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• OSFI RULING CONFIRMS FOREIGN BANK ISSUERS SELLING DEBT INSTRUMENTS IN CANADIAN CAPITAL MARKETS NOT SUBJECT TO THE *BANK ACT* (CANADA) •

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The Office of the Superintendent of Financial Institutions (“OSFI”) recently ruled that entities that fall within the broad meaning of the term “foreign bank” as defined in the *Bank Act* (Canada) (the “Act”) who sell debt instruments to Canadian securities dealers are not engaging in or carrying on business in Canada

for the purposes of Part XII of the Act. The ruling is significant because it provides foreign banks with some assurance that they may access Canadian capital markets to sell their debt instruments.

OSFI Ruling No 2007-01 was issued in response to a request OSFI received from several foreign banks and entities associated with foreign banks that are active issuers of debt instruments such as certificates of deposit, commercial paper and structured term notes (the “Issuers”). The Issuers sought clarity on the question of whether their proposal to sell debt instruments to Canadian securities dealers to fund their own or their affiliates’ banking business would be subject to Part XII of the Act, which governs the entry into and operations in Canada of “foreign banks”.

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RESTRICTIONS ON A “FOREIGN BANK” CARRYING ON BUSINESS IN CANADA

The Act governs the entry into and operations in Canada of all entities that fall within the definition of the term “foreign bank” in the Act. “Foreign bank” is defined in the Act to include any entity that is called a bank or that is regulated as or like a bank in any jurisdiction in which it carries on business. It also includes any entity that controls a foreign bank and any entity that provides financial services and is affiliated with a foreign bank.

Under the Act, a “foreign bank” may not engage in or carry on business in Canada except as authorized



by the Act (*i.e.*, through a foreign bank subsidiary or an authorized foreign branch or some other approved entity, or pursuant to an approval or an exemption order obtained from the Minister of Finance).

The Act does not provide guidance on the factors that OSFI may take into account in determining whether a foreign bank is engaging in or carrying on business in Canada. Whether a foreign bank would be considered to be engaging in or carrying on business in Canada will depend on the circumstances that surround the activity in question. OSFI will assess the facts and circumstances of each particular case to determine whether there is a sufficient connection between the foreign bank, or the entity associated with a foreign bank, and Canada.

THE RULING

In considering the request made by the Issuers, OSFI considered the following factors to be relevant to its determination that the proposed activity would not result in the Issuers being considered to be engaging in or carrying on business in Canada:

- Canadian securities dealers who sought access to investment products they could resell to investors had established relationships with the Issuers, in a manner consistent with industry practice;
- the negotiation and execution of the documentation related to the debt instruments, and decision-making about the administration and development of the debt instrument programs, would be done by employees of the Issuers outside Canada;
- the scope of activities expected to be performed by employees of the Issuers inside Canada would be limited;
- the Issuers would not deal directly with the investors who would ultimately hold the debt instruments;
- the Canadian securities dealers would not act as an agent or nominee of the Issuers — they would purchase the debt instruments as principal for the purposes of resale or inventory; and
- the activities to be performed by the payment agents engaged by the Issuers would be ancillary functions that were administrative in nature.

The Ruling is consistent with the widely-held view that, generally, where all aspects of the marketing, negotiation, execution and closing of a transaction by a foreign bank take place outside Canada, the foreign bank

would not be considered to be engaging in or carrying on business in Canada solely by reason of that transaction.

OPPORTUNITIES AND IMPACTS

The Ruling provides helpful guidance to foreign banks that are considering establishing debt instrument issuance programs in Canada, or that are contemplating greater access to Canadian capital markets.

The Ruling may open the Canadian market to the issuance of various structured note products by foreign banks. However, foreign bank debt products remain at a disadvantage to structured notes issued by Canadian banks which are, in the case of principal protected notes, generally exempt from Canadian securities laws and offered by way of a relatively simple information statement. Foreign bank debt products will have to be offered by way of either a prospectus or the commercial paper or accredited investor exemptions to the prospectus requirements in Canadian securities laws. Additionally, the ruling only permits fully underwritten offerings in relation to foreign bank debt products, rather than the best efforts agency arrangements prevalent in the Canadian structured note marketplace.

OSFI RULINGS GENERALLY

Rulings describe how OSFI has applied or interpreted certain provisions of the Act, and the regulations or guidelines thereunder. Rulings may provide guidance for other similar transactions where the relevant facts are the same as or similar to those of the transaction or type of transaction that OSFI considered for the purposes of issuing a particular Ruling. However, subsequent transactions may raise additional or different considerations that were not addressed in a previous Ruling. Accordingly, Rulings are not necessarily binding on OSFI's consideration of subsequent transactions.

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**• WHY CREDIT UNIONS ARE DISADVANTAGED IN
BUSINESS COMBINATIONS:
A SUMMARY OF PROVINCIAL LEGISLATIVE REGIMES
GOVERNING BUSINESS COMBINATIONS OF CREDIT UNIONS •**

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EXECUTIVE SUMMARY

Business combinations allow credit unions to combine back-office administrative work and to streamline and cross-sell financial products, resulting in significant cost savings. The following points can be inferred from a review of the current provincial legislation.

- The registration of credit unions in multiple provinces, in order to carry on the normal business of deposits and loans, is not possible.
- Continuance is limited to two provinces (British Columbia and Saskatchewan) and is not useful since once continued the credit union must cease to carry on business in its originating province.
- Cross-border amalgamations of credit unions are not feasible.
- Cross-border asset purchase transactions of credit unions are not possible since extra-provincial credit unions are precluded from carrying on business within the province.
- Outsourcing agreements are a partial solution to these impediments. However, not all provinces allow credit unions to enter into outsourcing agreements with extra-provincial credit unions and other provinces require that the provincial regulatory body supervising credit unions approve the outsourcing agreement. In fact, due to gaps in provincial legislation, consultation with the appropriate provincial regulatory body should be undertaken before entering into any outsourcing agreement with an extra-provincial credit union.
- The incorporation of a federal association or a retail association permits credit unions from different provinces to combine certain operational functions.

