' meeting). 3. Final approval and listing (on closing).	TSXV 1. Application for CPC's QT (apply before mailing CPC information circular). 2. Conditional QT approval (required before mailing CPC information circular). 3. Final approval and listing (on closing).

13. In all cases, the draft disclosure document must include all applicable annual and interim period financial statements.

<table>
<tr><th>Item / Issue</th><th>Initial Public Offering (IPO)</th><th>Reverse Takeover (RTO)</th><th>Qualifying Transaction (QT) with a Capital Pool Company (CPC)</th></tr>
<tr><td>Applications and Approvals Required (continued)</td><td>Securities Commissions
• Review of preliminary prospectus and final prospectus.
• IPO cannot be marketed before securities commissions issue receipt for preliminary prospectus.
• IPO cannot close until securities commissions issue receipt for final prospectus.
• Closing generally takes place 5 business days following receipt for final prospectus.</td><td>Shell shareholders (TSX/TSXV requirement)
• Approval by simple (50% + 1) majority (if share acquisition) or special (2/3) majority (if arrangement or amalgamation.
• If related persons of shell have interest in the company, their shares do not vote.
• Shareholder approval only required in limited circumstances.
• If shareholder approval not required, filing statement will be the disclosure document and will be vetted by the TSXV in similar fashion as a CPC QT.</td><td>CPC shareholders (TSXV requirement)
• Approval required if QT is not at arm's length or if it is a direct amalgamation, as opposed to the more customary "three-cornered" amalgamation.
• Approval is by simple (50% + 1) majority (if share acquisition) or special (2/3) majority (if arrangement or amalgamation.
• If related persons of CPC have interest in the company, their shares do not vote.
Company Shareholders
• Approval required if QT is an amalgamation.
• Approval is by special (2/3) majority.</td></tr>
<tr><td>Other Filings</td><td>Personal Information Forms
• for each director, officer and promoter[14] of the company (securities commission requirement when filing preliminary prospectus); and
• for each director, officer, promoter and principal shareholder (i.e., one holding 10% or more of the outstanding shares) of the company (TSX/TSXV requirement on listing and going forward).
Technical Reports for all material resource properties (if any).</td><td>Personal Information Forms for each director, officer, promoter and principal shareholder (i.e., one holding 10% or more of the outstanding shares) of Issuer (TSX/TSXV requirement on re-listing and going forward).
Technical Reports for all material resource properties (if any).</td><td>Personal Information Forms for each new director, officer, promoter and principal shareholder (i.e., one holding 10% or more of the outstanding shares) of the resulting issuer (TSX/TSXV requirement on closing and going forward).
Technical Reports for all material resource properties (if any).</td></tr>
</table>

14. The Ontario Securities Act defines a "promoter" as a "person or company who, acting alone or in conjunction with one or more other persons, companies, or a combination thereof, directly or indirectly, takes the initiative in founding, organizing or substantially reorganizing the business of an issuer".

Item / Issue	Initial Public Offering (IPO)	Reverse Takeover (RTO)	Qualifying Transaction (QT) with a Capital Pool Company (CPC)
Escrow and Lock-Ups	**IPO Escrow:** All securities held by principals (directors, officers, promoters, control persons and holders of 10% or more of the shares) of the company (excl. principals who hold less than 1% of the voting rights immediately after the IPO) must be placed in escrow (generally 18 month escrow period composed of four equal release periods). For TSX escrow restrictions do not apply to principals of companies meeting the requirements of an exempt listing. Exemption from escrow requirement if market cap of public entity exceeds C$100 million on completion of IPO. **Lock-Ups:** Underwriters usually require directors, officers, and principal shareholders of the company to refrain from selling or otherwise disposing of their shares for a period of time (usually 90-180 days) from closing.	**Resulting Issuer Escrow** • All securities held by principals (directors, officers, promoters and holders of 10% or more of the shares) of the resulting issuer must be placed in escrow (TSX/TSXV requirement on closing of RTO). • Securities held by such principals prior to the completion of the RTO will be held pursuant to a Value Security Escrow Agreement (36 month escrow if a Tier 2 issuer or 18 months if a TSX/ Tier 1 issuer). Note that in several instances, because of the market capitalization of the company and the size of the concurrent private placement, the resulting issuer moves up to the TSX (the senior exchange) on closing of the RTO. As such, if the resulting issuer has a market capitalization in excess of C$100 million, there will be no escrow. If the market capitalization is less than C$100 million, the escrow will be an 18-month escrow, similar to the escrow of a Tier 1 issuer.	**CPC Escrow** • All securities held by principals (directors, officers, promoters, control persons and holders of 10% or more of the shares) of the CPC must be placed in escrow pursuant to the CPC Escrow Agreement when the CPC completes its IPO (TSXV requirement on closing of CPC IPO). **Resulting Issuer Escrow** • All securities held by principals (directors, officers, promoters, and holders of 10% or more of the shares) of the resulting issuer must be placed in escrow (TSXV requirement on closing of QT). • Securities held by such principals prior to the completion of the QT will be held pursuant to a Value Security Escrow Agreement (36 month escrow if a Tier 2 issuer or 18 months if a Tier 1 issuer). Note that in several instances, because of the market capitalization of the company and the size of the concurrent private placement, the resulting issuer moves up to the TSX (the senior exchange) on closing of the QT. As such, if the resulting issuer has a market capitalization in excess of C$100 million, there will be no escrow. If the market capitalization is less than C$100 million, the escrow will be an 18-month escrow, similar to the escrow of a Tier 1 issuer.

Item / Issue	Initial Public Offering (IPO)	Reverse Takeover (RTO)	Qualifying Transaction (QT) with a Capital Pool Company (CPC)
Sponsorship	Issuers seeking listing on the TSX under the criteria for non-exempt companies must be sponsored (or seek waiver from the TSX) by a Participating Organization. Further, Issuers seeking listing on the TSXV must be sponsored (or seek waiver from the TSX). The Exchanges have discretion to waive the sponsorship requirement if the applicant is filing a full prospectus, completes a brokered financing immediately before or concurrently with listing, meets certain profitability tests, or satisfies other criteria.	Sponsorship will be required (or waived) in connection with any application for a New Listing made in the context of an RTO. In order to rely on any of the exemptions set forth under the TSXV Corporate Finance Policies, the Issuer must arrange a pre-filing conference with staff of the TSXV and obtain TSXV confirmation that the transaction is exempt from sponsorship.	Sponsorship will be required (or waived) in connection with any application for a New Listing made in the context of a QT. In order to rely on any of the exemptions set forth under the TSXV Corporate Finance Policies, the Issuer must arrange a pre-filing conference with staff of the TSXV and obtain TSXV confirmation that the transaction is exempt from sponsorship.
Timing	Prospectuses are subjected to a full review by securities regulators, which requires anywhere from 10 business days (statutory minimum) to 30 days or more, depending on the problems uncovered. The preparation of the long-form prospectus, the audited financial statements and the technical reports - all of which must be in place before filing the prospectus - can take anywhere from 30 to 90 days. Generally will take 90-120 days if everything is in order.	If shareholder approval of shell is not required, generally 75-90 days, if everything is in order. If shareholder approval of shell is required, generally will take 90-120 days, if everything is in order.	The CPC must complete a QT within 24 months of its IPO. The CPC must make its initial submission to the TSXV within 75 days after the public announcement of the QT. If shareholder approval is required, once the TSXV has reviewed the initial submission, and all of its concerns have been addressed, the CPC will be cleared to mail the CPC information circular. Generally will take 75-90 days if everything is in order.

