

# CANADA

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## 1. INTRODUCTION

The purpose of this Article is to summarize the laws, rules and procedures for the distribution of securities in the "exempt" market in Canada. Exempt market transactions are ones that can be made without the necessity of filing a prospectus in Canada. This Article also examines the dealer registration requirements for effecting exempt market transactions. The principal focus will be on transactions where the securities are also being distributed outside of Canada by a public offering or exempt market transaction.

## 2. REGULATORY SCHEME IN CANADA

### 2.1. Overview

There is no "federal" securities commission in Canada. Securities activities are regulated at the "provincial" level and each of Canada's ten provinces (and two territories) has its own securities laws and securities regulator. As a result, it is necessary to decide in which provinces securities are to be sold in order to determine the applicable requirements. It should be noted that almost all international exempt market transactions in Canada will include investors in Ontario and many will also include investors in Quebec. As a practical matter, while there are important differences among the laws of the provinces, if an issuer satisfies the exempt market requirements in Ontario and Quebec, that issuer should have little difficulty satisfying the requirements of the other provinces.

For the purposes of this Article, the discussion in each subject area will generally focus first on the applicable requirements in Ontario. The applicable requirements for Quebec will then be discussed with reference to the Ontario provisions. The other provinces will be discussed only where significant issues arise.

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## 2.2. *Current Regulatory Framework - Ontario and Quebec*

The principal securities regulators in Ontario and Quebec are the Ontario Securities Commission (the "OSC") and the Commission des valeurs mobilières du Québec (the "QSC"). The securities laws of Ontario and Quebec are currently contained in the following:

- (a) Securities Act (Ontario)<sup>1</sup>, Securities Act (Quebec)<sup>2</sup>;
- (b) regulations passed under both statutes in (a)<sup>3</sup>;
- (c) policy statements, blanket rulings and orders published and enforced by each of the OSC and the QSC;
- (d) National Policies of the Canadian Securities Administrators consisting of all of the provincial securities regulators including the OSC and the QSC;
- (e) Uniform Act Policies of the securities regulators of the provinces of Ontario, British Columbia, Alberta, Saskatchewan and Manitoba;
- (f) rules of The Toronto Stock Exchange and The Montreal Exchange and other regional exchanges applicable to their listed companies.

## 3. PUBLIC OFFERINGS IN CANADA - BASIC REQUIREMENTS

In order to "distribute" securities to the public in Canada, both the applicable "prospectus" and "dealer registration" requirements must be met. A prospectus must be prepared in accordance with the securities laws of the applicable province and generally must contain "full, true and plain disclosure of all material facts relating to the securities issued."<sup>4</sup> A preliminary prospectus must be filed with and reviewed by the relevant securities regulators. When compared to the requirements for exempt market distributions, preparing and filing a prospectus is a more time-consuming and expensive process, but it will permit unrestricted sales of securities to any person

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<sup>1</sup> Securities Act, R.S.O. 1990, ch. S.5 (Ontario).

<sup>2</sup> Securities Act, S.Q. 1982, ch. 48 (Quebec).

<sup>3</sup> R.R.O. 1990, Reg. 1015 (Ontario); O.C. 660-83, 6 April 1983, G.O.Q. 1983.II.1269 (Quebec).

<sup>4</sup> Securities Act, R.S.O. 1990, ch. S.5, § 56(1).

in the province in which a prospectus was filed. Canada does have shelf prospectus rules and prompt-offering qualification rules which can shorten the time periods for certain senior issuers.<sup>5</sup> The issuer, after the filing of the final prospectus, will become a "reporting issuer" and will be subjected to continuous disclosure and ongoing reporting requirements.<sup>6</sup>

An underwriter or dealer selling securities in the public market in Canada must be registered.<sup>7</sup> Except for the "international dealer" category discussed in the following section, the conditions of dealer registration include: a physical presence in Canada, the satisfaction of certain capital requirements and local employees who have passed local proficiency examinations.<sup>8</sup> As discussed below, there are exemptions from the prospectus and dealer registration requirements for certain transactions.

#### 4. REGULATION OF NON-PUBLIC OFFERINGS

##### 4.1. Dealer Registration Requirements

The following section deals with the issues facing a non-Canadian dealer that does not have a fully-registered Canadian subsidiary. It should be noted that a fully-registered Canadian dealer can effect all of the exempt market transactions discussed below.