Therefore, the only feasible solutions for credit unions wishing to reduce their administrative and

operational costs while expanding into other provinces is either a series of outsourcing agreements with other credit unions or the incorporation of a federal association or retail association.

INTRODUCTION

This article describes the provincial legislative regimes governing the business combination of credit unions. In particular, this article addresses the business combination of credit unions incorporated in different provincial jurisdictions. The article also describes the possibility of registering a credit union in multiple provinces or continuing a credit union from one province to another. The possible business combinations explored in this article are: (i) amalgamations, (ii) asset purchase transactions, and (iii) outsourcing agreements. An outsourcing agreement encompasses any agreement to provide back office administrative support, marketing support, technical support as well as cross-selling agreements, investment counselling contracts and portfolio management agreements. Generally, credit unions cannot be acquired through the purchase of their shares since voting rights reside with the members of a credit union and each member has only one vote at a membership meeting. The article also discusses the federal cooperative regime as an alternative method for cross-border business combinations of credit unions.

A summary table of the provincial regimes with respect to business combinations is attached as appendix I. A “yes” signifies that the province allows the credit union to perform that type of business combination. A “no” signifies that the province is silent on the matter or that it does not permit that kind of business combination. Some business combinations are divided in sub-categories. For example, “provincial” signifies that the action is between credit unions within the province while “cross-border” indicates that the action involves both a credit union from within the province and a

credit union from a different province. As well, the term “inside” means that a credit union is continuing to the province from another province. The expression “outside” indicates that the credit union is continuing from the province to another province. In addition, the term “provider” means that the credit union could provide outsourcing services to an extra-provincial credit union. The expression “receiver” indicates that the credit union could receive outsourcing services from an extra-provincial credit union. Please note that the footnotes provide additional information regarding the different provincial regimes.

ALBERTA

Credit unions in Alberta are governed by the *Credit Union Act*, R.S.A. 2000, c. C-32 (the “Alberta Act”).

EXTRA-PROVINCIAL POWERS

The Alberta Act allows Alberta credit unions to carry on business in any other jurisdiction outside of Alberta to the extent permitted by the laws of the other jurisdiction (Alberta Act, s. 42(2)). However, the Alberta Act prohibits any extra-provincial credit unions from carrying on business in Alberta (Alberta Act, s. 228).

MULTIPLE REGISTRATIONS

The Alberta Act does not provide for the registration of an extra-provincial credit union in Alberta.

CONTINUANCE

The Alberta Act does not provide for the continuance of a credit union inside or outside of the province.

AMALGAMATION

Section 182 of the Alberta Act allows any two or more credit unions to amalgamate and continue as one credit union. The agreement to amalgamate must be approved by the Credit Union Deposit Guarantee Corporation of Alberta and by two-thirds of the members of each credit union. The amalgamation provision applies only to credit unions incorporated in Alberta and, thus, an Alberta credit union cannot amalgamate with an extra-provincial credit union.

ASSET PURCHASE

A credit union may dispose of all or substantially all of its assets (Alberta Act, s. 47). The Alberta Act provides that at least two-thirds of the credit union’s members must approve the sale. In addition, the Alberta Act does not restrict an Alberta credit union from purchasing the assets of a provincial or extra-provincial credit union outside of Alberta.

An extra-provincial credit union can acquire an Alberta credit union’s business through an asset purchase transaction. The issue with a cross-border asset purchase transaction is that the extra-provincial credit union will not be able to carry on the business of a credit union within the province where the acquired assets are located. Therefore, this is not a feasible alternative.

OUTSOURCING AGREEMENT

A credit union may carry on any business that is incidental or conducive to the attainment of a credit union’s purpose (Alberta Act, s. 46(3) and Alta. Reg. 249/1989, s. 12(1)(d)). A subsidiary or affiliate of a credit union can act as a service corporation so long as it limits its services to Alberta credit unions and credit unions registered under legislation elsewhere in Canada (Alberta Act, s. 46(4) and Alta. Reg. 249/1989, s. 14). Therefore, it appears that Alberta credit unions can provide outsourcing services to extra-provincial credit unions if permitted to do so by the other jurisdiction.

An extra-provincial credit union cannot carry on any business in Alberta except to register a security (Alberta Act, s. 228). In addition, the Alberta Act prohibits any person from carrying on business in Alberta if its name contains the words “credit union” (Alberta Act, s. 223(1)). Therefore, at first glance, it seems that an extra-provincial credit union cannot provide outsourcing services to an Alberta credit union if such outsourcing would result in the extra-provincial credit union carrying on business in Alberta. Nonetheless, at the present time there is an Alberta credit union that shares back-office functions with an extra-provincial credit union. Therefore, it appears that the Alberta Superintendent of Financial Institutions does not object to an extra-provincial credit union providing outsourcing services to an Alberta credit union.

As a general rule, the Alberta Superintendent of Financial Institutions will want to review any outsourcing agreement before it is put into place in

order to judge the overall risk of such an outsourcing agreement on the operations of the Alberta credit union.

BRITISH COLUMBIA

Credit unions in British Columbia (“B.C.”) are governed by the *Credit Union Incorporation Act*, R.S.B.C. 1996, c. 82 (the “B.C. Act”).

EXTRA-PROVINCIAL POWERS

With the consent of the Credit Union Deposit Insurance Corporation of B.C. and the Financial Institutions Commission, B.C. credit unions can carry on business in any other jurisdiction outside of B.C. to the extent permitted by the laws of the other jurisdiction (B.C. Act, s. 81(1.1)).

MULTIPLE REGISTRATIONS

The B.C. Act does not provide for the registration of extra-provincial credit unions in B.C.

CONTINUANCE

An extra-provincial credit union can apply for continuance into B.C. if it is authorized to do so under the laws of its home jurisdiction (B.C. Act, s. 15.1). Currently, only Saskatchewan allows credit unions to apply for continuance outside of the province. Similarly, s. 15.2 of the B.C. Act allows B.C. credit unions to continue outside of the province if the laws of the other jurisdiction permit continuance. However, once continued into another province, the credit union must cease to carry on business within B.C.