Part 5

The Prospectus

This section of the Guide briefly summarizes certain provisions of the *Securities Act* (Ontario) and applicable policies of the Ontario Securities Commission relating to the public distribution of securities, and the liability of a company and its directors and officers in connection with that distribution. The legislation in Ontario is similar to the legislation in the other provinces and territories of Canada.

A. Prospectus Disclosure

A prospectus has the dual purpose of being a listing document for the company as well as a marketing document for the sale of securities. A company should allocate sufficient time and resources to ensure the prospectus appropriately tells the company's story. The prospectus should be written in plain and clear language and organized in a concise manner.

In order to ensure the public can make an informed investment decision, the prospectus must contain "full, true and plain disclosure of all material facts relating to the securities" offered by the prospectus and a prospectus cannot contain a "misrepresentation", namely an untrue statement of a 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 the light of the circumstances in which it was made. The term "material fact" is defined to mean a fact that would reasonably be expected to have a significant effect on the market price or value of the securities being offered.

There is certain information that is required to be included in a prospectus. The most significant areas of mandated disclosure are the following:

Disclosure	Description
Description of Business	The prospectus must contain an extensive description of the business carried on and intended to be carried on by the company. This will include a description of the business of the company with reference to the reportable operating segments identified under the accounting principles used to prepare the company's financial statements. The company should also describe any recent acquisitions or dispositions.
Risk Factors	The company must disclose all material risk factors relating to the company and its business, such as cash flow or liquidity problems, management experience, and general inherent industry risks, as well as those related to any other matter that would be likely to influence an investor's decision. The risk factors should be organized in priority from those that are the most material to the company to those that are less significant.
Capital Structure and Significant Shareholders	The capital structure of the company must be described in the prospectus, including the company's dividend policy. In addition, the prospectus must identify each person (if any) holding more than 10% of each class of voting securities of the company.
Use of Proceeds	The prospectus must discuss how the company proposes to use the net proceeds of the offering, with specific details required if more than 10% of such proceeds are principally being used for the purpose of reducing or retiring debt, acquiring specific assets or interests, for research and development, or to be received by an insider, affiliate or associate.
Plan of Distribution	The arrangements between the company and its underwriters concerning the IPO are set out in detail in an underwriting agreement and are described in the prospectus as the plan of distribution.
Directors and Officers and Executive Compensation	The identity of directors and senior officers of the company as well as certain information relating to their principal occupations, whether they have been bankrupt or subject to a cease trade order in the last 10 years and any related party transactions that they have engaged in with the company. The prospectus must also disclose the annual compensation of (i) the company's CEO, CFO and each of its next three most highly paid executive officers, or (ii) if the company is a venture issuer or IPO venture issuer, the company's CEO, CFO and the next most highly paid executive officer, together with a discussion and analysis of the company's approach to executive compensation.
Corporate Governance Practices	The company's corporate governance practices will need to be described in detail in the prospectus and any board code of conduct should be appended as well.
Material Contracts	The company will be required to give particulars of every material contract: (i) entered into since the beginning of its last completed financial year; or (ii) entered into previously but that is still in effect.
Legal Proceedings	The prospectus must disclose any material legal proceedings, whether pending or contemplated, other than routine litigation incidental to the business of the company.
Financial Statements	The company will be required to prepare its financial statements in accordance with International Financial Reporting Standards. There is no requirement to include forecasts or projections of financial results, although there are rules that must be followed if the company opts to provide such disclosure. Generally, a company will need to disclose three full years of audited annual financial statements, plus unaudited interims for its most recently completed quarter.
Management's Discussion and Analysis (MD&A)	The prospectus must contain a discussion and analysis by management of changes in the company's financial condition and results of operations for the two most recently completed financial years, in each case with a comparison against the previously completed financial year, as well as interim MD&A.

The company should also include any other material facts or information necessary to satisfy the full, true and plain disclosure requirements.

Any forward-looking information in the prospectus, such as company projections, is subject to special rules, which are described in more detail in Part 8 of this Guide.

Also, certain types of companies are required to provide additional disclosure related to their particular industry in order to secure a listing of their securities on the TSX or TSXV. We briefly review four here, being: (i) mining companies; (ii) oil and gas companies; (iii) cannabis companies; and (iv) emerging market companies.

Additional Considerations for Mining Companies

Mining companies must additionally provide a technical report in the form prescribed under National Instrument 43-101 – Standards of Disclosure for Mineral Projects (NI 43-101).

Key criteria that such NI 43-101 technical reports must incorporate or satisfy include, among others: (i) a summary of reserve and resource estimates, if applicable, and other scientific and technical information concerning mineral exploration and development activities; (ii) be prepared by, or under the supervision of, at least one "qualified person" as defined by NI 43-101 (in many instances the qualified person must be an independent qualified person); and (iii) be prepared on the basis of all available data relevant to the disclosure. Moreover, compliance with NI 43-101 continues for mining companies following an IPO, including requirements to file a technical report for each new material mineral project and to replace previous reports with current technical reports as prescribed.

Additional Considerations for Oil and Gas Companies

Similarly, oil and gas companies must provide additional information prescribed under National Instrument 51-101 – Standards of Disclosure for Oil and Gas Activities (NI 51-101).

Three different statements and reports are required under NI 51-101. Each of these statements and reports must be filed upon an IPO and then annually no later than the date on which the company is required to file its audited financial statements for its most recent financial year. These statements and reports are: (i) Statement of reserves data and other information (NI 51-101F1); (ii) Report of independent qualified reserves evaluator or auditor (NI 51-101F2); and (iii) Report of management and directors (NI 51-101F3). Under NI 51-101, written consent in the prescribed form from the author(s) must be provided for the use of the reports in support of the listing.

Additional Considerations for Cannabis Companies

The Canadian Securities Administrators (CSA) has issued various staff notice's specific to the cannabis industry, namely:

- CSA Staff Notice 51-352 (Revised) – Issuers with U.S. Marijuana-Related Activities, which sets out the CSA's disclosure expectations for specific risks facing issuers with marijuana-related activities in the United States;
- CSA Staff Notice 51-357 – Staff Review of Reporting Issuers in the Cannabis Industry, which highlights good disclosure practices for issuers in the cannabis industry focused on transparent information about financial performance and risks and uncertainties; and
- CSA Staff Notice 51-359 – Corporate Governance Related Disclosure Expectations for Reporting Issuers in the Cannabis Industry, which provides supplementary guidance related to the disclosure of financial interests in the context of M&A transactions.

Additional Considerations for Emerging Market Companies

In July 2015, the TSX issued a Staff Notice that identifies listing requirements for Emerging Market Issuers. In determining whether a company is an "Emerging Market Issuer" the TSX and TSXV, as applicable will consider the following criteria:

(i) residency of mind and management; (ii) jurisdiction of the primary business operations and assets; (iii) jurisdiction of incorporation; (iv) nature of the business; and (v) corporate structure.