###### 4.1.1. Ontario

While the dealer registration requirement exists in all provinces, most (except Ontario and Newfoundland) provide dealer registration exemptions that correspond to the prospectus exemptions<sup>9</sup> such that the dealer registration requirement is not an additional obstacle outside of Ontario.

Any "market intermediary," with a few minor exceptions,

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<sup>5</sup> See Rules for Shelf Prospectus Offerings and for Pricing Offerings after the Final Prospectus is Received, National Policy No. 44; Prompt Offering Qualification System, OSC Policy No. 5.6; Prompt Offering Qualification System, Draft National Policy No. 47.

<sup>6</sup> Securities Act, R.S.O. 1990, ch. S.5, § 1(1); see *id.* pt. XVIII.

<sup>7</sup> *Id.* § 25(1).

<sup>8</sup> *Id.* pt. XI; R.R.O. 1990, Reg. 1015, pt. V.

<sup>9</sup> See *infra* section 4.2.

must be registered in Ontario pursuant to the province's universal registration regime.<sup>10</sup> Essentially, a market intermediary is any person (other than an issuer) engaging in Ontario in the business of "trading" (very broadly defined) in securities as principal or agent, other than for its own account for investment purposes without a view to resale or distribution.<sup>11</sup> Examples of "market intermediaries" include market makers, selling group members and those entering into agreements with underwriters or issuers to purchase or sell securities in connection with any distribution.<sup>12</sup>

In Ontario there is a special registration category for "International Dealers" that permits such dealers to participate in specified types of transactions with certain purchasers.<sup>13</sup> A registered international dealer in Ontario may act as a market intermediary solely for the purposes of:

- (a) carrying on in Ontario those activities, other than sales of securities, that are reasonably necessary to facilitate a distribution of securities that are offered primarily abroad;
- (b) trading with a *designated institution* in debt securities in the course of a distribution, where the debt securities are offered primarily abroad and otherwise than by means of a prospectus prepared and filed in accordance with the Securities Act (Ontario);
- (c) trading with a *designated institution* in debt securities, except in the course of the distribution by which they were issued;
- (d) trading with a *designated institution* in *foreign securities*, except in the course of a distribution by means of a prospectus prepared and filed in accordance with the Securities Act (Ontario); and
- (e) trading with a broker or investment dealer in any securities,

and only if the international dealer is acting as principal or as agent for the issuer of the securities, another designated

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<sup>10</sup> R.R.O. 1990, Reg. 1015, pt. XI; *id.* § 204(1).

<sup>11</sup> Securities Act, R.S.O. 1990, ch. S.5, § 1(1).

<sup>12</sup> R.R.O. 1990, Reg. 1015, § 204(1).

<sup>13</sup> *Id.* § 208.

institution or a non-resident.<sup>14</sup>

“Designated institutions” are defined as follows:

- (a) a bank listed in Schedule I or II to the Bank Act (Canada),
- (b) a loan corporation or trust company registered under the Loan and Trust Corporations Act (Ontario),
- (c) an insurance company licensed under the Insurance Act (Ontario),
- (d) a credit union or caisse populaire incorporated or registered under the Credit Unions and Caisses Populaires Act (Ontario),
- (e) a co-operative to which the Co-operative Corporations Act (Ontario) applies,
- (f) the Federal Business Development Bank,
- (g) a subsidiary of any company referred to in clauses (a) to (f),
- (h) the Government of Canada or any province or territory of Canada,
- (i) any municipal corporation or public board or commission in Canada,
- (j) a mutual fund, other than a private mutual fund, having net assets of at least Cdn. \$5,000,000,
- (k) a trustee pension plan or fund sponsored by an employer for the benefit of its employees and having net assets of at least Cdn. \$5,000,000,
- (l) a registered dealer,
- (m) a company or person, other than an individual, recognized by the OSC as an exempt purchaser, or
- (n) a portfolio manager or financial intermediary acting as a trustee or agent for fully-managed accounts.<sup>15</sup>

International dealers are not permitted to deal with individuals regardless of the aggregate acquisition cost to the purchaser or the sophistication of the purchaser.<sup>16</sup> Canadian affiliates of foreign dealers who are fully registered in Ontario

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<sup>14</sup> *Id.* § 208(1).

<sup>15</sup> *Id.* § 204(1).