AMALGAMATION

Section 20 of the B.C. Act allows any two or more credit unions to amalgamate and continue as one credit union. The agreement to amalgamate must be approved by the Financial Institutions Commission as well as by two-thirds of the members of each credit union and by two-thirds of each class of shareholders. The amalgamation provision only applies to credit unions incorporated in B.C. or continued into B.C. Thus, a B.C. credit union can only amalgamate with an extra-provincial credit union if the foreign credit union first continues into B.C.

ASSET PURCHASE

A credit union may dispose of all or substantially all of its assets to another credit union once the asset transfer agreement is approved by two-thirds of the credit union members, by two-thirds of each class of shareholders and by the Financial Institutions Commission (B.C. Act, s. 16). Only credit unions incorporated under the B.C. Act or continued into B.C. may purchase the assets of a B.C. credit union. The B.C. Act does not restrict a B.C. credit union from purchasing the assets of a provincial or extra-provincial credit union outside of B.C.

OUTSOURCING AGREEMENT

A B.C. credit union or one of its subsidiaries can provide outsourcing services to extra-provincial credit unions (if permitted to do so by the other jurisdiction) with the consent of the Credit Union Deposit Insurance Corporation of B.C. and the Financial Institutions Commission (B.C. Act, s. 81(1.1)).

The B.C. Act prohibits any person from carrying on business in B.C. if its name contains the words “credit union”, “caisse populaire” or “caisse d’économie” (B.C. Act, s. 14(3)). However, the B.C. Act does not prohibit extra-provincial credit unions from carrying on business that is ancillary to the business of deposits and loans. Therefore, an extra-provincial credit union could provide outsourcing services to a B.C. credit union.

As a general rule, the Financial Institutions Commission will want to review any outsourcing agreement before it is put into place in order to judge the overall risk of such an outsourcing agreement on the operations of the B.C. credit union.

MANITOBA

Credit unions in Manitoba are governed by the *Credit Unions and Caisses Populaires Act*, C.C.S.M., c. C301 (the “Manitoba Act”).

EXTRA-PROVINCIAL POWERS

Subject to the approval of the Registrar, a Manitoba credit union has the capacity to carry on its business in any jurisdiction outside Manitoba to the extent permitted by the laws of that jurisdiction (Manitoba Act, s. 14(2)).

MULTIPLE REGISTRATIONS

The Manitoba Act also allows for multiple registrations with the approval of the Registrar. Therefore, a Manitoba credit union can register in another province in order to carry on business under the laws of that other jurisdiction while maintaining its registration in Manitoba (Manitoba Act, s. 130). However, s. 130 is largely moot since all the provinces oblige a credit union to have its registered office in the province where it wishes to carry on business. Therefore, a credit union can effectively register in only one province. Nova Scotia allows for multiple registrations. It remains to be seen if the Superintendent of Credit Unions of Nova Scotia would allow a Manitoba credit union to register in Nova Scotia while keeping its registered office within Manitoba.

In addition, Manitoba permits an extra-provincial credit union to register in Manitoba if the Government of Manitoba has entered into an agreement with the government of another province providing for reciprocal rights for credit unions (Manitoba Act, s. 129). As of yet, no agreement giving substantive rights to extra-provincial credit unions has been signed with any province or territory.

CONTINUANCE

The Manitoba Act does not provide for the continuance of extra-provincial credit unions into the province or for the continuance of a Manitoba credit union outside of the province.

AMALGAMATION

Section 119 of the Manitoba Act allows any two or more credit unions to amalgamate and continue as one credit union. The agreement to amalgamate must be approved by two-thirds of the members of each credit union (Manitoba Act, s. 120) and the Registrar (Manitoba Act, s. 124). The amalgamation provision applies only to credit unions incorporated in Manitoba (Manitoba Act, s. 3(1)) and thus a Manitoba credit union cannot amalgamate with an extra-provincial credit union.

ASSET PURCHASE

A credit union may dispose of all or substantially all of its assets (Manitoba Act, s. 125). The Manitoba Act provides that the sale must be approved by

two-thirds of the credit union members and by the Registrar. In addition, the Manitoba Act does not restrict a Manitoba credit union from purchasing the assets of a provincial or extra-provincial credit union outside of Manitoba.

An extra-provincial credit union can acquire a Manitoba credit union's business through an asset purchase transaction. The issue with a cross-border asset purchase transaction is that the extra-provincial credit union will not be able to carry on the business of a credit union within the province where the acquired assets are located. Therefore, this is not a feasible alternative.

OUTSOURCING AGREEMENT

A Manitoba credit union may provide outsourcing services to extra-provincial credit unions (if permitted to do so by the other jurisdiction) with the consent of the Registrar (Manitoba Act, s. 14(2)). The Manitoba Financial Institutions Regulation Branch will consider such outsourcing requests on a case-by-case basis.

The Manitoba Act prohibits any person from carrying on business in Manitoba if its name contains the words "credit union" or "caisse populaire" (Manitoba Act, s. 10(6) and s. 10(7)). However, the Manitoba Act does not prohibit extra-provincial credit unions from carrying on business that is ancillary to the business of deposits and loans. Therefore, an extra-provincial credit union could provide outsourcing services to a Manitoba credit union with the consent of the Registrar. The Manitoba Financial Institutions Regulation Branch will consider such outsourcing requests on a case-by-case basis.

NEW BRUNSWICK

Credit unions in New Brunswick ("N.B.") are governed by the *Credit Unions Act*, S.N.B. 1992, c. C-32.2 (the "N.B. Act").

EXTRA-PROVINCIAL POWERS

With the approval of the Superintendent of Credit Unions, N.B. credit unions can carry on business in any other jurisdiction outside of N.B. to the extent permitted by the laws of the other jurisdiction (N.B. Act, s. 17). However, s. 5 of the N.B. Act prohibits an extra-provincial credit union from carrying on the business of a credit union within N.B.

MULTIPLE REGISTRATIONS

The N.B. Act does not provide for the registration of an extra-provincial credit union in N.B.

CONTINUANCE

The N.B. Act does not provide for continuance of credit unions outside or inside N.B.