If deemed an Emerging Market Issuer, the TSX Staff Notice provides further guidance in support of the listing application addressing the following high level criteria: (i) pre-filing meetings; (ii) management; (iii) auditors; (iv) internal controls; (v) sponsorship; (iv) related party transactions; (vii) non-traditional capital or corporate structure and ownership of principal assets; (viii) background research; and (ix) policies. After the IPO of an Emerging Market Issuer, the TSX and TSXV may monitor and asses the Emerging Market Issuer to ensure continued compliance with the criteria set out in the Staff Notice.

Translation

If a company decides to file its prospectus in the Province of Québec it will have to translate the document into French. The company will have to assess if the time delay and costs involved in translating the prospectus results in a meaningful increase to its net proceeds from the financing.

B. Foreign Issuers

The multijurisdictional disclosure system (MJDS) adopted by the SEC and Canadian securities regulatory authorities eliminates many of the major obstacles for U.S. issuers offering securities in Canada, by facilitating cross-border securities offerings.

The MJDS permits eligible U.S. issuers to satisfy certain offering and reporting requirements by submitting disclosure documents that comply with SEC requirements supplemented with certain additional disclosure requirements. Under the MJDS, a U.S. issuer can extend the distribution of securities to Canada without having to produce an entirely new prospectus conforming to the requirements and obligations of Canadian securities law.

C. Prospectus Liability

Statutory Prospectus Liability

Securities legislation imposes a rigorous standard of responsibility and liability. In brief, where a prospectus contains a "misrepresentation", each purchaser who purchased a security offered by prospectus during the period of distribution or during distribution to the public has, without regard to whether the purchaser relied on the misrepresentation, a remedy against the offering company either in damages or for rescission, as well as a remedy in damages against the directors of the company (and each other person who signs the prospectus).

As previously explained, a misrepresentation is: (i) an untrue statement of material fact; or (ii) 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 would reasonably be expected to have a significant effect on the market price or value of the company's securities.

A prospectus is required to be signed by: (i) the Chief Executive Officer, the Chief Financial Officer, and two other directors who are not those officers; (ii) any promoter of the company; and (iii) the underwriters of the offering. The parties that sign the prospectus on behalf of the company are required to certify that the prospectus contains full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and does not contain a misrepresentation.

If it is subsequently determined that a prospectus contained a misrepresentation, a purchaser of securities under the prospectus would have the right to either rescind the purchase, or claim damages, on a joint and several basis, from such persons as: (i) the company; (ii) each person who signed the prospectus on behalf of the company (i.e., the Chief Executive Officer, the Chief Financial Officer, and each signing director); (iii) every director of the company at the time the prospectus was filed (whether or not the director reviews the prospectus, signs the certificate or is present at the meeting at which the filing of the

prospectus is approved); and (iv) the underwriters who signed the prospectus. If rescission is the remedy pursued, then no right of action for damages will be available as a remedy. It should be emphasized that the purchaser does not need to prove that they relied upon the misrepresentation in order to prevail in an action for rescission or damages.

Quasi-Criminal Liability

There is also quasi-criminal liability imposed on a person or corporation that has made a statement in any prospectus which, at the time and in light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading, or where the person or company has otherwise failed to comply with any provision of applicable legislation. This includes the failure to provide full, true and plain disclosure in a prospectus of all material facts relating to the securities proposed to be distributed.

The penalty imposed if a corporation is convicted is a fine of not more than C$5,000,000. In the case of an individual who is convicted, the penalty is a term of imprisonment of not more than five years less a day, a fine of not more than C$5,000,000, or both. Where a corporation is found guilty, every director or officer of the corporation who authorized, permitted or acquiesced in the offence is also guilty of the offence, and may be liable to a fine of not more than C$5,000,000, a term of imprisonment of not more than five years less a day, or both.

A person or company will not be guilty of an offence in respect of a misrepresentation in a preliminary prospectus or prospectus where the person or company did not know, and in the exercise of reasonable diligence could not have known, that the statement was a misrepresentation.

Defences

In the event that a prospectus is determined to contain a misrepresentation, there would be no defences available to the company unless it could be proven that the purchaser purchased the securities with knowledge of the misrepresentation. On the other hand, the following defences are available to: (i) the officers who signed the prospectus; (ii) each of the directors of the company; (iii) each promotor; and (iv) the underwriters who signed the prospectus:

Defence	Description
No Knowledge	A party is not be liable if he, she or it proves that the prospectus was filed without his, her or its knowledge or consent, and on becoming aware of such filing, he, she or it promptly gave reasonable general notice that the filing was without his, her or its knowledge or consent.
Withdrawal of Consent	If, before the purchase of securities by a purchaser, on becoming aware of a misrepresentation in the prospectus, the party withdrew his, her or its consent to the filing of the prospectus and gave reasonable general notice of such withdrawal and the reason therefore.
Due Diligence	If a party conducted such reasonable investigation as was necessary to provide reasonable grounds for a belief that there had been no misrepresentation. If a party believed there had been a misrepresentation, the party would be liable regardless of the extent of any such "due diligence" investigation. However, a party will not be liable for any misrepresentation in a "non expertized" part of a prospectus (as discussed below) where the party does not believe that the prospectus contains a misrepresentation and the party conducts a reasonable investigation and, as a result of that investigation, has reasonable grounds for a belief that the prospectus does not contain a misrepresentation. In determining what constitutes a "reasonable due diligence" investigation, the standard of conduct required is that of "a prudent person in the circumstances of the particular case". This standard is an objective "prudent person" test.
Reasonable Reliance on an Expert	In the case of a statement contained in the prospectus (such as the summary of the technical report or the summary of Canadian tax considerations) purporting to be made on the authority of an expert, a party would not be liable if he, she or it proved that he, she or it had no reasonable grounds to believe, and did not believe, that there had been a misrepresentation or that such part of the prospectus did not fairly represent the report, opinion or statement of the expert or was not a fair copy of or extract from the report, opinion or statement of the expert.
Non-Reliance	If the purchaser can be shown to have purchased the securities with knowledge of the misrepresentation.

Establishing the "Due Diligence" Defence

The "due diligence" defence is the most important of the defences available to the directors. As such, a key role of legal counsel will be to advise the company regarding prudent procedures to be adopted in preparation for an offering to best place the company, its directors and officers to assert a due diligence defence, should that ever be necessary.

What constitutes a reasonable investigation depends in large measure on the relationship of the individual with the company. The closer the involvement of an officer or director with the affairs of the company, the greater the level of care that must be exercised in conducting a due diligence investigation to ascertain the veracity of statements contained in the prospectus or whether additional statements need to be added to the prospectus to prevent them from containing a material omission. For example, members of the audit committee of the board of directors may have a greater level of care than other directors with respect to financial information set forth in the prospectus. Furthermore, the courts have made it clear in a number of cases that blind reliance on management will not be sufficient to discharge a director's duty of reasonable investigation.