<sup>16</sup> *Id.*

as "investment dealers" are not subject to the constraints imposed on international dealers and are free to deal on an unrestricted basis.<sup>17</sup> To qualify as an international dealer, an applicant must carry on the business of a dealer and underwriter in a country other than Canada.<sup>18</sup>

"Foreign securities" are securities of non-Canadian issuers, i.e. issuers that are incorporated, formed or created under the laws of a jurisdiction other than Canada or any province or territory of Canada.<sup>19</sup>

The OSC has published, for comment, proposed changes to the regulations governing universal registration.<sup>20</sup> It had become apparent that the OSC could not process expeditiously the number of registration applications that resulted from the implementation of the universal registration system. Lengthy delays in obtaining registration were caused by the overwhelming number of applications from domestic limited market dealers. These delays affected international dealer applications. The OSC has not yet proposed any changes to the international dealer rules. However, it is expected that the proposed changes, if implemented, will allow many domestic market intermediaries to use an expedited registration system which in turn will enable OSC staff to process other applications more quickly.

It should be noted that in June 1992, the OSC adopted new rules for the registration of international advisers in Ontario on a basis similar to that for international dealers.<sup>21</sup>

#### 4.1.2. Quebec

Quebec imposes registration requirements on dealers operating in the exempt market although it does not have a universal dealer registration scheme. Registration as a dealer is not required for a person who limits its activities as a dealer to the distribution of securities to "sophisticated purchas-

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<sup>17</sup> See *id.* § 98.

<sup>18</sup> See *id.* § 208(2).

<sup>19</sup> *Id.* § 204(1).

<sup>20</sup> Proposed Changes to Registration Exemptions and Registration Process, 13 Ont. Sec. Comm'n Bull. 5396 (1990).

<sup>21</sup> International Advisers, OSC Policy No. 4.8.

ers",<sup>22</sup> not including any individuals, without any advertisement.<sup>23</sup> A non-registered intermediary may obtain an exemption from registration as a dealer to effect a private placement on a transaction-by-transaction basis, provided it files certain prescribed forms with the QSC.

#### 4.2. *Prospectus Exemptions*

The major exemptions from the prospectus requirements are for trades with prescribed institutions, sophisticated purchasers and exempt purchasers and for trades that meet minimum acquisition cost thresholds (i.e. private placements).

##### 4.2.1. *Prescribed Institutions/Sophisticated Purchasers*

###### a. Ontario

An exemption is available for distributions to "prescribed" institutions, defined to include: chartered banks, loan corporations, trust companies, insurance companies, the Government of Canada or a province or territory of Canada, and any municipal corporation or public board or commission in Canada.<sup>24</sup> It should be noted that the definition of "prescribed institution" is similar to, but not the same as, the definition of "designated institution."<sup>25</sup>

In each case, the prescribed institution must purchase as a principal.<sup>26</sup> For this purpose, a registered trust company is deemed to be acting as principal when it trades as trustee or agent for accounts it fully manages.<sup>27</sup>

###### b. Quebec

Trades to "sophisticated purchasers" (defined similarly to "designated" institutions in Ontario) that purchase securities for their own account or who are trust companies, insurance companies, dealers or advisers purchasing for fully-managed

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<sup>22</sup> See *infra* section 4.2.1.

<sup>23</sup> Securities Act, S.Q. 1982, ch. 48, § 157.

<sup>24</sup> Securities Act, R.S.O. 1990, ch. S.5, § 72(1)(a).

<sup>25</sup> See *supra* section 4.1.1.

<sup>26</sup> Securities Act, R.S.O. 1990, ch. S.5, § 72(1)(a).

<sup>27</sup> *Id.* § 72(2).

accounts are exempted from Quebec's prospectus (and dealer registration) requirements.<sup>28</sup> In order to use the exemption, no advertisement of the offer of securities may be made.<sup>29</sup>

#### 4.2.2. *Exempt Purchasers*

An exemption is available where the party purchasing as principal is recognized, based on an application from the purchaser, by the OSC or the QSC as an exempt purchaser.<sup>30</sup> Such an exemption is intended primarily for persons with a substantial pool of capital, for sophisticated investment advisers and for professionally managed pension or mutual funds.

