

LISTINGS IN HONG KONG BY CANADIAN COMPANIES: A FOLLOW-UP

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Further to our June 2012 article [Dual-listing of Canadian Public Companies on the Hong Kong Stock Exchange](#) which looked at common issues faced by Canadian companies when applying for a listing on the Hong Kong Stock Exchange ("HKSE"), we follow up with a review of the Canadian jurisdictions that the listing committee of the HKSE has determined to be acceptable in principal as an applicant issuer's place of incorporation.

list of acceptable overseas jurisdictions

In February 2012, the HKSE issued [Listing Decision HKEx-LD11-2011](#) (the "**Listing Decision**") to permit companies incorporated in Alberta to list on the HKSE if they complied with certain requirements. With the recent dual-listing of Sunshine Oilsands Ltd. (HKSE:2012), companies incorporated in Alberta join British Columbia (SouthGobi Energy Resources Ltd. and China Gold International Resources Corp. Ltd.¹) and Ontario (Manulife Financial Corporation) as the only Canadian jurisdictions currently accepted by the HKSE.²

stockholder protection measures

The Listing Decision sets out a number of shareholder protection measures that an Alberta company must generally adopt in its incorporation documents and bylaws, other measures that may be adopted if not unduly burdensome, and other differences that only need to be disclosed in the prospectus.

The following are the shareholder protection measures that an Alberta company must generally adopt by amending its articles and bylaws:

- to provide that at least a 2/3 majority of shareholders who vote at a general meeting is required for any changes to the articles and bylaws;
- to provide for the company's share register to be open to shareholders inspection and any closure of the register must not be more than 30 days and notice be given to shareholders of any such closure;
- to provide for the appointment of directors to be voted on individually;
- to provide a general prohibition against the company making loans to its directors or their associates except in limited circumstances; and

- to provide that payment to a director or past director as compensation for loss of office or retirement must be approved by ordinary resolution of shareholders.

In addition, the company must undertake that it would not convert to an unlimited liability company.

In all of the above shareholder protections, the HKSE will accept comparable protections and will not rigidly require applicant issuers to amend their incorporation documents. As stated in its September 2009 [Guidance Letter](#), which was intended to provide a streamlined procedure for listing overseas companies, the HKSE recognized that amendments of incorporation documents may be prohibited under the laws of the applicant issuer's jurisdiction of incorporation or cause undue burden for the applicant issuer. Therefore, the HKSE will allow an applicant issuer to demonstrate comparable equivalence through alternative means. For example, by demonstrating that compliance with rules of the applicant issuer's currently listed exchange would result in the same shareholder protection.

The HKSE also noted some acceptable differences between the requirements under the *Hong Kong Companies Ordinance* ("**HKCO**") and the *Alberta Business Corporations Act* ("**ABCA**"), which the applicant issuer may either bring in line with the Hong Kong rules or provide disclosure in its prospectus, these include:

- variation of incorporation documents, share class rights, voluntary winding-up and share capital reduction by a majority of not less than 3/4 of shareholders who vote at a general meeting under the HKCO (compared with a 2/3 majority under the ABCA);
- the lack of petition rights to the courts for holders of greater than 10% of the issued shares of that class. Instead, the ABCA provides shareholders with dissent rights to require the company to purchase their shares by paying fair market value in any fundamental amendments to the company's incorporation documents; and
- different mechanisms to achieve share capital reduction, redemption and repurchase of shares, and distribution and dividends – in each case, the HKSE was satisfied with the alternative shareholder protection provided under the ABCA.

conclusion

The HKSE noted that provided an Alberta company complied with the above shareholder protection requirements, it made no difference whether the applicant issuer was a reporting issuer or not.

Further, there is no obligation for an issuer to provide regular updates on any changes to the ABCA, subject of course to generally applicable continuous disclosure requirements. In the event that any change in Alberta law or their corporate practices would materially impact the shareholder protection standards as compared to those in Hong Kong, the HKSE also retains discretion to impose additional conditions or reconsider Alberta as

an acceptable jurisdiction.

further observations

Hong Kong has become an increasingly attractive market for foreign issuers. Offering better access to Asian capital, the HKSE was the world's top financing market for total equity funds raised by initial public offering in each of 2009, 2010 and 2011.

As part of its efforts to attract overseas listings, the HKSE and the Securities and Futures Commission published the [Joint Policy Statement Regarding the Listing of Overseas Companies](#) (the "**JPS**") in March 2007. The JPS sets out key shareholder protection matters which the HKSE would expect applicant issuers to address.

Companies incorporated in Ontario, Alberta or British Columbia^[3] now enjoy "second-comer" advantage by being able to follow an established framework to become listed or dual-listed in Hong Kong. The fact that applicant issuers from acceptable jurisdictions will not need to, amongst other things, provide a detailed comparison of shareholder protection matters between its home jurisdiction and Hong Kong, will help reduce professional fees which are more substantial as compared with Canadian listings.

McMillan LLP is experienced in assisting foreign companies list on the Toronto Stock Exchange and the TSX Venture Exchange, as well as helping Canadian companies list or dual-list on the HKSE.

by Stephen D. Wortley and Michael Yang

¹ McMillan LLP advised Citigroup Global Markets Limited and Bank of China International Asia Limited as underwriters in the initial public offering by China Gold International Resources Corp. Ltd. on the HKSE in November 2010 on Canadian legal matters. We are also currently working on several potential offerings by Canadian mining resource companies on the HKSE.

² There are currently 19 acceptable overseas jurisdictions, include three Canadian jurisdictions. For a full list of acceptable overseas jurisdictions published and updated by the HKSE, please refer to:
http://www.hkex.com.hk/eng/rulesreg/listrules/listsptop/listoc/list_of_aoj.htm.

³ The HKSE in 2006 had designated British Columbia as an acceptable jurisdiction provided that applicant issuers make certain revisions to their incorporation documents including in respect of prohibition of financial assistance, variation of class rights, and special resolutions. The HKSE did not specify the required revisions. For more information on companies incorporated in British Columbia, please see [Listing Decision HKEx-LD58-1](#) (November 2006), and the prospectuses filed by SouthGobi Energy Resources Ltd. and China Gold International Resources Corp. Ltd. Both are accessible online at:

http://www.hkexnews.hk/listedco/listconews/advancedsearch/search_active_main.aspx.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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