Part 6

The Underwriting or Agency Agreement

A. The Engagement Letter

When a securities dealer is retained by a company to assist with an offering of securities, the parties will first sign an engagement letter which details the broad parameters of the listing and associated offering, including: (i) the amount being raised; (ii) commission to be paid; (iii) indemnities and termination rights granted; (iv) over-allotment terms (i.e., “green shoe”); and (v) a timeline. With permission of the company, the dealer may engage other syndicate members (i.e., additional dealers) to assist with the distribution of the securities, building the company’s profile and awareness of the offering and providing research and trading support.

B. Underwriter Due Diligence

Dealers will conduct extensive diligence on the company. This will include business, financial and legal due diligence. This diligence review will start very early in the listing process and may continue beyond the underwriting or agency agreement being signed.

Management plays a key role in ensuring the smooth completion of diligence and the company should be prepared to work collaboratively with the dealer and its advisors to respond to multiple diligence requests. The dealer will also conduct one or more oral diligence sessions with the company’s management, audit committee chair, technical report authors, auditors and legal advisors, in which it will ask various questions about the company, its business and the disclosure in the prospectus.

As discussed in Part 1, the company will need to be organized and respond to additional requests from the underwriters promptly. A slow or disorganized process can send negative signals to underwriters and investors, while a smooth, well-run process can create momentum for a successful listing. See Part 5 of this Guide for a further discussion on a dealer's due diligence defence.

C. The Underwriting Agreement

The engagement letter is replaced with an underwriting or agency agreement setting out a more comprehensive road map for the deal. This typically occurs after the preliminary prospectus has been cleared by regulators and shortly before the final prospectus is filed. Underwriting agreements are security purchase agreements, and agency agreements are security placement agreements, and contain a standard set of clauses, the most significant of which are summarized below:

Clause	Description
Representations, Warranties and Covenants	The underwriting agreement will include a range of representations and warranties in favour of the underwriter given by the company, any selling shareholders and any promoters, including: (i) general representations regarding the accuracy and completeness of the prospectus disclosure; and (ii) specific disclosures regarding (a) issued and outstanding capital, (b) options or other rights to purchase unissued securities, (c) non-conflict between the terms of the offering and the company's organizational instruments and material agreements, (d) the conduct of the company's business in accordance with applicable laws, and (e) the absence of material undisclosed litigation or liabilities.
Over-Allotment Option	Although standard in a firm-commitment underwriting agreement, the over-allotment option is an important underwriting agreement clause the function of which the company should be familiar with. Specifically, it is a key underwriter tool used to provide after-market price support and stability for the offered securities. Also referred to as a "green shoe" option, it typically applies for a 30-day period beginning following the closing of the offering and allows the underwriters to take investor orders for more securities (i.e., an over-allotment) than the underwriters purchased under the prospectus. Should the price of the securities rise above the offering price during the 30-day period, the underwriters exercise the option to purchase additional securities from the company at the offering price to satisfy the over-allotment. Should the price of the securities fall below the offering price following closing, the underwriters can satisfy the over-allotment by purchasing the required number of securities in the open market. These additional purchases of securities by the underwriters deliver after-market price support for the securities. By contrast, without such an over-allotment option, the underwriters' ability to provide post-closing price support would be much more limited. In addition to the underwriting agreement, over-allotment options are described in the prospectus. The option is required by Canadian securities laws to be capped at 15% of the initial number of securities offered under the prospectus and is made available to the underwriters on a pro rata basis.

Clause	Description
Lock-Ups and Blackout Periods	Lock-ups and blackout periods are closely related and function to protect investors who purchased securities in the offering in the first few months of trading following closing. The risk being guarded against is the possibility of adverse price swings that could result from company insiders selling shares shortly after the offering (i.e., because sales of securities by insiders soon after closing could be interpreted as indicative of a lack of confidence in the company or its future performance and prospects). Lock-ups (applicable to management and shareholders) and blackouts (applicable to the company) are therefore typically imposed by the underwriters to prevent the company, its directors, senior management and significant shareholders from divesting any of their securities in the company without the underwriters' consent for a fixed period post-closing, often 180 days. Moreover, in addition to guarding against the negative optics of early insider sales, underwriters value lock-ups and blackouts for guarding against a flooding of the market by securityholders simply seeking to capitalize on the newfound liquidity of the company's securities.
Commission and Expenses	The underwriters' commission is often highly negotiated and the typical range is 4%–7% of the proceeds of the offering. Considerations informing the negotiation of the underwriters' commission include: (i) the size of the offering; (ii) the type of securities being offered; (iii) the jurisdictions in which the securities are being offered; and (iv) market precedent having regard to the foregoing. Regarding the underwriters' expenses, it is customary for the parties to agree that the company will reimburse the underwriters for all reasonable costs incurred by the underwriters in connection with the offering, even where the offering does not proceed. Prior to the execution of the underwriting agreement, this issue will typically be addressed in the parties' engagement letter. Where there are selling shareholders, they may be responsible for their share of the underwriting fee and expenses. Alternatively, such selling shareholders may reach a different arrangement with the company.
Indemnities and Contribution	The company, any selling shareholders and any promoter will provide the underwriters with a fulsome indemnity in respect of various possible liabilities relating to the offering, including: (i) untrue statements or misrepresentations in the prospectus; (ii) non-compliance with applicable securities laws by the company in connection with the offering; and (iii) any investigation or order restricting the marketing, distribution or trading of the offered securities. A contribution clause can be understood as a backstop to the underwriting agreement's indemnity in that it provides for equitable contribution where an indemnity is claimed but held to be unenforceable by, or otherwise unavailable to, an underwriter. In such circumstances the clause functions to require the parties to contribute to the aggregate of all losses incurred in proportions reflecting the relative benefits received by the parties, their relative failures or wrongdoings, and other equitable considerations.
Alternative Transaction Fees	An alternative transaction fee clause stipulates that the company is obligated to pay the underwriter a set fee should the offering not be completed and the company enters an alternative transaction not related to the offering within a specified period of time. Alternative transactions fees are typically addressed in the earlier engagement letter before also being included in the underwriting agreement.

Clause	Description
Termination Rights	Termination rights grant the underwriters the ability to withdraw from the offering at or prior to closing upon the occurrence of specified events, which commonly include some manner of the following "termination outs": *Regulatory Out*: the initiation of any regulatory investigation, the issuance of any regulatory order, or any change in law that, in the reasonable opinion of the underwriter, adversely impacts the marketability of, distribution of, or trading in the offered securities. *Market Out*: a change in the state of the financial markets in Canada (or such other financial markets as the parties have agreed are significant to the particular offering) such that, in the reasonable opinion of the underwriter, the offered securities cannot be profitably marketed. *Material Change Out*: a material change in the business, assets or liabilities of the company that, in the reasonable opinion of the underwriter, would reasonably be expected to have a significant adverse impact on the offered securities' price or value. *Disaster Out*: a development of national or international consequence that, in the reasonable opinion of the underwriter, may or has seriously adversely impacted the financial markets in Canada (or such other financial markets as the parties have agreed are significant to the particular offering) or the business of the company taken as a whole.