#### 4.2.3. *Private Placement Exemption*

##### a. Ontario

An exemption is available where the purchaser purchases as principal and the trade is in a security which has an aggregate acquisition cost to such purchaser of not less than Cdn. \$150,000.<sup>31</sup>

Purchasers in the form of corporations, syndicates, partnerships, or other forms of unincorporated association cannot be created solely to utilize the exemption by groups of individuals whose particular share of the total cost of the purchase is less than the Cdn. \$150,000.<sup>32</sup>

The Cdn. \$150,000 limit is calculated on a present-value basis.<sup>33</sup> Where the purchaser makes a commitment not immediately satisfied by a cash payment, such purchaser will have the benefit of the exemption only if it is certain, or virtually certain, to be called upon to make payment.<sup>34</sup>

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<sup>28</sup> Securities Act, S.Q. 1982, ch. 48, §§ 43-45.

<sup>29</sup> *Id.* § 43.

<sup>30</sup> R.R.O. 1990, Reg. 1015, § 204; *see* Securities Act, S.Q. 1982, ch. 48, § 44(12).

<sup>31</sup> Securities Act, R.S.O. 1990, ch. S.5, § 72(1)(d); R.R.O. 1990, Reg. 1015, § 27(1).

<sup>32</sup> Private Placements, OSC Policy No. 6.1, sec. II.B.4.

<sup>33</sup> *See id.* sec. II.B.1.

<sup>34</sup> *Id.* sec. II.B.2.



## b. Quebec

A prospectus exemption is provided for a distribution of securities, without advertisement, where the total cost is at least Cdn. \$150,000 per person.<sup>35</sup> Each purchaser must act for its own account.<sup>36</sup> Entities, including corporations (unlike Ontario), may not be established solely to acquire securities under this exemption.<sup>37</sup>

### 4.3. Filing Requirements/Fees

Distributions, i.e. "primary" trades of previously unissued securities or trades from the holdings of a controlling person made in reliance upon the exemptions discussed in section 4.2 of this Article, generally give rise to filing requirements with the various provincial securities regulators. A form reporting the exempt distribution must be filed in each province, generally within ten days of the trade.<sup>38</sup>

In addition, where an offering memorandum or other disclosure document is used in connection with a distribution of securities,<sup>39</sup> it must be filed with the securities regulator in each jurisdiction in which securities are sold.<sup>40</sup>

#### 4.3.1. Ontario

In Ontario, the vendor must file a Form 20 and two copies of the offering memorandum must be delivered to the OSC.<sup>41</sup> Where a private placement purchaser is an entity other than a corporation, the vendor must file a certificate stating that, after exercising reasonable diligence, the vendor believes the exemption is available by virtue of the fact that each member of the entity is an individual who has contributed at least Cdn. \$150,000 towards the purchase.<sup>42</sup>

The filing fee in Ontario is the greater of Cdn. \$100 and

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<sup>35</sup> Securities Act, S.Q. 1982, ch. 48, § 51.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Securities Act, R.S.O. 1990, ch. S.5, § 72(3).

<sup>39</sup> See *infra* section 4.4.

<sup>40</sup> R.R.O. 1990, Reg. 1015, § 32(4).

<sup>41</sup> *Id.*; see Securities Act, R.S.O. 1990, ch. S.5, § 72(3).

<sup>42</sup> Private Placements, OSC Policy No. 6.1, sec. II.B.5.

0.02% of the total gross proceeds realized in Ontario.<sup>43</sup>

#### 4.3.2. Quebec

The person making the distribution must file a notice with the QSC within ten days, containing information similar to a Form 20.<sup>44</sup> Where an offering memorandum or other disclosure document is used (even if the use of such a document is not required) it must be filed with the QSC without delay.<sup>45</sup> In certain situations, an offering memorandum is mandatory and must be filed with the QSC before any sales are completed.<sup>46</sup>

The filing fee in Quebec is 0.02% of the total gross proceeds realized in Quebec from the distribution of the securities (subject to a minimum fee of Cdn. \$250).<sup>47</sup>

#### 4.4. Offering Memorandum Guidelines

##### 4.4.1. When Required

No provincial securities legislation imposes an absolute requirement to deliver an offering memorandum in respect of any exempt market transaction discussed herein. In Ontario, the obligation to deliver an offering memorandum is triggered if there is advertising of the securities involved.<sup>48</sup> In Quebec, if there is advertising, reliance may not be placed on the private placement or sophisticated purchaser exemption.<sup>49</sup> In Quebec, an offering memorandum is not required where the distribution is made to sophisticated purchasers or a registered dealer is involved in the distribution.<sup>50</sup> However, where a dealer with a restricted practice who has obtained permission to make a private placement, or where a non-registered intermediary who has obtained an exemption from registration as a dealer to make a private placement, is

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<sup>43</sup> R.R.O. 1990, Reg. 1015.

