

## HKEx LISTING DECISION

Cite as HKEx-LD58-1 (November 2006)

Withdrawn, superseded by Canada - British Columbia Country Guide in December 2013

Summary	
<b>Name of Parties</b>	Company X - a company incorporated in British Columbia, Canada (British Columbia) with its shares listed on the Frankfurt Stock Exchange and the NASDAQ National Market
<b>Subject</b>	Whether the Exchange would accept British Columbia as an approved jurisdiction under Chapter 19 of the Listing Rules for the purposes of primary and secondary listings on the Main Board of the Exchange
<b>Listing Rules</b>	Chapter 19 of the Main Board Listing Rules
<b>Decision</b>	<p>The Exchange determined that British Columbia would be accepted as an approved jurisdiction for the purpose of the proposed primary listing on the Exchange under Chapter 19 of the Listing Rules subject to certain revisions of Company X's articles of association by Company X.</p> <p>The Exchange also indicated that, in principle, British Columbia could also be accepted as an approved jurisdiction for the purpose of primary and secondary listings on the Exchange in appropriate future circumstances where future applicants adopt similar revisions to their constitutive documents.</p> <p>Where a secondary listing is sought, the Exchange would still be required to be satisfied that the regulatory oversight offered by the regulator of the issuer's primary listing venue is of a standard that is at least equivalent to that of the Exchange.</p>

### SUMMARY OF FACTS

1. Company X was incorporated in British Columbia, Canada (British Columbia) and its shares had been listed on the Frankfurt Stock Exchange and the NASDAQ National Market since 1997. Company X was considering a primary listing on the Exchange.
2. Company X made a pre-initial public offering enquiry seeking guidance on its

listing in Hong Kong in respect of the acceptance of British Columbia under Chapter 19 of the Listing Rules.

*Shareholder protection in British Columbia*

3. British Columbia adopts the common law system of adjudication with the protection of rights and the prevention of arbitrary determination. Canada, of which British Columbia forms part, also has, among other things, a well-developed accounting profession which is in the process of converging to international accounting standards.
4. Canada is one of the two overseas jurisdictions (the other being the UK) which the Exchange has recognised for purposes of a current listing. In considering the secondary listing of Manulife, whose primary listing venue is the Toronto Stock Exchange, the Exchange recognised Ontario, Canada (Ontario) for the purpose of Chapter 19 of the Listing Rules then.
5. British Columbia has adopted a strategy to pursue reforms to make regulation of securities more efficient and effective through participating in the development and implementation of the “passport system” described below and streamlining various legislation. In September 2004, ministers responsible for securities regulation in all Canadian provinces and territories but Ontario signed a Provincial-Territorial Memorandum of Understanding Regarding Securities Regulation which provides, among other things, a “passport system” for securities regulation resulting in a single window of access to capital markets in participating provinces and territories. According to Company X’s legal advisers, while Ontario has yet to join the “passport system”, the British Columbia and the Ontario Securities Acts are broadly similar in scope. Their securities regulators have each adopted a number of national instruments which regulate securities in those provinces and it was submitted that the differences in the standards of shareholder protection between British Columbia and Ontario are not material.

*NASDAQ National Market and Frankfurt Stock Exchange*

6. Since May 1997, Company X’s shares had been listed on the NASDAQ National Market, which is the largest electronic stock market in the United States in terms of number of listed companies and average daily share turnover. Following several corporate scandals in the United States, the Sarbanes-Oxley Act was enacted in 2002 and NASDAQ has adopted more stringent corporate governance rules. Also listed companies are subject to a periodic reporting regime under the Securities Exchange Act. If a company is unable to maintain compliance with the continued listing criteria, it will be notified in writing of the nature of the deficiency and the action necessary to regain compliance. Depending on the circumstances, a period for regaining compliance will be given. If the period expires without compliance being achieved, NASDAQ will issue a delisting notification. Company X listed on NASDAQ will be subject to these corporate governance rules.