D. Types of Offerings

In the context of a going public transaction, there are two main types of security offerings - **"firm commitment underwritten"** and **"best efforts"**. When an offering is underwritten it means the dealer is contractually bound to purchase the securities if the dealer is not able to source purchasers for the securities, while an agency or best efforts offering means the dealer is not bound to purchase the securities but rather is committed to use its "best efforts" to place the securities. Most large IPOs in Canada are completed on a firm commitment underwritten basis. Importantly, in a firm-commitment underwriting, if the underwriters do not terminate, the company is entitled to receive all proceeds from the offering, even where the underwriters are unable to sell all of the offered securities.

Part 7

Canadian Tax Considerations

The following are some of the principal differences from an income tax perspective that should be considered by a Canadian private company and its shareholders when considering becoming a public corporation.

A. Impact on Corporate Level Taxation

A corporation that is throughout a taxation year a "Canadian-controlled private corporation" (CCPC), as defined in the *Income Tax Act* (Canada), may qualify for income tax at a reduced rate on its first C$500,000 of taxable income each year.[15] Special refundable tax rules may also apply to a CCPC's investment income. In addition, there are preferential tax rules that may apply to a CCPC that incurs certain types of research and development expenses.

A private corporation, as defined in the *Income Tax Act* (Canada), maintains a capital dividend account which is a notional tax account that keeps track of amounts that may be distributed tax-free to Canadian resident shareholders. The most common component of this account is the non-taxable portion of net capital gains realized by the corporation.

Under the *Income Tax Act* (Canada), a "private corporation" does not include a "public corporation". A public corporation includes a corporation resident in Canada that has a class of its shares listed on a designated stock exchange in Canada. The designated stock exchanges in Canada are: (i) the TSX; (ii) Tiers 1 and 2 of the TSXV; (iii) the Montreal Exchange; (iv) the Canadian Securities Exchange; and (v) the Cboe Canada.[16] In addition, a CCPC does not include a corporation that has a class of shares listed on any designated stock exchange (whether Canadian or foreign).

Once a class of shares of a CCPC is listed on a designated stock exchange, it will cease to be a CCPC and it will have a deemed taxation year end under the *Income Tax Act* (Canada). The corporation will no longer benefit from the lower tax rate on its

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15. The threshold is $600,000 in Saskatchewan.
16. Cboe Canada is a privately owned exchange formerly known as the NEO Exchange.

first C$500,000 of taxable income,[17] will not be subject to the refundable tax regime on its investment income, will no longer be able to pay tax-free capital dividends, and will have reduced tax benefits for research and development tax incentives under the *Income Tax Act* (Canada). Accordingly, to the extent relevant, planning may be necessary in advance of going public to, among other things, use the remaining balance of the capital dividend account and maximize refundable taxes and research and development tax incentives.

B. Impact on Shareholder Level Taxation

Lifetime Capital Gains Exemption

Shareholders who are individuals resident in Canada can dispose of shares of a CCPC that meet certain criteria and claim a one-time exemption from capital gains tax up to a maximum of approximately C$971,000 of capital gain realized on such disposition.

If the qualifying shares are not disposed of in the course of the go-public transaction (e.g., in a secondary offering), then the individual shareholder may file a tax election to be deemed to have disposed of the shares of the CCPC that meet the criteria for the exemption in order to claim the capital gains exemption. The shareholder can elect to realize all or any portion of the accrued capital gain and the cost base of the shares will be increased by the elected amount on a going-forward basis.

Taxation of Employee Stock Options

The *Income Tax Act* (Canada) contains rules regarding the taxation of employee stock options. More favourable rules apply with respect to stock options issued by a CCPC to arm's length employees. The two main advantages for employee stock options granted by a CCPC are: (i) the ability to defer taxation of the stock option benefit (i.e., the amount by which the fair market value of the shares on the date of issuance exceeds the amount paid for the shares) from the year the share is issued by the CCPC to the year in which the share is disposed of by the employee; and (ii) the employee may claim a deduction in respect of the stock option benefit equal to 50% of stock option benefit included in their income, provided that the shares are held by the employee for at least two years from the date they are issued, regardless of the amount of the exercise price paid to acquire the shares from the CCPC.

By contrast, in the case of employee stock options granted by a public corporation: (i) the stock option benefit is taxable in the year that the shares are issued to the employee; and (ii) the 50% deduction is only available if certain conditions are met, including that the exercise price paid for the shares was not less than the fair market value of the shares on the date the stock option was granted to the employee.

It should be noted that the more beneficial tax rules apply provided that the corporation is a CCPC at the time the employee stock options are issued (regardless of its status at a later time). Accordingly, a CCPC that is contemplating becoming a public corporation may want to issue stock options (or additional stock options) to arm's length employees prior to the date the corporation ceases to be a CCPC.

Qualified Investment Status for Registered Plans

In limited circumstances, shares of a CCPC can meet the criteria to be a qualified investment for certain registered plans under the *Income Tax Act* (Canada), namely, a trust governed by a registered retirement savings plan, registered retirement income fund, registered education savings plan, tax-free savings account, registered disability savings plan, or deferred profit sharing plan.

Shares listed on a designated stock exchange are, generally, qualified investments under the *Income Tax Act* (Canada) for such registered plans, as are shares of a "public corporation" even if the particular class of shares is not listed on a designated stock exchange.

17. The threshold is $600,000 in Saskatchewan.

Part 8

Post-Listing Reporting Requirements

A. Continuous Disclosure Regime

Following a public listing in Canada, the company will become a reporting issuer under Canadian securities laws. Reporting issuers must regularly provide the public with certain prescribed disclosure about their activities and financial status (often referred to as the “continuous disclosure regime”). The continuous disclosure regime is central to Canada’s capital market system, aimed at providing investors with transparent access to information about reporting issuers. Reporting issuers are obliged to provide information to the public on a range of governance, financing and operational issues and risk factors so investors can assess the performance and integrity of the company.

In addition, the TSX and TSXV also have prescribed requirements requiring companies listed on their exchanges to disclose material information on an ongoing basis as further discussed below.

Periodic Disclosure Requirements

The general continuous disclosure obligations for reporting issuers are set out in National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102). NI 51-102 is aimed at providing consistency in the preparation and public filing of disclosure documents for reporting issuers in all Canadian jurisdictions.