<sup>44</sup> Securities Act, S.Q. 1982, ch. 48, §§ 46, 51.

<sup>45</sup> O.C. 660-83, 6 April 1983, G.O.Q. 1983.II.1269, § 37.2.

<sup>46</sup> See Securities Act, S.Q. 1982, ch. 48, §§ 47-48, 53.

<sup>47</sup> O.C. 660-83, 6 April 1983, G.O.Q. 1983.II.1269, § 267(7).

<sup>48</sup> R.R.O. 1990, Reg. 1015, § 32(2).

<sup>49</sup> Securities Act, S.Q. 1982, ch. 48, § 43.

<sup>50</sup> *Id.* § 46.

involved, such dealer or intermediary must file an offering memorandum with the QSC prior to the distribution and must provide the memorandum to each potential purchaser.<sup>51</sup>

An issuer or dealer will often wish to provide investors with documents purporting to describe the business and affairs of an issuer, although there is no statutory obligation to provide an offering memorandum for a particular distribution. The various provincial statutes generally define "offering memorandum" so broadly as to include virtually any document containing such a description, and thus impose some content requirements. Such content requirements, if any, may depend on the type of purchaser involved and the exemption relied upon.<sup>52</sup>

An issuer or underwriter may generally provide a draft offering memorandum to prospective investors, so long as it meets the prescribed content requirements. In Quebec, the draft offering memorandum must be filed with the QSC.<sup>53</sup>

Road shows are permissible so long as access is restricted to qualified purchasers and the information disclosed in presentations is consistent with the contents of the offering memorandum used in connection with the offering.

#### 4.4.2. *Content Requirements*

Except for one very important exception, there is little regulation of the content of an offering memorandum for the exempt transactions described in this Article. The securities laws of most of the Canadian provinces require that an offering memorandum must provide investors with a contractual right of action against the issuer for rescission or damages.<sup>54</sup> Such right will be available to an investor if the offering memorandum contains a misrepresentation, i.e. an untrue statement of a material fact or an omission to state a material fact).<sup>55</sup>

On certain global offerings in respect of which securities have been privately placed in Canada, Canadian securities

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<sup>51</sup> QSC Policy No. Q-21.

<sup>52</sup> See *infra* section 4.4.2.

<sup>53</sup> O.C. 660-83, 6 April 1983, G.O.Q. 1983.II.1269, § 37.2.

<sup>54</sup> R.R.O. 1990, Reg. 1015, § 32.

<sup>55</sup> Securities Act, R.S.O. 1990, ch. S.5, § 1(1).

regulators have granted discretionary relief from the requirement to provide purchasers with a contractual right of action.<sup>56</sup> In instances where securities are being registered in the United States, the OSC has recently indicated a reluctance to grant such relief, although the OSC may be prepared to consider providing relief to conform with applicable U.S. liability standards.

#### 4.4.3. *Other Issues of Content*

In the typical scenario, a foreign underwriter using an offering memorandum in the exempt market in Canada is utilizing a prospectus filed in the United States or offering materials prepared in compliance with another "home jurisdiction's" requirements. In this situation, it is customary to add Canadian sticker language tailored to meet Canadian securities law requirements. In addition to a description of resale requirements and contractual rights of action,<sup>57</sup> the sticker typically includes a red herring. In certain instances, some discussion of tax consequences, bankruptcy laws or other material considerations for Canadian investors may also be appropriate.

Certain Canadian securities laws restrict the ability to make, in certain circumstances, any representation that securities will be listed on any stock exchange or that application has been or will be made to list such securities upon any stock exchange.<sup>58</sup> In Quebec, the express authorization of the QSC is required in order to use offering materials that contain a reference to a stock exchange.<sup>59</sup> As a result, securities commission approval must be obtained in these circumstances.<sup>60</sup> Similarly, Canadian securities regulators have imposed substantive requirements on the use of financial forecasts in offering materials.<sup>61</sup>

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<sup>56</sup> See, e.g., 15 Ont. Sec. Comm'n Bull. 2911 (1992); 15 Ont. Sec. Comm'n Bull. 2808 (1992).

