

HKEX LISTING DECISION

HKEX-LD11-2011 (published in May 2011 and updated in February 2012)

Parties	<p>Company X – a company incorporated in Alberta, Canada, listed on the Toronto Stock Exchange (TSX) and a reporting issuer subject to the continuous disclosure requirements under the Securities Act (Alberta) .</p> <p>Company Y – a company incorporated in Alberta, Canada, not listed on any exchange and a non-reporting issuer</p>
Issues	Whether the Exchange would consider Alberta an acceptable jurisdiction of an issuer’s incorporation under Chapter 19 of the Main Board Listing Rules and Chapter 24 of the GEM Listing Rules
Listing Rules and Regulations	<ol style="list-style-type: none">1. Chapter 19 of the Main Board Listing Rules and Chapter 24 of the GEM Listing Rules (Rules)2. Joint Policy Statement Regarding the Listing of Overseas Companies of 7 March 2007 (JPS)3. Listing Decisions: HKEX-LD65-1; HKEX-LD65-2, HKEX-LD65-3, HKEX-LD71-1, HKEX-LD80-1, HKEX-LD84-1, HKEX-LD108-1, HKEX-LD109-1, HKEX-LD110-1, HKEX-LD111-1, HKEX-LD1-2011, HKEX-LD4-2011, HKEX-LD10-2011 and HKEX-LD24-20124. Guidance Letter HKEX-GL12-09
Decision	<p>The Exchange considered Alberta an acceptable jurisdiction for an issuer’s incorporation under the Rules irrespective of whether it is a reporting issuer or not</p> <p>Applicants may follow the streamlined procedures in Guidance Letter HKEX-GL12-09 and need not complete a detailed line-by-line comparison with the JPS</p>

FACTS

1. The Exchange was requested to consider Alberta, Canada an acceptable jurisdiction for an issuer’s incorporation under Chapter 19 with respect to:
 - a. Company X (listed on TSX and a reporting issuer) who proposed to secondary list on the Exchange; and
 - b. Company Y (a non-reporting issuer and not listed on any exchange) who proposed to primary list on the Exchange.

2. Both Company X and Company Y were incorporated under the Business Corporations Act (Alberta) (**ABCA**); and had sufficient nexus with Alberta; their headquarters and major assets were in Alberta.
3. Alberta adopts a common law system and maintains a “passport system” that enables a single window of access to capital markets in participating Provinces and Territories in Canada. Alberta’s securities regulator has adopted securities regulations similar to those in Ontario and British Columbia, which are considered as acceptable overseas jurisdictions by the Exchange.
4. The Alberta Securities Commission, is a full signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information.
5. The Exchange was provided with a comparison table (**Comparison Table**) comparing the Hong Kong Companies Ordinance (**HKCO**) with the ABCA based on the JPS framework as supplemented by Guidance Letter HKEx-GL12-09.

APPLICABLE RULES, REGULATIONS AND PRINCIPLES

6. All listing applicants must ensure that they are able to and will comply with the Rules, the Securities and Futures Ordinance (**SFO**) and, if they apply, the Hong Kong Codes on Takeovers and Mergers and Share Repurchases (**Takeovers Codes**).
7. Chapter 19 of the Main Board Rules and Chapter 24 of the GEM Rules provide a general framework for overseas companies to list on the Exchange. The Exchange may refuse a listing if it is not satisfied that the overseas issuer is incorporated in a jurisdiction which offers at least equivalent standards of shareholder protection to Hong Kong.
8. Where the Exchange believes that the overseas issuer’s jurisdiction of incorporation does not provide shareholder protection standards equivalent to those in Hong Kong, it may approve the listing of the overseas issuer if it varies its constitutive documents to provide the necessary protection (see Note to Main Board Rules 19.05(1), 19.30(1) and GEM Rule 24.05(1)).
9. The JPS formalises this process by setting out a list of shareholder protection areas the Exchange takes into account.
10. The standards in the JPS were compared against the standards of different overseas jurisdictions in Listing Decisions HKEx-LD65-1, HKEx-LD65-2, HKEx-LD65-3, HKEx-LD71-1, HKEx-LD80-1, HKEx-LD84-1, HKEx-LD108-1, HKEx-LD109-1, HKEx-LD110-1, HKEx-LD111-1, HKEx-LD1-2011, HKEx-LD4-2011, HKEx-LD10-2011 and LD24-2012.
11. Guidance Letter HKEx-GL12-09 sets out Streamlined Procedures for listing overseas companies (**Streamlined Procedures**). Under it, a potential applicant can benchmark the shareholder protection standards in its home jurisdiction to any one of the recognised or accepted jurisdictions, instead of benchmarking to Hong Kong.