The following list sets out some of the documents required to be filed under the periodic disclosure requirements of NI 51-102, each of which must be in form and content prescribed by NI 51-102:

Document(s)	Description
Financial Statements	Each reporting issuer must prepare and file annual and quarterly interim financial statements, which include a statement of comprehensive income, a statement of changes in equity and a statement of cash flows. The annual statements must be prepared and audited in accordance with International Financial Reporting Standards. The audit committee of the reporting issuer's board of directors is required to directly oversee the work of the issuer's auditor. In addition, the auditor may also play a role in the review of the interim financial reports. This is not strictly required. However, if an auditor has not performed a review of the interim financial reports, those financial reports must be accompanied by a notice indicating that the financial reports have not been reviewed by an auditor, and must not be used in a prospectus.
Management's Discussion and Analysis (MD&A)	Each reporting issuer is required to file MD&A relating to their annual financial statements and each interim financial report. The MD&A offers an opportunity to provide investors with management's view on the company's performance and how that performance may affect future plans.
Annual Information Forms (AIF)	An AIF is mandatory for all TSX reporting issuers, but is not required for TSXV issuers. An AIF requires detailed information about the history, operations and financial affairs of the reporting issuer, including a discussion of the company's prospects and risk factors. Although not required for TSXV issuers, a current AIF is one of the eligibility criteria for making use of the short form prospectus system, so venture issuers intending to make use of the system will need to meet the AIF requirement.
Information Circulars	A reporting issuer is required to hold annual meetings of, prepare and send a proxy circular to, and solicit proxies from, its shareholders in accordance with timelines prescribed by corporate law, applicable securities laws and the rules of the TSX or TSXV. Subject to limited exceptions, each reporting issuer must prepare and file an information circular when holding a shareholder meeting. The information circular provides information to shareholders with respect to, among other things: (i) the voting shares and the principal holders of such voting shares; (ii) the matters to be voted upon at the meeting, including information about each of the proposed directors; (iii) executive compensation, including a compensation discussion and analysis, the summary compensation table for the Chief Executive Officer, the Chief Financial Officer and the three other most highly compensated executive officers, and disclosure on incentive and pension plans and severance arrangements; and (iv) any interests of insiders in material transactions.
Business Acquisition Reports (BAR)	Reporting issuers must file a BAR upon the completion of a significant acquisition. An acquisition is generally considered to be a significant acquisition if: (i) the consolidated assets of the acquired business exceed 20% (100% for TSXV issuers) of the consolidated assets of the issuer calculated using their most recent audited annual financial statements, or (ii) the issuer's consolidated investments in and advances to the acquired business as at the acquisition date exceed 20% (100% for TSXV issuers) of the consolidated assets of the issuer in its most recent audited annual financial statements, excluding any such investments or advances. The prescribed contents of the BAR include, among other things, comparative annual audited financial statements and interim financial reports of the acquired business.

The issuer's annual financial statements and MD&A must be approved by its board of directors before the statements are filed. In addition, the company's Chief Executive Officer and Chief Financial Officer are required to certify the annual financial statements, interim financial reports, MD&A and AIF.

There is no securities law requirement to prepare and file a "glossy" annual report. However, many reporting issuers prepare such an annual report, which is sent to their shareholders and which includes a corporate presentation and other information in addition to the annual audited financial statements and the annual MD&A.

Timely Disclosure Requirements

The continuous disclosure regime requires certain timely disclosures to be made by reporting issuers in respect of material information. Material information consists of both "material facts" and "material changes" relating to the business and affairs of a reporting issuer.

- A **"material fact"** means a fact that would reasonably be expected to have a significant effect on the market price or value of the issuer's securities.
- A **"material change"** means a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer, and includes a decision to implement such a change made by the directors, or senior management who believe that confirmation of the decision by the directors is probable.

Failure to comply with these obligations can result in a range of undesirable outcomes including sanctions from regulators or secondary market liability to investors.

In 2023, the Ontario Court of Appeal outlined a "two-step" test for conducting a material change analysis that provides issuers with some guidance regarding their continuous disclosure obligations. The first question is whether "there has been a change in the business, operations, or capital of the issuer." This step does not involve an assessment of the magnitude of change. If the first question is answered in the affirmative, the second question is whether "the change was material, in the sense that it would be expected to have a significant impact on the value of the issuer's shares..."

In addition to obligations under applicable securities laws, an issuer will be subject to disclosure obligations based on the rules of the exchange it is listed on. For instance, TSXV Policy 3.3 states, without limiting the concept of material information, that certain events are deemed to be material in nature and *require* immediate disclosure. These events include, but are not limited to: (i) any issuance of securities by way of statutory exemption or prospectus; (ii) any change in the beneficial ownership of the issuer's securities that affects or is likely to affect the control of the issuer; (iii) any stock split, stock consolidation, stock dividend, exchange, call of securities for redemption, redemption, capital reorganization or other change in capital structure; and (iv) any acquisition or disposition of the issuer's own securities.

The TSX Policy Statement on Timely Disclosure also provides numerous examples of developments that are *likely* to require prompt disclosure. While the TSX may seem less proscriptive than the TSXV on this subject, issuers listed on the TSX should familiarize themselves with certain events including: (i) changes in share ownership that may affect control of the company; (ii) major corporate acquisitions or dispositions; (iii) changes in capital structure; (iv) borrowing of a significant amount of funds; and (v) development of new products and developments affecting the company's resources, technology, products or market.

The following timely disclosure documents are required to be filed by a reporting issuer in respect of material information:

Document(s)	Description
Press Releases	Subject to limited exceptions, if a material change occurs in the affairs of a reporting issuer, a reporting issuer must immediately issue and file a news release authorized by an executive officer disclosing the nature and substance of the change. In addition, subject to certain exceptions, the TSX and TSXV require listed companies to disclose material information by press release forthwith upon the information becoming known to management, or in the case of information previously known, forthwith upon it becoming apparent that the information is material.
Material Change Reports	As soon as practicable, and in any event within ten days of the date on which a material change has occurred, a reporting issuer must file a material change report with respect to the material change. Confidential filing of a material change report is permitted in certain limited circumstances, for example if it interferes with or compromises a specific objective or strategy being pursued by the reporting issuer.

The Canadian Investment Regulatory Organization (CIRO) is the successor organization carrying on the functions previously performed by the Investment Industry Regulatory Organization of Canada and Mutual Fund Dealers Association. CIRO's Market Surveillance department has the responsibility of reviewing all news releases from listed issuers that contain material information concerning their affairs. Under TSX and TSXV rules, when an announcement involving material information is to be released, Market Surveillance must be advised of its content and supplied with a copy in advance of its release.

For issuers listed on the TSXV, Section 4.2 of TSXV Policy 3.3 states that news releases must be pre-filed with CIRO prior to dissemination to the public where the news release contains information relating to the following: (i) reverse takeovers, changes of business or other reorganizations; (ii) qualifying transactions, reviewable transactions, including corporate acquisitions or dispositions; (iii) change of control; (iv) future oriented financial information or other operating projections; and (v) disclosure of mineral reserves/resources or oil and gas reserves.

For issuers listed on the TSX, when an announcement involving material information is released, CIRO must be advised of its content and supplied with a copy in advance of its release. For both TSXV and TSX listed issuers, additional coordination with CIRO may be necessary where a major corporate development occurs and disclosure obligations result in an issuer releasing material information during trading hours.

Market Surveillance also maintains a continuous stock watch program which is designed to highlight unusual market activity, such as unusual price and volume changes in a stock relative to its historical pattern of trading. Under TSX and TSXV rules, where trading is affected by the existence of rumours and speculation, Market Surveillance may require that an announcement be made by the issuer whether such rumours and speculation are factual or not.

Forward-Looking Information

In addition to the periodic and timely disclosure requirements, the legislation also addresses the inclusion of forward-looking information (FLI) and future-oriented financial information (FOFI) in a reporting issuer's disclosure documents, which are defined below:

FLI

Disclosure regarding possible events, conditions or financial performance that is based on assumptions about future economic conditions and courses of action and includes future-oriented financial information with respect to prospective financial performance, financial position or cash flows that is presented as a forecast or a projection

FOFI

Forward-looking information about prospective financial performance, financial position or cash flows, based on assumptions about future economic conditions and courses of action, and presented in the format of a historical statement of financial position, a statement of comprehensive income or a statement of cash flows

Reporting issuers must not disclose any FLI unless the issuer has a reasonable basis for the FLI. These rules apply to all of the FLI that is disclosed by a reporting issuer, other than in oral statements. This includes information that the issuer files with the securities regulators, information contained in news releases issued by the issuer, information published on the issuer's website and information published in marketing materials prepared or distributed by the issuer.