<sup>57</sup> See *supra* section 4.4.2.

<sup>58</sup> Securities Act, R.S.O. 1990, ch. S.5, § 38(3).

<sup>59</sup> Securities Act, S.Q. 1982, ch. 48, § 199(4).

<sup>60</sup> *Id.*

<sup>61</sup> See Future-Oriented Financial Information, OSC Policy No. 5.8; Future-Oriented Financial Information, Draft National Policy Statement No. 48, 15 Ont. Sec. Comm'n Bull. 2700 (1992).

#### 4.4.4. *French Translation*

The laws of Quebec require that an offering memorandum and related documents be drafted in French only or in French and English.<sup>62</sup> However, the Charter of the French language provides, in effect, that any adhesion contracts, contracts containing printed standard clauses and related documents, such as a purchase agreement under a private placement, in certain circumstances must be drafted in the French language except in the case where the parties expressly request the use of the English language or any other language.<sup>63</sup> In that regard, the usual practice is to sign an English/French declaration stating that the parties have agreed that the documentation be drafted in English only. Issuers who carry on business in Quebec in addition to distributing securities therein could be subject to additional French language requirements.<sup>64</sup>

#### 4.5. *Reporting and Other Obligations arising from the Private Placement of Securities in Canada*

##### 4.5.1. *Canadian Dealing Network*

If a dealer wishes to promote secondary trading in the securities, it may seek approval from the Canadian Dealing Network Inc. (the "CDN"), a subsidiary of The Toronto Stock Exchange, to quote a market in such securities on the CDN (an over-the-counter market).<sup>65</sup> While the conditions for such approval may be wide-ranging, the general practice would be to require the issuer to consent to an undertaking to the effect that notice will be given to the CDN of any material changes in the affairs of the issuer. The quotation on the CDN does not amount to a listing on a stock exchange and therefore does not give rise to other ongoing reporting obligations.

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<sup>62</sup> Securities Act, S.Q. 1982, ch. 48, § 40.1.

<sup>63</sup> Charter of the French Language, R.S.Q. 1977, ch. C-11, § 55.

<sup>64</sup> See, e.g., *id.* §§ 58, 58.1, 68.

<sup>65</sup> OSC Note 1.8 (The Canadian Dealing Network).

#### 4.5.2. *Future Listing on an Exchange in Canada*

Certain foreign issuers that initially accessed the Canadian capital markets through exempt market transactions have gone on to seek listings in Canada. Listing would result in the company becoming a reporting issuer in Ontario and subject to ongoing reporting and filing obligations.

#### 4.5.3. *Other Legal Considerations*

Although an issuer would not be subject to additional ongoing reporting and disclosure requirements in Canada as a result of an exempt market transaction, the existence of Canadian shareholders may give rise to the application of Canadian securities laws in respect of certain transactions, such as rights offerings, stock dividends, tender offers or issuer bids. In addition, aside from the contractual rights described above, an offering of securities in Canada may give rise to civil and quasi-criminal liability of the issuer and its directors (and, in certain instances, the selling shareholders) for misrepresentations.

### 5. RESALE RESTRICTIONS

The rules governing secondary trading as applied in the Canadian provinces take one of two forms. The majority of the provinces, including Ontario and Quebec, have adopted a "closed system" approach. The remaining provinces may be called "investment intent" jurisdictions.

In a closed system, every trade by an issuer of its own securities and every sale of securities by a control person (i.e. a "distribution") requires the filing of a prospectus or a ruling from the relevant provincial securities commission allowing the sale, unless a statutory prospectus exemption is available. The closed system includes a set of resale restrictions on securities which were initially sold pursuant to certain specific prospectus exemptions.<sup>66</sup> If those resale restrictions are not met, the person selling the securities is required to file a prospectus (or rely on a further exemption).

It is typical for a selling document provided to purchasers relying on statutory prospectus exemptions to include a brief

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<sup>66</sup> Securities Act, R.S.O. 1990, ch. S.5, § 72(4)-(6).

paragraph stating that the securities acquired by the purchaser may be subject to resale restrictions. Additionally, there may be a requirement to legend share certificates to identify applicable resale restrictions and hold periods.