ANALYSIS

12. An applicant may adopt any method (e.g., by amending its constitutive documents or administrative procedures) to achieve equivalence with the shareholder protection standards of Hong Kong or another recognised or accepted jurisdiction. The Exchange does not prescribe the method used. However, the Exchange recommends that the applicant first consider passing a shareholders' resolution to amend constitutive documents to provide for the protection expected under the JPS. The Exchange will consider the reasons given on a case by case basis in passing.
13. The Appendix shows how Company X and Company Y resolved the JPS items to the Exchange's satisfaction through making amendments to the constitutive documents and/or providing undertakings to the Exchange.
14. Where the JPS merely requires disclosure of the law on corporate matters (e.g. Items 1(g) and 4(e) of the JPS), an applicant is required to clearly disclose the information in its listing document.

Acceptable Differences

15. Based on the submissions, while the Exchange noted some differences in shareholder protection remained, these differences were considered acceptable (see paragraphs 16 to 22 below.)

Items 1(a),1(b),1(d) & 4(b) of the JPS – Voting threshold for changing constitutive documents, variation of share class rights, voluntary winding-up and share capital reduction

16. Under the HKCO, these matters must be approved by a majority of not less than three-quarters of the shareholders entitled to and do vote at a general meeting. In Alberta, the above matters are resolved by a resolution under the ABCA which must be passed by a majority vote of not less than two-thirds of the shareholders who voted at a general meeting. The Exchange has accepted a voting threshold of two-third under the Streamlined Procedures.

Item 1(b) of the JPS – Court petition to cancel class rights variation

17. Unlike the HKCO, the ABCA does not provide for a right to petition the court for holders holding more than 10% of the issued shares of that class. The ABCA, instead, provides shareholders with the right to require the company to purchase their shares and pay fair value for them for fundamental amendments in the company's articles (**Dissent Rights**). This serves as an alternative shareholder safeguard

Item 1(e) of the JPS – appointment of auditor

18. Although the ABCA, like the HKCO, requires appointment of auditors to be approved by a simple majority vote of the shareholders cast at a general meeting, it provides a different voting mechanism for appointment of auditors which limits the voting choices to only "For" or "Withheld". It is legally impossible to allow for "Against" votes. Alberta law is similar to British Columbia and Ontario laws in this regard.

19. It was submitted that sufficient shareholders protection is available because:
- a. shareholders may remove the auditor from office by ordinary resolution at a special meeting; and
 - b. the audit committee can request the auditors to resign at any time for poor performance and the directors can fill the vacancy until the next shareholders' annual meeting or if the Articles so provide the vacancy must be filled by the vote of the shareholders.

Item 4(b) of the JPS – No court process for share capital reduction

20. Under the HKCO, share capital reduction in a company must be subject to court confirmation. Under Alberta law, a two-third majority resolution is required for capital reduction. The ABCA does not require a court confirmation for capital reduction. Alternative safeguards are in place as the ABCA provides that (i) a two-third majority resolution is required for capital reduction; (ii) shareholders may make application to the court for a rectification order if a company's action is oppressive or unfairly prejudicial to or unfairly disregards shareholders' interests.

Item 4(c) of the JPS – redemption and repurchase of share

21. The HKCO requires a company to redeem its shares out of distributable profits or fresh proceeds from a new share issue. The ABCA does not specify the types of funds that may be used to repurchase or redeem a company's shares. However, it provides protection by prohibiting the repurchase or redemption of shares unless certain financial tests are met (i.e. the liquidity test or alternative liquidity test prescribed under the ABCA).

Item 4(d) of the JPS – distribution and dividend

22. The HKCO requires distribution of a company's assets to its members to be made out of realised profits and if out of assets, the remaining net assets must not be less than the share capital plus undistributable reserves. There is no similar provision in the ABCA. However, the ABCA provides that a company can only make a distribution if the liquidity test (stated in Item 4(c) above) can be met after the distribution.

CONCLUSION

23. The Exchange considered Alberta an acceptable jurisdiction for a company's incorporation irrespective of whether it is a reporting issuer or not on the basis that:
- a. both Company X and Company Y would amend their respective constitutive documents and provide the proposed undertakings to the Exchange (see the Appendix);
 - b. Company X's primary listing would remain on the TSX. For the avoidance of doubt, this requirement would not apply to Company Y who sought a primary listing on the Exchange;

- c. the shareholder protection standards of an Alberta company as supplemented by the proposed undertakings were broadly commensurate with those in Hong Kong;
 - d. there were no specific circumstances the Exchange was aware of that would render the acceptance of Alberta inappropriate;
 - e. both Company X and Company Y would disclose in their listing documents the jurisdictional and regulatory differences between Hong Kong and Alberta, especially on the JPS aspects; and
 - f. both Company X and Company Y would duly inform the Exchange and make announcement in accordance with the Rules if there were major changes in Alberta law or their corporate practices which would significantly worsen the shareholder protection standards as compared to those in Hong Kong. The Exchange would impose conditions as appropriate or reconsider Alberta as an acceptable jurisdiction for a company's incorporation.
24. The Exchange would require the following confirmations when Company X and Company Y filed their listing applications:-
- a. a sponsor's confirmation that it has considered and reviewed all material shareholder protection areas identified in the JPS in its due diligence review under Practice Notice 21 to the Rules and that it is independently satisfied that the shareholder protection offered in Alberta is at least equivalent or broadly commensurate to that in Hong Kong; and
 - b. a legal opinion and sponsor's confirmation that the listing applicant's constitutional documents do not contain provisions which will prevent it from complying with the Rules, the SFO – Disclosure of Interest, and, if they apply, the Takeovers Codes.