When disclosing material FLI, a reporting issuer must: (i) identify it as such; (ii) caution users that actual results of the FLI may vary from the FLI and identify material risk factors that could cause the actual results to differ; (iii) state the material factors/assumptions used to generate the FLI; and (iv) describe its policy for updating the FLI.

FOFI is a subset of FLI and additional requirements apply for the disclosure of FOFI and financial outlooks. For instance, if a reporting issuer discloses FLI that is FOFI, the issuer must include disclosure that: (i) states the date management approved the information, if the document containing the information is undated; and (ii) explains the purpose of the information and cautions readers that it may not be appropriate for other purposes.

A reporting issuer must discuss, in its MD&A, events and circumstances that occurred during the period to which the MD&A relates that are reasonably likely to cause actual results to differ materially from material FLI for a period that is not yet complete that the issuer previously disclosed to the public, and state the expected differences. A reporting issuer must also disclose and discuss, in its MD&A, material differences between actual results for the period to which the MD&A relates and any FOFI that the reporting issuer previously disclosed for such period.

Non-IFRS Measures

Reporting issuers are subject to certain identification and disclosure requirements with respect to their use of non-GAAP/non-IFRS measures. Non-GAAP/non-IFRS financial measures are those that depict an issuer's historical or expected financial performance, financial position or cash flow, but do not appear on its financial statements. Typical non-IFRS financial measures include, among others, "EBITDA", "adjusted earnings", "adjusted EBITDA" and "free cash flow". The general obligations for reporting issuers with respect to non-GAAP/non-IFRS measures are set out in National Instrument 52-112 *Non-GAAP and Other Financial Measure Disclosure* (NI 52-112). A reporting issuer must identify and label a non-IFRS financial measure including disclosure about the measure's composition. Further, reporting issuers are required to disclose a quantitative reconciliation of a non-IFRS financial measure to the most directly comparable financial measure for both the current and comparative period.

Other Filing Requirements

In addition to the above requirements, reporting issuers in Canada must also publicly file the following documents:

Document(s)	Description
Disclosure Materials	Any disclosure material that an issuer sends to its securityholders.
Constating Documents	Articles of incorporation, amalgamation, continuation or any other constating or establishing documents of the issuer as well as by-laws or other corresponding instruments.
Other Documents Affecting Rights of Securityholders	This includes: (i) any shareholder or voting trust agreement that the issuer has access to and that can reasonably be regarded as material to an investor; (ii) any shareholders' rights plans (poison pills) or other similar plans; and (iii) any other contract that creates or can reasonably be regarded as materially affecting the rights or obligations of its securityholders generally.
Material Contracts	Any contract (other than certain contracts entered into in the ordinary course of business) that is material to the issuer and was entered into within the last financial year, or before the last financial year but is still in effect.

B. Insider Reporting Regime

Insider Reporting Requirements

The insider reporting requirements under Canadian provincial securities legislation require "reporting insiders" of a reporting issuer to file insider reports disclosing their direct or indirect beneficial ownership of, or control or direction over, securities of the reporting issuer and any interest in or a right or obligation associated with, a related financial instrument of a security of the issuer. A "reporting insider" includes, among other categories:

Reporting Insider	Description
Officers and Directors	Chief executive officer, chief financial officer or chief operating officer of the reporting issuer, of a significant shareholder of the reporting issuer or of a major subsidiary of the reporting issuer; and A director of the reporting issuer, of a significant shareholder of the reporting issuer or of a major subsidiary of the reporting issuer; and A person or company responsible for a principal business unit, division or function of the issuer.
Significant Shareholders	A person or company that has beneficial ownership of, or control or direction over, whether direct or indirect, or a combination of beneficial ownership of, and control or direction over, whether direct or indirect, securities of an issuer carrying more than 10% of the voting rights attached to all the issuer's outstanding voting securities, including based on post-conversion beneficial ownership of the issuer's securities. A person has post-conversion beneficial ownership of a security if the person is the beneficial owner of a security convertible into the security within 60 days.
Other Insiders	Any insider that in the ordinary course received or has access to information as to material facts or material changes concerning the issuer before the material facts or material changes are generally disclosed, and directly or indirectly exercises or has the ability to exercise significant power or influence over the business, operations, capital or development of the issuer.

A “reporting insider” must file a report within ten days of becoming an insider. After filing the initial insider report, each time a change occurs in an insider’s direct or indirect beneficial ownership of, or control or direction over the securities of the issuer, a further report must be filed within five days following the date on which the change occurred.

Insider reporting is the responsibility of the insider and not of the issuer. Applicable securities legislation sets out detailed penalties and sanctions for insiders who contravene their reporting obligations.

There are also various prohibitions and penalties related to insider trading that this Guide does not address.

Early Warning Reporting Requirements

Any person or company who acquires (whether from treasury or in the secondary market) beneficial ownership of, or control or direction over, 10% or more of the voting or equity securities, or securities convertible or exchangeable into voting or equity securities, of any class of a reporting issuer, is required to promptly issue and publicly file a press release containing certain prescribed information and within two business days publicly file an early warning report in the prescribed form. Each time an additional 2% or more of the outstanding securities of the relevant class are acquired or there is a change in any material fact in the previously submitted report, another press release and report are required.

Note that, with some exceptions, there is a cooling-off period that prohibits purchases by any person or company who is required to file an early warning report until the expiry of one business day after each report is filed.

C. Audit Committee and Governance

Over recent years, corporate governance has been an increasing focus for securities regulators and reporting issuers should be aware of their governance obligations and reporting requirements.

Audit Committees

Every reporting issuer must have an audit committee, which is directly responsible for the supervision of the work of the external auditor, approval of all non-audit services of the auditor, review of all financial statements, MD&A and annual and interim profit or loss press releases prior to public disclosure and recommendations regarding the appointment of the external auditor and their compensation.

The audit committee must have at least three members and, subject to limited exceptions, each member must be financially literate and independent. The test of independence of an audit committee member requires an assessment by the board of directors of whether the member has a direct or indirect material relationship with the issuer. Canadian securities law sets out a list of relationships that are deemed to be material.

The audit committee is required to have a written mandate and certain disclosure relating to the audit committee is required to be contained in the company’s AIF.

Corporate Governance

Apart from the audit committee requirements, there are no strict rules mandating corporate governance practices in Canada. However, the Canadian securities regulators have published policies that provide recommended, but not mandatory, corporate governance practices that issuers are encouraged to consider as guidelines in developing their own corporate governance practices. These include practices related to an issuer’s board and guidelines related to ethical business conduct and the ability of directors to exercise independent judgement.