If an issuer does not plan to become a "reporting issuer" in Canada, its securities placed in Canada will be subject to indefinite hold periods and resales will only be permitted pursuant to further prospectus exemptions or, in certain circumstances and provinces, to purchasers located outside of the province in which the vendor is located. Accordingly, the market for these restricted securities in Canada will most likely remain an institutional one. In contrast, since the resale of the issuer's securities purchased in the secondary markets (e.g., on a foreign stock exchange) would generally not be deemed to be a "distribution," such securities will in certain provinces be freely tradeable in Canada, and a retail market for them may develop over time.

For securities that are subject to Canadian resale restrictions but trade only on foreign markets, it is common for the securities to be sold on a foreign securities exchange outside of Canada regardless of these restrictions. The jurisdictional nexus of Canada to resales is not always clear and such sales may be considered to violate the restrictions outlined above, in certain circumstances depending upon the extent of the activity in Canada in furtherance of the sale.<sup>67</sup> Issuers have obtained exemption orders expressly permitting resales on foreign securities exchanges following various exempt trades.

## 6. OFFERINGS BY CANADIAN ISSUERS OUTSIDE CANADA

In its Interpretation Note on Distributions Outside Ontario, the OSC takes the position that, in the light of the broad definition of "trade"<sup>68</sup> in the Securities Act (Ontario), where there are connecting factors with Ontario, a distribution outside Ontario by an Ontario issuer will be considered to be a distribution in Ontario requiring a prospectus or an exemption from the requirement for a prospectus unless reasonable steps are taken to ensure the securities come to rest outside

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<sup>67</sup> *Id.* § 1(1).

<sup>68</sup> *Id.*

Canada.<sup>69</sup> Where a person intends to make from Quebec a distribution of securities to persons established outside Quebec, no prospectus is necessary where the QSC agrees and does not object within 15 days after receiving certain prescribed information.<sup>70</sup>

In Eurobond offerings, "reasonable steps" will usually mean a general restriction on sales into Canada, a lock-up for 40 days<sup>71</sup> from the end of the initial distribution period and certification as to ownership.<sup>72</sup> The OSC, however, suggests for other types of issues the additional requirements of all-sold telexes, confirmation slips by underwriters (both of which are frequently incorporated in Eurobond financings) and restrictions on the transfer agent registering any securities in the name of an Ontario resident for a period of (for example) 40 days following closing.<sup>73</sup>

The use of the 40-day lock-up period was accepted by the OSC as a principal feature of acceptable selling restrictions because, among other reasons, the selling restrictions were consistent with the approach taken by the U.S. Securities and Exchange Commission in the past.<sup>74</sup> The OSC has indicated that it intends to re-examine its Interpretation Note in view of the introduction of Rule 144A and Regulation S in the United States.

## 7. OTHER CONSIDERATIONS

A blanket ruling of the OSC permits the sale of "eurosecurities" in an aggregate principal amount of at least Cdn. \$250,000 with certain registered Ontario residents without prospectus compliance and without the necessity of filing any notice of the trade.<sup>75</sup> Such purchasers may re-sell such eurosecurities in any amount to non-residents of Canada or in the aggregate principal amount of at least Cdn. \$250,000

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<sup>69</sup> See Distributions of Securities Outside Ontario, Securities Act Interpretation Note 1.5.

<sup>70</sup> See Securities Act, S.Q. 1982, ch. 48, § 12.

<sup>71</sup> This figure was recently reduced from 90 days.

<sup>72</sup> See *supra* note 69.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Eurosecurity Financings, OSC Blanket Ruling § 4(7), 7 Ont. Sec. Comm'n Bull. 4897 (1984).



to other registered Ontario residents without being subject to hold periods or prospectus requirements.<sup>76</sup> Few entities have taken advantage of the opportunity to be registered with the OSC as qualified Eurosecurities purchasers.

It should be noted that most Canadian pension plans (i.e. designated institutions/sophisticated purchasers) have foreign investment limits that restrict the percentage of their portfolio that can be invested outside of Canada. The limit is currently 18% of the assets of the fund and is expected to rise to 20% in 1994.<sup>77</sup>

## 8. CONCLUSION

In contrast to the securities laws of most other countries, the regulation of private placements in Canada is both well-defined and extensive. As a result, Canada has an active private placement market that foreign issuers and dealers can readily access through generally available dealer registration and prospectus exemptions.

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<sup>76</sup> *Id.*

<sup>77</sup> Income Tax Act (Canada), R.S.C. 1952, ch. 148, § 206.