AMALGAMATION

Section 133 of the N.B. Act allows any two or more credit unions to amalgamate and continue as one credit union. The agreement to amalgamate must be approved by two-thirds of the members of each credit union (N.B. Act, s. 135) and by the Superintendent of Credit Unions (N.B. Act, s. 138). The amalgamation provision applies only to credit unions incorporated in N.B. and thus an N.B. credit union cannot amalgamate with an extra-provincial credit union.

ASSET PURCHASE

A credit union may dispose of all or substantially all of its assets if two-thirds of the credit union's members approve of the sale (N.B. Act, s. 139). The Superintendent of Credit Unions must also approve the sale (N.B. Act, s. 140). In addition, the N.B. Act does not restrict a N.B. credit union from purchasing the assets of a provincial or extra-provincial credit union outside of N.B.

An extra-provincial credit union can acquire an N.B. credit union's business through an asset purchase transaction. The issue with a cross-border asset purchase transaction is that the extra-provincial credit union will not be able to carry on the business of a credit union within the province where the acquired assets are located. Therefore, this is not a feasible alternative.

OUTSOURCING AGREEMENT

It is unlikely that a N.B. credit union can provide outsourcing services to an extra-provincial credit union since it cannot directly or indirectly, through a subsidiary or otherwise, deal in goods, wares and merchandise or engage in any trade or other business (N.B. Act, s. 20). The business of the credit union seems to be limited to deposits and loans (N.B. Act, s. 18(1)) and networking arrangements with financial institutions (N.B. Act, s. 18(4)).

Section 5 of the N.B. Act prohibits an extra-provincial credit union from carrying on the business of a credit union within N.B. The N.B. Act also prohibits any person from carrying on business in N.B. if its name contains the words "credit union" or "caisse populaire" (N.B. Act, s. 12(5)).

However, the N.B. Act does not prohibit extra-provincial credit unions from carrying on business that is ancillary to the business of deposits and loans; it only prohibits carrying on the business of a credit union (N.B. Act, s. 5). Therefore, an extra-provincial credit union could provide outsourcing services to a N.B. credit union.

As a general rule, the Superintendent of Credit Unions will want to review any outsourcing agreement before it is put into place in order to judge the overall risk of such an outsourcing agreement on the operations of the N.B. credit union.

NEWFOUNDLAND AND LABRADOR

Credit unions in Newfoundland and Labrador ("NF&L") are governed by the *Credit Union Act*, S.N.L. 1995, c. C-37.1 (the "NF&L Act").

EXTRA-PROVINCIAL POWERS

With the approval of the Superintendent of Credit Unions, NF&L credit unions can carry on business in any other jurisdiction outside of NF&L to the extent permitted by the other jurisdiction (NF&L Act, s. 17). However, s. 5 of the NF&L Act prohibits an extra-provincial credit union from carrying on the business of a credit union within NF&L.

MULTIPLE REGISTRATIONS

The NF&L Act does not provide for the registration of an extra-provincial credit union in NF&L.

CONTINUANCE

The NF&L Act does not provide for the continuance of credit unions outside or inside of NF&L.

AMALGAMATION

Section 131 of the NF&L Act allows any two or more credit unions to amalgamate and continue as one credit union. The agreement to amalgamate must be approved by two-thirds of the members of each credit union (NF&L Act, s. 133) and by the Superin-

tendent of Credit Unions (NF&L Act, s. 136). The amalgamation provision applies only to credit unions incorporated in NF&L and thus a NF&L credit union cannot amalgamate with an extra-provincial credit union.

ASSET PURCHASE

A credit union may dispose of all or substantially all of its assets if two-thirds of the credit union's members approve of the sale (NF&L Act, s. 137). The Superintendent of Credit Unions must also approve the sale (NF&L Act, s. 138). In addition, the NF&L Act does not restrict a NF&L credit union from purchasing the assets of a provincial or extra-provincial credit union outside of NF&L.

An extra-provincial credit union can acquire a NF&L credit union's business through an asset purchase transaction. The issue with a cross-border asset purchase transaction is that the extra-provincial credit union will not be able to carry on the business of a credit union within the province where the acquired assets are located. Therefore, this is not a feasible alternative.

OUTSOURCING AGREEMENTS

It is unlikely that a NF&L credit union can provide outsourcing services to an extra-provincial credit union since it cannot directly or indirectly, through a subsidiary or otherwise, deal in goods, wares and merchandise or engage in any trade or other business (NF&L Act, s. 20(2)). The business of the credit union seems to be limited to deposits and loans (NF&L Act, s. 18(1)).

With the written approval of the Credit Union Deposit Guarantee Corporation of NF&L, a credit union may enter into an arrangement for services with a financial institution or other corporation for the provision of a service offered by the financial institution or other corporation (NF&L Act, s. 18(3) and N.L.R. 55/99, s. 3). The terms financial institution and services offered are not defined in the NF&L Act or the accompanying regulations. Therefore, the expression financial institution could include extra-provincial credit unions and the types of services offered by financial institutions could encompass outsourcing services.

In addition, the NF&L Act does not prohibit extra-provincial credit unions from carrying on business that is ancillary to the business of deposits and

loans; it only prohibits carrying on the business of a credit union (NF&L Act, s. 5). Furthermore, the NF&L Act allows an extra-provincial credit unions conducting business in the province to identify itself as "credit union" or "caisse populaire" (NF&L Act, s. 12(4)). Therefore, an extra-provincial credit union could provide outsourcing services to a NF&L credit union. However, the preliminary discussions with the Credit Union Deposit Guarantee Corporation indicated that they are not inclined to approve such service agreements.

NOVA SCOTIA

Credit unions in Nova Scotia ("N.S.") are governed by the *Credit Union Act*, S.N.S. 1994, c. 4 (the "N.S. Act").

EXTRA-PROVINCIAL POWERS

With the approval of the Superintendent of Credit Unions, N.S. credit unions can carry on business in any other jurisdiction outside of N.S. to the extent permitted by the other jurisdiction (N.S. Act, s. 15).