7. Company X's shares are also listed on the Frankfurt Stock Exchange, the largest of the eight German stock exchanges. The Frankfurt Stock Exchange is an entity regulated by the Exchange Supervisory Authority at the state level and the Federal Financial Supervisory Authority.
8. The Exchange reached an agreement with the National Association of Securities Dealers (NASD) and the Frankfurt Stock Exchange in 1999 and 2005 respectively to share market surveillance information.
9. Based on the comparison of relevant shareholder protection measures between Hong Kong and British Columbia covering the Companies Ordinance (Cap 32) of the Laws of Hong Kong (the CO), the British Columbia Business Corporations Act (BCA), and the British Columbia Securities Act (SA) provided by Company X, the Exchange had highlighted the following areas where the BCA or SA is unable to provide protection equivalent to those of Hong Kong and proposed amendments to Company X's articles of association accordingly:
  - Prohibition of financial assistance
  - Variation of class rights
  - Special resolution
  - Information on directors and certain shareholders
  - Consent of shareholders for subscription for shares
  - Allotment of shares
  - Right to demand poll
  - Investigation of affairs
  - Management contracts
10. Company X's sponsor had confirmed that with the provisions under the BCA and SA, together with the proposed revised articles of association to be adopted by Company X, the standards of shareholder protection under the BCA, the SA and the articles of association would be at least equivalent to those provided in Hong Kong. The Hong Kong legal advisers of Company X, based on among other things, the comparison of relevant Hong Kong and British Columbia provisions prepared by the Canadian legal advisers of Company X, had provided a legal opinion confirming that the standards of shareholder protection available to the shareholders of Company X would be at least equivalent to those provided in Hong Kong, subject to the proposed revised articles of association to be adopted by Company X (together, the Confirmations).
11. For the purpose of Chapter 19 of the Listing Rules, a primary listing applicant does not need to demonstrate that any other primary listing venue on which it is listed offers a level of shareholder protection at least equivalent to Hong Kong as the Exchange would be the primary regulator of the listing applicant which would be required to comply with, among other things, the Listing Rules and their appendices, the Securities and Futures Ordinance and the Codes on Takeovers and

## Mergers and Share Repurchases.

12. While there may be changes in the British Columbia company laws after acceptance of British Columbia as an approved jurisdiction, British Columbia will be treated on the same basis as currently afforded to Bermuda and the Cayman Islands ie as it would be unduly burdensome for the listed issuers to undertake a regular overview of the law changes in those jurisdictions, British Columbia-incorporated issuers would not be required to provide a regular update. In the event that there should be major changes in British Columbia's company laws which render its standards of shareholder protection significantly worse than those in Hong Kong, the Exchange would then consider imposing further conditions as appropriate or reconsider accepting any future application where the applicant is incorporated in British Columbia.
13. Upon submission of an applicant's application for its proposed primary listing, its sponsor would be required to submit confirmation to the Exchange as to Chapter 19, similar to the Confirmations detailed in paragraph 10 above.

### *Overseas issuers seeking a secondary listing*

14. The Exchange is of the view that the principles in respect of shareholder protection to be considered in accepting British Columbia as an approved jurisdiction for primary and secondary listings should be the same. Therefore, if British Columbia is accepted for the purpose of primary listing, it follows that British Columbia should also be accepted as an approved jurisdiction for secondary listing under Chapter 19 of the Listing Rules.
15. However, the Exchange must also be satisfied that the regulatory oversight offered by the regulator of the issuer's primary listing venue is of a standard that is comparable to that of the Exchange. This would have to be assessed on a case-by-case basis depending where the applicant's primary listing venue is.

## **THE ISSUES RAISED FOR CONSIDERATION**

16. Whether the Exchange would accept British Columbia as an approved jurisdiction under Chapter 19 of the Listing Rules for the purposes of primary and secondary listings on the Main Board of the Exchange

## **APPLICABLE LISTING RULES OR PRINCIPLES**

### *For primary listings*

17. Under Rule 19.05 of the Listing Rules, in considering approving primary listing on the Exchange of securities of an overseas issuer that is not incorporated in an approved jurisdiction (ie Hong Kong, Bermuda, the Cayman Islands and the People's Republic of China (PRC)), the Exchange is to be satisfied that the overseas issuer is incorporated in a jurisdiction which offers equivalent standards

of shareholder protection to those provided in Hong Kong.

