

**HKEx LISTING DECISION**  
**HKEx-LD11-2011 (May 2011)**

<b>Parties</b>	Company X – a company incorporated in Alberta, Canada proposing to list on the Main Board
<b>Issues</b>	Whether the Exchange would consider Alberta an acceptable jurisdiction under Chapter 19 of the Main Board Listing Rules and Chapter 24 of the GEM Listing Rules
<b>Listing Rules and Regulations</b>	<ol style="list-style-type: none"> <li>1. Chapter 19 of the Main Board Listing Rules and Chapter 24 of the GEM Listing Rules (<b>Rules</b>)</li> <li>2. Joint Policy Statement Regarding the Listing of Overseas Companies of 7 March 2007 (<b>JPS</b>)</li> <li>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, Ex-LD1-2011, HKEx-LD4-2011, HKEx-LD10-2011</li> <li>4. Guidance Letter HKEx-GL12-09</li> </ol>
<b>Decision</b>	<p>The Exchange considered Alberta an acceptable jurisdiction for an issuer with a primary listing on the TSX under the Rules</p> <p>Future applicants incorporated in Alberta and listed on the TSX 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 asked to consider Alberta, Canada an acceptable jurisdiction under Chapter 19.
2. Company X was listed on the Toronto Stock Exchange (**TSX**) and proposed to secondary list on the Exchange. It submitted that:
  - a. it was incorporated under the Business Corporations Act (Alberta) (**ABCA**);
  - b. it had sufficient nexus with Alberta; its headquarters and major assets were in Alberta;
  - c. Alberta Securities Commission is a full signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information; and
  - d. Alberta adopts a common law system of adjudication to protect rights and prevent arbitrary determination. Alberta 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.

3. 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**

4. All listing applicants must ensure that they are able to and will comply with the Rules, the Securities and Futures Ordinance (**SFO**) and the Hong Kong Codes on Takeovers and Mergers and Share Repurchases (**Takeovers Codes**).
5. Chapter 19 of the Main Board Rules and Chapter 24 of the GEM Rules provide a general framework for overseas companies seeking a listing 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.
6. 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)).
7. The JPS formalises this process by setting out a list of shareholder protection areas the Exchange takes into account.
8. 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 .
9. 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**

10. Where an applicant proposes to change its corporate practices (e.g., by amending its constitutive document or administrative procedures) to achieve equivalence with the shareholder protection standards of Hong Kong or another recognised or accepted jurisdiction, there may be more than one acceptable way to do so. The Exchange does not prescribe the method used.
11. Company X submitted that its articles of association (**Articles**) could not be amended under Alberta law to provide comparable shareholder protection standards as those in Hong Kong for some JPS items (as detailed in Items 1(c), 3(a), 3(d), 3(e) of the Appendix). Instead, it would give undertakings (**Undertakings**) to the Exchange to ensure comparable shareholder protection.

12. After considering the Alberta laws applicable to Alberta public companies and the Undertakings, the Exchange was satisfied that Company X would provide broadly equivalent shareholder protection standards as those under the HKCO. While some differences remained, the Exchange considered that the differences are acceptable. The differences are highlighted below (Items 1(a), 1(b), 1(d), 1(e), 4(b), 4(c) & 4(d) of the JPS).
13. Where the JPS merely requires disclosure of the laws on corporate matters (e.g., Items 1(g) and 4(e) of the JPS), Company X would clearly disclose the information in its listing document.

### ***Differences***

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

17. Under the HKCO, these matters must be approved by a three-quarter majority of the share capital present in the general meeting. In Alberta, the above matters are resolved by a special resolution under the ABCA which must be passed by a majority of not less than two third of the votes cast by shareholders who voted at a special meeting of the shareholders (**Special Resolution**). The Exchange has accepted a voting threshold of two-third under the Streamlined Procedures.

#### *Item 1(b) – Court petition to cancel class rights variation*

18. Unlike the HKCO, the ABCA does not provide for a right to petition to 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) – appointment of auditor*

19. 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.
20. Company X 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) - No court process for share capital reduction

21. Under the HKCO, share capital reduction in a company must be subject to court confirmation. Under Alberta laws, a Special 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 Special 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) – redemption and repurchase of share

22. 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) – distribution and dividend

23. 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**

24. The Exchange considered Alberta an acceptable jurisdiction for a company's incorporation on the basis that: -
- a. Company X would provide the Undertakings to the Exchange;
  - b. its primary listing would remain on the TSX;
  - c. the shareholder protection standards of an Alberta company listed on the TSX as supplemented by the Undertakings are 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. Company X would disclose in its listing document the jurisdictional and regulatory differences between Hong Kong and Alberta, especially on the JPS aspects; and
  - f. Company X would duly inform the Exchange and make announcement in accordance with the Rules if there were major changes in Alberta laws 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.

25. The Exchange would require the following confirmations when Company X filed its listing application:-
- a. a sponsor's confirmation that it has considered and reviewed all material shareholder protection areas 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 Takeovers Codes.

## **NOTES TO ISSUERS AND MARKET PRACTITIONERS**

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

Company X would give the following undertakings to the Exchange to address the shareholder protection differences so long as it remained listed on the Exchange.

Item	Shareholder protection matters	Undertakings and/or Alternative Safeguards proposed by Company X
1(c)	<p><b><u>The HKCO requirement</u></b> Any alteration in the constitutional document to increase an existing member's liability to the company is not binding unless agreed by the member in writing.</p> <p><b><u>The ABCA requirement</u></b> Under the ABCA, a limited company can convert to an unlimited liability company through a Special Resolution. 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>Company X submitted that shareholders are entitled to exercise their Dissent Rights if a company amends its articles to convert to an unlimited company.</p> <p><b>Proposed Undertaking:</b> Company X would not convert to an unlimited liability company.</p>
3(a)	<p><b><u>The HKCO requirement</u></b> The appointment of a director is required to be voted on individually.</p> <p><b><u>The ABCA requirement</u></b> 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><b>Proposed Undertaking:</b> Company X would arrange directors to be voted on individually in line with the HKCO.</p>
3(d)	<p><b><u>The HKCO requirement</u></b> A public company generally must not make loans to its directors and their associates unless in certain circumstances.</p> <p><b><u>The ABCA requirement</u></b> Alberta laws allow 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><b>Proposed Undertaking:</b> Company X would only lend to directors under the circumstances allowed under the HKCO.</p>
3(e)	<p><b><u>The HKCO requirement</u></b> 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><b><u>The ABCA requirement</u></b> Alberta laws do 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><b>Proposed Undertaking:</b> Company X would only make payment to a director or past director as compensation for loss of office or retirement from office in accordance with the HKCO.</p>