MULTIPLE REGISTRATIONS

N.S. does allow, with the approval of the Superintendent of Credit Unions, a N.S. credit union to register to carry on business under the laws of another jurisdiction while maintaining its registration in N.S. (N.S. Act, s. 141). However, this provision is largely moot since all the other provinces oblige the credit union to have its registered office in the province where it wishes to carry on business. Therefore, a credit union can effectively register in only one province.

In addition, a credit union incorporated under the laws of another jurisdiction may become registered in N.S. for certain limited purposes approved by the Superintendent of Credit Unions, but in no case shall the credit union be permitted to carry on in N.S. the ordinary business of deposits and loans (N.S. Act, s. 140). Therefore, a Manitoba credit union could potentially register in N.S. since the Manitoba regime allows for multiple registrations outside of the province.

CONTINUANCE

The N.S. Act does not provide for the continuance of credit unions outside or inside N.S.

AMALGAMATION

Section 130 of the N.S. Act allows any two or more credit unions to amalgamate and continue as one credit union. The agreement to amalgamate must be approved by two-thirds of the members of each credit union (N.S. Act, s. 132) and by the Superintendent of Credit Unions (N.S. Act, s. 135). The amalgamation provision applies only to credit unions incorporated in N.S. and thus a N.S. credit union cannot amalgamate with an extra-provincial credit union.

ASSET PURCHASE

A credit union may dispose of all or substantially all of its assets if two-thirds of the credit union's members approve of the sale (N.S. Act, s. 136). The Superintendent of Credit Unions must also approve the sale. In addition, the N.S. Act does not restrict a N.S. credit union from purchasing the assets of a provincial or extra-provincial credit union outside of N.S.

An extra-provincial credit union can acquire a N.S. credit union's business through an asset purchase transaction if (i) it registers with the Superintendent of Credit Unions, and (ii) it does not carry on in N.S. the ordinary business of deposits and loans. The issue with a cross-border asset purchase transaction is that the extra-provincial credit union will not be able to carry on the business of a credit union within the province where the acquired assets are located. Therefore, this is not a feasible alternative.

OUTSOURCING AGREEMENT

A N.S. credit union may provide outsourcing services to extra-provincial credit unions (if permitted to do so by the other jurisdiction) with the approval of the Superintendent of Credit Unions (N.S. Act, s. 15). The Superintendent of Credit Unions will consider such outsourcing requests on a case-by-case basis.

A person cannot carry on business within N.S. if its name contains the words "credit union" or "caisse populaire" (N.S. Act, s. 10(4)). The extra-provincial credit union can avoid this restriction by registering itself with the Superintendent of Credit Unions (N.S. Act, s. 10(5)(b) and s. 140).

With the written approval of the Nova Scotia Credit Union Deposit Insurance Corporation, a credit union may enter into an arrangement with a financial

institution or any other body corporate for the provision of any service offered by that financial institution or other body corporate (N.S. Act, s. 16(4) and N.S. Reg. 45-95, s. 11). In addition, the N.S. Act does not prohibit extra-provincial credit unions from carrying on business that is ancillary to the business of deposits and loans (N.S. Act, s. 140). Therefore, an extra-provincial credit union could provide outsourcing services to a N.S. credit union. The Superintendent of Credit Unions will consider such outsourcing requests on a case-by-case basis.

ONTARIO

Credit unions in Ontario are governed by the *Credit Unions and Caisses Populaires Act, 1994*, S.O. 1994, c. 11 (the "Ontario Act").

EXTRA-PROVINCIAL POWERS

The Ontario Act allows Ontario credit unions to exercise their powers outside of Ontario to the extent permitted under the laws of the applicable jurisdiction (Ontario Act, s. 25).

MULTIPLE REGISTRATIONS

The Ontario Act permits an extra-provincial credit union to register in Ontario if the Government of Ontario has entered into an agreement with the government of another province providing for reciprocal rights for credit unions (Ontario Act, s. 332). As of yet, no agreement giving substantive rights to extra-provincial credit unions has been signed with any province or territory.

CONTINUANCE

The Ontario Act does not provide for the continuance of extra-provincial credit unions into the province nor does it provide for the continuance of an Ontario credit union outside of the province.

The Ontario Legislature has recently enacted the *Budget Measures and Interim Appropriation Act, 2007*, S.O. 2007, c. 7 (the "Ontario Amending Act"). Its amendments, if proclaimed in force, would allow an extra-provincial credit union to be able to apply for continuance into Ontario if it is authorized to do so under the laws of its home jurisdiction (Ontario Amending Act, s. 161). Similarly, s. 161 of the Ontario Amending Act would allow Ontario credit unions to continue outside of

the province if the laws of the other jurisdiction permit continuance. However, once continued into another province, the credit union would cease to carry on business within Ontario.

AMALGAMATION

Section 309 of the Ontario Act allows any two or more credit unions to amalgamate and continue as one credit union. The agreement to amalgamate must be approved by the Superintendent of Financial Services as well as by two-thirds of the members of each credit union and by two thirds of each class of shareholders. Section 309 applies only to credit unions incorporated under the Ontario Act and thus extra-provincial credit unions cannot amalgamate with Ontario credit unions.

ASSET PURCHASE

A credit union may dispose of all or a substantial portion of its assets (Ontario Act, s. 203). The Ontario Act provides that such asset transfers must be approved by two-thirds of the credit union members and by the Superintendent of Financial Services. In addition, only another Ontario credit union may assume the liabilities of the selling credit union as part of the purchase price (Ontario Act, s. 203(5)). The Ontario Act does not restrict an Ontario credit union from purchasing the assets of a provincial or extra-provincial credit union outside of Ontario.

Section 109 of the Ontario Amending Act would bar any credit union from purchasing more than 15 per cent of the assets of a financial institution (which includes credit unions) without first obtaining approval for the purchase from two-thirds of the credit union's members.

An extra-provincial credit union can acquire an Ontario credit union's business through an asset purchase transaction. The issue with a cross-border asset purchase transaction is that the extra-provincial credit union will not be able to carry on the business of a credit union within the province where the acquired assets are located. Therefore, this is not a feasible alternative.