18. Where the Exchange believes that the jurisdiction in which the overseas issuer is incorporated is unable to provide standards of shareholder protection at least equivalent to those provided in Hong Kong, the Exchange may approve the listing of securities of the overseas issuer subject to such overseas issuer making such variations to its constitutional documents as the Exchange may require (see note to Rule 19.05(1) of the Listing Rules).
19. In assessing whether the overseas issuer is “*incorporated or otherwise established in a jurisdiction where the standards of shareholder protection are at least equivalent to those provided in Hong Kong,*” the Exchange would look at areas mainly from the perspective of the CO. The Exchange would ordinarily request the potential applicant, through its legal advisers, to demonstrate to the Exchange, with written materials and otherwise, that its place of incorporation is acceptable for the purposes of the Listing Rules. The Exchange would expect the submission to include details demonstrating that the regulatory regime where the potential applicant is incorporated provides standards of shareholder protection at least equivalent to those provided in Hong Kong. Its submission should, as a minimum, include:
  - An analysis of the issuer’s constitutive documents against the articles requirements of the Listing Rules;
  - An overview of the foreign regulatory regime, including its securities laws and stock exchange rules (if applicable); and
  - A comparative analysis of the foreign and Hong Kong laws governing areas relevant to investor protection.
20. Any differences relating to the major areas concerning shareholder protection would be highlighted and addressed where necessary. The Exchange will also require a legal opinion from the proposed applicant’s advisers and a confirmation from the sponsor that the proposed applicant’s constitutive documents are in full compliance with the Listing Rules requirements to be provided in due course after the proposed applicant submits its listing application to the Exchange.

*For secondary listings*

21. For overseas issuers which are not incorporated in an approved jurisdiction seeking a secondary listing on the Exchange, in addition to the standard of shareholder protection offered by the jurisdiction in which the overseas issuer is incorporated, the Exchange must be satisfied that the regulatory oversight offered by the regulator of the issuer’s primary listing venue is of a standard that is comparable to those of the Exchange (see Rule 19.30(1)(b) of the Listing Rules).

## **THE ANALYSIS**

### *Overseas issuers seeking a primary listing*

22. The Exchange went through a thorough review of the shareholder protection measures in two jurisdictions, namely, Bermuda and the Cayman Islands in early 1989 when Hong Kong experienced a turbulent period of issuers changing domicile to these offshore jurisdictions. As a result, additional requirements, largely in the format as they presently appear, were laid down in the Listing Rules for these two jurisdictions. These new requirements include requiring Bermudian and Cayman Islands companies to adopt prescribed provisions in their articles of association and adhere to certain disclosure requirements in their listing documents. This was also the case for companies incorporated in the PRC.
23. The question is whether a similar requirement would be necessary for an issuer incorporated in British Columbia and seeking a primary listing.
24. In accordance with the Exchange's practice, Company X had submitted comparative tables on shareholder protection safeguards in Hong Kong and British Columbia in respect of certain areas and provisions of the CO. The Exchange's view on the shareholder protection measures was based on an overview of the British Columbia regulatory regime and a comparative analysis of the Hong Kong and British Columbia laws and other provisions governing areas relevant to investor protection.
25. The Exchange highlighted some amendments to be made as set out in paragraph 9 above. Based on the proposed amendments to be made in Company X's articles of association and the Confirmations, the Exchange concluded that British Columbia could be accepted for the purpose of the proposed listing of Company X under Chapter 19 of the Listing Rules.

### *Acceptance of British Columbia as an approved jurisdiction for primary listing*

26. The Exchange considers that no two jurisdictions would offer identical levels of shareholder protection. Based on the foregoing analysis regarding the standards of shareholder protection in British Columbia, including the proposed revision of Company X's articles of association, and the regulatory environment of British Columbia, the Exchange concluded that British Columbia could be accepted for the purpose of the proposed listing of Company X under Chapter 19 of the Listing Rules. The Exchange considered that the shareholder protection measures adopted by Company X mentioned above should be fully disclosed in Company X's listing document.

## **THE DECISION**

27. The Exchange determined that British Columbia would be accepted as an approved jurisdiction for the purpose of the proposed primary listing on the Exchange under Chapter 19 of the Listing Rules subject to the proposed revisions of its articles of association by Company X.
28. The Exchange also indicated that, in principle, British Columbia could also be accepted as an approved jurisdiction for the purpose of primary and secondary listings on the Exchange in appropriate future circumstances where future applicants adopt similar revisions to their constitutive documents.
29. Where a secondary listing is sought, the Exchange would still be required to be satisfied that the regulatory oversight offered by the regulator of the issuer's primary listing venue is of a standard that is at least equivalent to that of the Exchange.