NOTES TO ISSUERS AND MARKET PRACTITIONERS

For any questions relating to this Listing Decision please feel free to contact the Listing Division.

Remarks:

Amendments were made in February 2012 to further report on the Exchange's decision in relation to the enquiry of Company Y, who was a non-reporting issuer and not listed on any exchange, regarding acceptability of Alberta as its place of incorporation.

Appendix

Actions taken by Company X and Company Y to address the shareholder protection differences so long as they remain listed on the Exchange.

Item	Shareholder protection matters	Actions taken by applicants to provide comparability with Hong Kong law	
		Company X	Company Y
1(a)	<p><u>The HKCO requirement</u> Amendment in constitutive documents requires a three-quarter majority vote in general meeting.</p> <p><u>The Alberta requirement</u> Alberta company may only amend its articles of associations, its primary constitutive document, upon obtaining at least a 2/3 majority vote of shareholders who voted at a meeting. For an amendment to its bylaws, its secondary constitutive document, it needs to obtain a simple majority vote (> 50%) of shareholders who voted at a general meeting.</p>	<p>Both Company X and Company Y would pass a resolution to amend their Articles or bylaws to provide that any amendment to the Articles or bylaws requires a vote of not less than 2/3 majority of shareholders who voted at a general meeting.</p> <p>Where a company it could not obtain the necessary votes to pass the required resolution, the Exchange would, on a case specific case, accept an undertaking to achieve comparability.</p>	
1(c)	<p><u>The HKCO requirement</u> Any alteration in the constitutive documents to increase an existing member's liability to the company is not binding unless agreed by the member in writing.</p> <p><u>The Alberta requirement</u> A limited company can convert to an unlimited liability company through obtaining at least a 2/3 majority vote of shareholders who voted at a meeting. Upon conversion, the shareholders of the unlimited liability company are liable for the debts and liabilities of the company whether those debts and liabilities arose before or after the conversion.</p> <p>Shareholders are entitled to exercise their Dissent Rights if a company amends its Articles to convert to an unlimited company.</p>	<p>Company X undertook that it would not convert to an unlimited liability company. The Exchange accepted this undertaking.</p>	<p>Company Y submitted that even if a change to the Articles were effected, it could be overridden by a subsequent amendment.</p> <p>Company Y undertook that it would not convert to an unlimited liability company. The Exchange accepted this undertaking.</p>
1(f)	<p><u>The HKCO requirement</u> A company's share register must be open to inspection to shareholders and closure of the register must not be more than 30 days and notice be given to shareholders of such closure.</p>	<p>No action required by Company X.</p>	<p>Company Y would amend its Articles or bylaws to provide for comparable requirements.</p>

Item	Shareholder protection matters	Actions taken by applicants to provide comparability with Hong Kong law	
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	<p><u>The Alberta requirement</u> With respect to a reporting issuer, any person, on payment of a reasonable fee and the delivery of a specified statutory declaration may require a corporation to furnish to him within 10 days a share register and related subsequent changes.</p> <p>Alberta law does not contain any provisions regarding the closure of a securities register.</p>		If it could not obtain the necessary votes to pass the required resolutions, the Exchange agreed to accept it giving an undertaking to achieve comparability.
3(a)	<p><u>The HKCO requirement</u> The appointment of a director is required to be voted on individually.</p> <p><u>The ABCA requirement</u> There is no statutory requirement under the ABCA for directors to be elected individually.</p>	<p>Company X had allowed shareholders to vote on the appointment of directors individually for a number of years.</p> <p>Company X undertook to arrange its directors to be voted on individually in line with the HKCO.</p> <p>The Exchange accepted this undertaking.</p>	Company Y would amend its Articles or bylaws to provide for comparable requirements.
3(d)	<p><u>The HKCO requirement</u> A public company generally must not make loans to its directors and their associates unless in certain circumstances.</p> <p><u>The ABCA requirement</u> Alberta law allows a company to give financial assistance to any person for any purpose.</p>	<p>Company X had not provided financial assistance to its directors for a number of years.</p> <p>Company X undertook that it would only lend to directors under the circumstances allowed under the HKCO.</p> <p>The Exchange accepted this undertaking.</p>	If it could not obtain the necessary votes to pass the required resolutions, the Exchange agreed to accept it giving an undertaking to achieve comparability.
3(e)	<p><u>The HKCO requirement</u> Payment to a director or past director as compensation for loss of office or retirement must be approved by shareholders with an ordinary resolution.</p> <p><u>The ABCA requirement</u> Alberta law does not require shareholder approval for payments to directors upon loss of office.</p>	<p>Company X had never paid any compensation to directors for loss of office or retirement from office for a number of years.</p> <p>Company X undertook that it would only make payment to a director or</p>	

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		<p>past director as compensation for loss of office or retirement from office in accordance with the HKCO.</p> <p>The Exchange accepted this undertaking.</p>	