OUTSOURCING AGREEMENT

An Ontario credit union may, with the Superintendent's written approval, engage in any business that is reasonably ancillary to the provision of financial services (Ontario Act, s. 174(2)). Therefore, an

Ontario credit union can provide outsourcing services to extra-provincial credit unions.¹

The Ontario Act prohibits any person from carrying on business in Ontario if its name contains the words "credit union" or "caisse populaire" (Ontario Act, s. 20(1)).

However, the Ontario Act does not prohibit extra-provincial credit unions from carrying on business that is ancillary to the business of deposits and loans. Therefore, an extra-provincial credit union could provide outsourcing services to an Ontario credit union.

As a general rule, the Superintendent will want to review any outsourcing agreement before it is put into place in order to judge the overall risk of such an outsourcing agreement on the operations of the Ontario credit union.

PRINCE EDWARD ISLAND

Credit unions in Prince Edward Island ("P.E.I.") are governed by the *Credit Unions Act*, R.S.P.E.I. 1988, c. C-29.1 (the "P.E.I. Act").

EXTRA-PROVINCIAL POWERS

P.E.I. credit unions can carry on business in any other jurisdiction outside of P.E.I. to the extent permitted by the other jurisdiction (P.E.I. Act, s. 11(2)). However, s. 159(1) of the P.E.I. Act prohibits an extra-provincial credit union from carrying on business in P.E.I. except to realize a security.

MULTIPLE REGISTRATIONS

The P.E.I. Act does not provide for the registration of an extra-provincial credit union in P.E.I.

CONTINUANCE

The P.E.I. Act does not provide for the continuance of credit unions outside or inside of P.E.I.

AMALGAMATION

Section 124 of the P.E.I. Act allows any two or more credit unions to amalgamate and continue as one credit union. The agreement to amalgamate must be approved in a general meeting of the members of each credit union (P.E.I. Act, s. 127) and by the Registrar (P.E.I. Act, s. 129). The amalgamation provision applies only to credit unions incorporated

in P.E.I. and thus a P.E.I. credit union cannot amalgamate with an extra-provincial credit union.

ASSET PURCHASE

A credit union may dispose of all or substantially all of its assets if two-thirds of the credit union's members approve of the sale. The Credit Union Deposit Insurance Corporation must also approve the sale (P.E.I. Act, s. 47). In addition, the P.E.I. Act does not restrict a P.E.I. credit union from purchasing the assets of a provincial or extra-provincial credit union outside of P.E.I.

An extra-provincial credit union can acquire a P.E.I. credit union's business through an asset purchase transaction. The issue with a cross-border asset purchase transaction is that the extra-provincial credit union will not be able to carry on the business of a credit union within the province where the acquired assets are located. Therefore, this is not a feasible alternative.

OUTSOURCING AGREEMENT

In accordance with s. 11(2) of the P.E.I. Act, a P.E.I. credit union could provide outsourcing services to an extra-provincial credit union to the extent permitted by the other jurisdiction.

As a general rule, the P.E.I. Consumer, Corporate and Insurance Division will want to review any outsourcing agreement before it is put into place in order to judge the overall risk of such an outsourcing agreement on the operations of the P.E.I. credit union.

However, an extra-provincial credit union cannot carry on any business in P.E.I. except to register a security (P.E.I. Act, s. 159(1)). In addition, the P.E.I. Act prohibits any person from carrying on business in P.E.I. if its name contains the words "credit union" or "caisse populaire" (P.E.I. Act, s. 7(5)). Therefore, an extra-provincial credit union cannot provide outsourcing services to a P.E.I. credit union if such outsourcing would result in the extra-provincial credit union carrying on business in P.E.I.

An extra-provincial credit union may enter into an agreement with a P.E.I. credit union for the purposes of permitting its members to transact business with it by means of automated teller equipment or other electronic facilities located in P.E.I. (P.E.I. Act, s. 159(2)).

QUÉBEC

Credit unions in Québec are governed by *An Act Respecting Financial Services Cooperatives*, R.S.Q., c. C-67.3 (the "Québec Act").

EXTRA-PROVINCIAL POWERS

A credit union is empowered to pursue its activities outside Québec (Québec Act, s. 65).

MULTIPLE REGISTRATIONS

The Québec Act does not provide for the registration of an extra-provincial credit union in Québec.

CONTINUANCE

The Québec Act does not provide for continuance of credit unions outside or inside Québec.

AMALGAMATION

Section 271 of the Québec Act allows any two or more credit unions to amalgamate and continue as one credit union. Each credit union must adopt the amalgamation agreement by by-law at a special meeting (Québec Act, s. 274). The amalgamation must also be approved by the federation that has consented to admit the amalgamated credit union (Québec Act, s. 271 & s. 272) and by the Authority (Québec Act, s. 280). The amalgamation provision only applies to credit unions incorporated in Québec and thus a Québec credit union cannot amalgamate with an extra-provincial credit union.

Section 428 of the Québec Act allows two or more federations to amalgamate. Each federation must adopt the amalgamation agreement through by-law at a special meeting (Québec Act, s. 430). The Authority must approve the amalgamation (Québec Act, s. 436).

ASSET PURCHASE

The Québec Act does not provide any guidance on asset purchase transactions. It would appear that Chapter VII of the Québec Act (Winding-Up and Dissolution) would apply. However, it is unclear how the Québec Act would apply for the partial sale of a credit union's assets.

The Québec Act does not restrict a Québec credit union from purchasing the assets of a provincial credit union. The Québec Act does however limit a Québec credit union from acquiring more than 30 per cent of the assets or voting rights of a credit union whose head office is outside Québec (Québec Act, s. 473).

An extra-provincial credit union can acquire a Québec credit union's business through an asset

purchase transaction. The issue with a cross-border asset purchase transaction is that the extra-provincial credit union will not be able to carry on the business of a credit union within the province where the acquired assets are located. Therefore, this is not a feasible alternative.

OUTSOURCING AGREEMENT

A Québec credit union may provide outsourcing services to extra-provincial credit unions (if permitted to do so by the other jurisdiction) with the consent of the Government. (Québec Act, s. 65 and s. 67). In addition, the Québec Act does stipulate that the federation may, as an ancillary activity, provide to any person the services it uses for its own benefit or the benefit of its members (Québec Act, s. 368).