From a reporting perspective, a reporting issuer is required to include specific disclosure about its corporate governance practices in its management information circular or AIF (where a management information circular has not been sent to the issuer’s securityholders). The disclosure rules have been put in place to provide greater transparency for the marketplace regarding the nature and adequacy of an issuer’s corporate governance practices.

D. Secondary Market Liability

Each of Canada's provinces has statutory civil liability provisions related to secondary market disclosure. Liability can arise in three ways, being: (i) a misrepresentation in a document released by or on behalf of the company; (ii) a misrepresentation made in a public oral statement by or on behalf of the company; and/or (iii) the failure of the company to make timely disclosure of a material change. Persons against whom such a claim can be made include: (i) a reporting issuer; (ii) its directors, officers and experts; and (iii) "influential persons" (including control persons, promoters, investment fund managers and certain insiders).

Unlike in a common law claim of negligent misrepresentation, under securities laws the plaintiff need not prove that they relied to their detriment on any misrepresentation by or on behalf of the company. For a claim based on a misrepresentation in a public oral statement or non-core document (core documents including financial statements, information circulars, MD&A and AIFs), the plaintiff must establish that the company or person who made the misrepresentation engaged in gross misconduct in allowing the misrepresentation to be made, knew of the misrepresentation when making it, or deliberately avoided acquiring knowledge of the misrepresentation, as applicable. No similar burden applies in the case of a misrepresentation made in a core document.

Securities statutes include multiple mechanisms designed to limit unmeritorious claims as well as to protect potential defendants in the secondary market context. First, a plaintiff can commence a proceeding only with leave of the court. This requires that the plaintiff establish that: (i) the action is being brought in good faith; and (ii) there is a "reasonable possibility" that the action will be resolved in the plaintiff's favour. Second, several defences function to either shield the defendant from liability or to limit the scope of damages that may be payable. These include that: (i) any forward looking information at issue was properly qualified; (ii) the plaintiff had prior knowledge of the material change or misrepresentation; (iii) a reasonable investigation was conducted prior to the deficient disclosure and such investigation raised no reasonable grounds indicating the disclosure would be deficient; and (iv) any change to the market price of the securities at issue was attributable to a factor unrelated to the alleged deficient disclosure.

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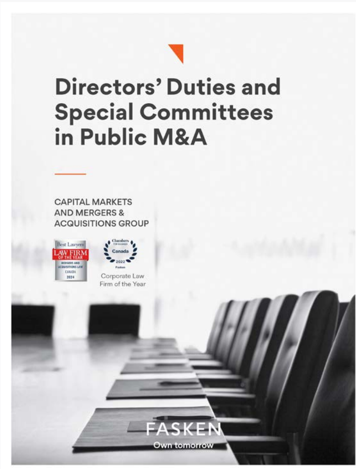

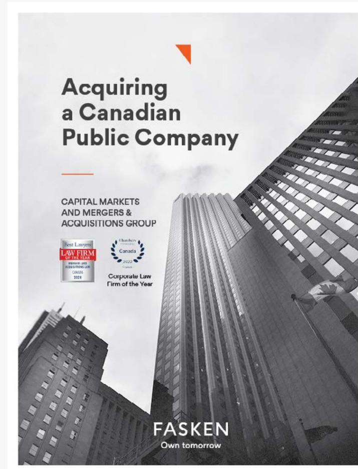

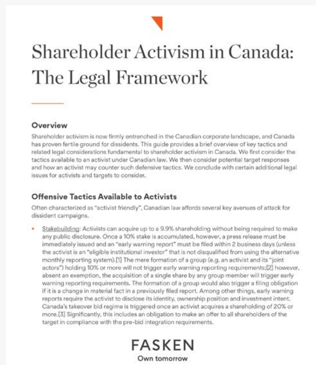

For Fasken's other M&A and corporate governance thought leadership, please visit our **Capital Markets and Mergers & Acquisitions Knowledge Centre**.

Fasken Awards & Rankings

A clear leader in Canadian M&A

Source		FASKEN	Stikeman Elliott	Blakes, Cassels & Graydon	Osler, Hoskin & Harcourt	McCarthy Tétreault	Davies Ward Phillips & Vineberg	Torys
Mergermarket	Canadian M&A (by deal count)	**No. 1**	No. 3	No. 5	No. 2	No. 4	No. 6	No. 10
Bloomberg	M&A – Canada Announced (by deal count)	**No. 1**	No. 6	No. 5	No. 2	No. 4	No. 7	No. 12
	M&A – Canada Mid-Market (Up to $250 million, by volume)	**No. 1**	No. 14	No. 6	No. 3	No. 2	No. 4	No. 5
	M&A – Canada Mid-Market (up to US$500 million, by deal count)	**No. 1**	No. 7	No. 5	No. 2	No. 4	No. 6	No. 12
	M&A – Canada Mid-Market (up to US$250 million, by deal count)	**No. 1**	No. 6	No. 5	No. 2	No. 4	No. 6	No. 13
REFINITIV	Canadian Involvement Announced (based on number of deals)	**No. 1**	No.4	No. 6	No. 2	No. 5	No. 7	No. 16
	Canadian Involvement Completed (based on number of deals)	**No. 1**	No. 4	No.6	No. 2	No. 5	No. 7	No. 10
	Canadian Involvement Mid-Market	**No. 1**	No. 5	No. 6	No. 3	No. 4	No. 7	No. 17
	Canadian Involvement Small-Cap	**No. 1**	No. 4	No. 6	No. 2	No. 5	No. 7	No. 20

*Mergermarket (Q3 2023), Bloomberg (Q3 2023), Refinitiv M&A (Q3 2023), Refinitiv Mid-Market/Small-Cap (Q3 2023)

Our firm is frequently recognized by the most prestigious ranking agencies around the world.

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The LEGAL 500

Chambers AND PARTNERS

IFLR1000

Best Lawyers

Client Testimonials

"They are a great team to work with, offer great client service, and are very responsive and efficient. Fasken goes above and beyond. They always impress."

- Client Quote, Chambers Global

"My firm engaged Fasken to assist us in connection with our private equity client's acquisition. Our client and the entire deal team were very impressed with the work of the Fasken team. I frequently work with, and across from, top firms as part of my private equity practice and the Fasken team was more responsive, more technically proficient and much easier to deal with."

- International Law Firm that engaged Fasken for cross-border deals

"Excellent service, very timely responses, and a wide array of experience in several different types of industries. I am comfortable entrusting matters in their hands. They get the job done and are good at it."

- Client Quote, The Legal 500

"The Fasken team are very complementary, and their expertise in their respective fields is second to none."

- Client Quote, Chambers Global

"Of the many other firms that I have encountered... I have not seen their equal in Canada."

- Client Quote, Chambers Global

"Our company was undergoing a cross-border transaction, which was quite complex and required in-depth business considerations, regulatory advice, and Federal Commission interaction. The depth of knowledge and experience the Fasken attorneys brought to the table was astounding."

- International Law Firm that engaged Fasken for cross-border deals

"The entire Fasken team is not only knowledgeable of all the relevant laws, but they are true partners and help management think through critical business matters in a practical way, allowing management to make sound business decisions. Compared to others, I think Fasken went above and beyond, I was very impressed."

- Client Quote, Chambers Global

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