The Québec Act prohibits any person from carrying on business in Québec if its name contains the words “credit union” or “caisse populaire” (Québec Act, s. 18).

However, the Québec Act does not prohibit extra-provincial credit unions from carrying on business that is ancillary to the business of deposits and loans. Therefore, an extra-provincial credit union could provide outsourcing services to a Québec credit union. However, the preliminary discussions with the Autorité des marchés financiers indicated that they are not inclined to approve such service agreements.

SASKATCHEWAN

Credit unions in Saskatchewan are governed by the *Credit Union Act, 1998*, S.S. 1998, c. C-45.2 (the “Saskatchewan Act”). It is the most progressive of the provincial statutes with respect to business combinations with extra-provincial credit unions. For example, Saskatchewan has a series of legislative dispositions governing extra-provincial credit unions within the province. However, this legislation is not yet in force.

EXTRA-PROVINCIAL POWERS

Saskatchewan credit unions are permitted to carry on business outside of Saskatchewan to the extent permitted by the laws of the other jurisdiction (Saskatchewan Act, s. 34(2)). However, s. 10 of the Saskatchewan Act prohibits an extra-provincial credit union from carrying on the business of a credit union within Saskatchewan.

MULTIPLE REGISTRATIONS

The Saskatchewan Act does not provide for the registration of an extra-provincial credit union in Saskatchewan.

CONTINUANCE

An extra-provincial credit union can apply for continuance into Saskatchewan if it is authorized to do so under the laws of its home jurisdiction (Saskatchewan Act, s. 309). Currently, only British Columbia allows credit unions to apply for continuance outside of the province. Similarly, s. 312 of the Saskatchewan Act allows Saskatchewan credit unions to continue outside of the province if the laws of the other jurisdiction permit continuance. However, once continued into another province, the credit union must cease to carry on business within Saskatchewan.

AMALGAMATION

Section 303 of the Saskatchewan Act allows Saskatchewan credit unions to amalgamate and continue as one credit union. It also allows a Saskatchewan credit union to amalgamate with an extra-provincial credit union when the laws governing the extra-provincial credit union permit such an amalgamation. This is a moot point since none of the other provinces permits a credit union to amalgamate with a credit union from outside the province. The agreement to amalgamate must be approved by two-thirds of the members of each credit union (Saskatchewan Act, s. 305), by two-thirds of each class of shareholders (Saskatchewan Act, s. 305) and by the Registrar (Saskatchewan Act, s. 308).

Asset Purchase

A credit union may dispose of all or substantially all of its assets (Saskatchewan Act, s. 313). The Saskatchewan Act provides that the sale must be approved by the Credit Union Deposit Guarantee Corporation of Saskatchewan as well as by two-thirds of the credit union’s members and two-thirds of each of its class of shareholders regardless of whether or not that class of shares has voting rights. In addition, the Saskatchewan Act does not restrict a Saskatchewan credit union from purchasing the assets of a provincial or extra-provincial credit union outside of Saskatchewan.

An extra-provincial credit union can acquire a Saskatchewan credit union's business through an asset purchase transaction. The issue with a cross-border asset purchase transaction is that the extra-provincial credit union will not be able to carry on the business of a credit union within Saskatchewan unless it continued into the province. Therefore, this is not a feasible alternative.

OUTSOURCING AGREEMENT

A Saskatchewan credit union may provide outsourcing services to an extra-provincial credit union if permitted to do so by the laws of the other jurisdiction (Saskatchewan Act, s. 34(2)).

The Saskatchewan Act prohibits any person from carrying on business in Saskatchewan if its name contains the words "credit union" or "caisse populaire" (Saskatchewan Act, s. 18(1)). Interestingly, the Saskatchewan Act does not prohibit extra-provincial credit unions from carrying on business that is ancillary to the business of deposits and loans (Saskatchewan Act, s. 10). Therefore, an extra-provincial credit union could provide outsourcing services to a Saskatchewan credit union.

As a general rule, the Saskatchewan Financial Services Commission will want to review any outsourcing agreement before it is put into place in order to judge the overall risk of such an outsourcing agreement on the operations of the Saskatchewan credit union.

FEDERAL COOPERATIVE REGIME

Given that provincial legislation governing credit unions impedes cross-border business combinations, the most efficient way to combine credit unions incorporated in different provincial jurisdictions is by using the *Cooperative Credit Associations Act*, S.C. 1991, c. 48 ("CCAA"). This federal legislation allows credit unions to form associations or retail associations.

An application to incorporate an association or a retail association must be submitted by at least two credit unions, not all of which are incorporated under the laws of one province (CCAA, s. 24 & s. 50). Once the association or retail association is incorporated, these credit unions will become members of the association or retail association yet they will maintain their corporate independence.

An application to incorporate an association includes the issuance of letters of patent from the

Minister of Finance (Canada), an order to commence and carry on business from the Superintendent of Financial Institutions and the completion of provincial licensing requirements (such as extra-provincial registration). This application includes substantive information including a detailed business plan and three-year financial projections. There are additional requirements to incorporate a retail association such as obtaining the approval from the Minister of Finance (Canada) to form a retail association and obtaining membership to the Canada Deposit Insurance Corporation.

An association provides financial services to its members, such as taking deposits and making loans, as well as providing administrative, educational, promotional, technical, research and consultative services in support of its financial services. The association may also act as a financial agent for, and provide investment counselling and portfolio management services, to its members (CCAA, s. 375). In addition, an association may:

- hold and manage real property;
- act as a custodian of property on behalf of its members;
- receive money on deposit from the government of Canada, a province or a municipality in Canada, or any agency thereof, and a deposit protection agency;
- make loans to and investments in entities that are not members of the association; and
- with the prior written approval of the Minister of Finance, develop, design, hold, manage, manufacture, sell or otherwise deal with data transmission systems, information sites, communication devices or information platforms or portals that are used to provide information that is primarily financial or economic in nature.
- With the prior written approval of the Minister of Finance (Canada), provide its members with the following services:
 - collection, manipulation and transmission of information that is primarily financial or economic in nature or that relates to the business of its members;
 - provide advisory services in the design, development or implementation of information management systems; and
 - design, develop or market computer software and equipment (CCAA, s. 376).
- With the approval of the Minister of Finance and subject to any orders from the Superintendent of

Financial Institutions, provide clearing, settlement and payment services to members of the Canadian Payments Association and engage in ancillary services related to those clearing, settlement and payment services. (CCAA, s. 375.1(b)).

A retail association can engage in all the businesses that an association is permitted to engage in (listed above) but it may in addition provide financial services to non-members of the association (CCAA, s. 375.1(a) and S.O.R./Reg. 2002-216). In addition, a retail association may:

- act as a custodian of property on behalf of any person to whom the association may provide financial services;
- act as a financial agent;
- provide investment counselling services and portfolio management services;
- issue payment, credit or charge cards and, in cooperation with others including other financial institutions, operate a payment, credit or charge card plan;
- promote merchandise and services to the holders of any payment, credit or charge card issued by the association;
- engage in the sale of tickets (including lottery tickets) and urban transit tickets; and
- act as receiver, liquidator or sequestrator (CCAA, s. 376).

The main advantage of an association or retail association is that it can carry on business throughout Canada (CCAA, s. 16). In most provinces, the association or retail association will have to register as an extra-provincial corporation before it can carry on business within those provinces. The four exceptions are Alberta, B.C., N.S. and Saskatchewan. In Alberta, Nova Scotia and Saskatchewan the association or retail association will have to be registered as a loan corporation whereas in B.C. it will have to be registered as an extra-provincial trust company.

In addition, in regard to transactions between the association and its members, particular attention will have to be paid to Part XII of the CCAA since the self-dealing rules restrict the type of transactions possible between members and the association.

CONCLUSION

Business combinations allow credit unions to combine back-office administrative work and to stream-

line and cross-sell financial products resulting in significant cost savings. As stated in the Executive Summary at the outset, after reviewing the current provincial legislation the following points can be inferred. First, the registration of credit unions in multiple provinces, in order to carry on the normal business of deposits and loans, is not possible. Second, continuance is limited to two provinces and is not useful since once continued the credit union must cease to carry on business in its originating province. Third, cross-border amalgamations of credit unions are not feasible. Fourth, neither are cross-border asset purchase transactions of credit unions since extra-provincial credit unions are precluded from carrying on business within the province. Fifth, outsourcing agreements are a convenient solution to this impediment. However, not all of the provinces allow credit unions to enter into outsourcing agreements with extra-provincial credit unions and other provinces require that the provincial regulatory body supervising credit unions approve the outsourcing agreement. In fact, due to gaps in provincial legislation, consultation with the appropriate provincial regulatory body should be undertaken before entering into any outsourcing agreement with an extra-provincial credit union. Finally, the incorporation of a federal association or a retail association permits credit unions from different provinces to combine certain operational functions.

One can expect new associations and retail associations since the coming into force of Bill C-37 (S.C. 2007, c. 5) reduces the number of credit unions needed to form an association or retail association from ten to two thus making this option even more attractive. It seems that the optimal solution for credit unions wishing to reduce their administrative and operational costs while expanding into other provinces is either a series of outsourcing agreements with other credit unions or the incorporation of a federal association or retail association.

[Editor's note: Robert W. McDowell, Yvon Martineau, David H. Field Q.C., Robert E. Elliott, Robert W. Quon, Stephen B. Kerr, Koker K. Christensen, Kathleen E. Yoa and A. Wojtek Baraniak are members of Fasken Martineau's Financial Institutions and Services Group.]

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¹ Section 30 of Regulation 76/95 stipulates that an Ontario credit union shall not directly provide the follow-

ing financial services: (i) services provided by a factoring corporation, (ii) services provided by an investment counselling and portfolio management corporation, (iii) services provided by a mutual fund corporation,

(iv) services provided by a mutual fund distribution corporation, and (v) services provided by a securities dealer. This prohibition does not impact any outsourcing agreements contemplated in this paper.

APPENDIX I

Provinces	Amalgamation		Asset Sale		Continuance		Outsourcing Agreement ⁽⁶⁾		
	Provincial	Cross-Border	Provincial	Cross-Border	Inside	Outside	Provider	Receiver	Multiple Registrations
Alberta	Yes	No	Yes	Yes ⁽³⁾	No	No	Yes	Yes	No
British Columbia	Yes	No	Yes	No ⁽⁴⁾	Yes ⁽⁵⁾	Yes ⁽⁵⁾	Yes	Yes	No
Manitoba	Yes	No	Yes	Yes ⁽³⁾	No	No	Yes	Yes	Yes ⁽⁷⁾
New Brunswick	Yes	No	Yes	Yes ⁽³⁾	No	No	No	Yes	No
Newfoundland and Labrador	Yes	No	Yes	Yes ⁽³⁾	No	No	No	No	No
Nova Scotia	Yes	No	Yes	Yes ⁽³⁾	No	No	Yes	Yes	Yes ⁽⁷⁾⁽⁸⁾
Ontario	Yes	No	Yes	Yes ⁽³⁾	No	No	Yes	Yes	No
Prince Edward Island	Yes	No	Yes	Yes ⁽³⁾	No	No	Yes	No	No
Quebec	Yes	No	No ⁽²⁾	No ⁽²⁾	No	No	Yes	No	No
Saskatchewan	Yes	Yes ⁽¹⁾	Yes	Yes ⁽³⁾	Yes ⁽⁵⁾	Yes ⁽⁵⁾	Yes	Yes	No

(1) The laws of the extra-provincial credit union must also allow cross-border amalgamations.
(2) No guidance on procedure for asset purchase transactions is provided.
(3) Extra-provincial credit unions can purchase the assets but cannot carry on business in the province.
(4) Only credit unions incorporated or continued in the province can purchase the credit union's assets.
(5) The province from which the credit union is entering or leaving, whatever the case may be, must also have legislation with respect to continuance.
(6) Should consult the provincial regulatory body before proceeding.
(7) Allows a credit union to register in another province.
(8) Allows an extra-provincial credit union to register in the province but it cannot carry on the ordinary business of deposits and loans within the province.

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