

THE PRIVATE EQUITY
REVIEW

SIXTH EDITION

Editor
Stephen L Ritchie

THE LAWREVIEWS

THE PRIVATE EQUITY REVIEW

The Private Equity Review

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For further information please email
Nick.Barette@thelawreviews.com

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SIXTH EDITION

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Stephen L Ritchie

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Gideon Robertson

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Nick Barette

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PREFACE

The sixth edition of *The Private Equity Review* comes on the heels of a solid but at times uneven 2016 for private equity. Deal activity and fundraising were strong in North America, Europe and Asia, but the year ended with uncertainty in the face of Brexit, a new United States administration and continued challenges in developing economies such as Brazil. Nevertheless, we expect private equity will continue to play an important role in global financial markets, not only in North America and Western Europe, but also in developing and emerging markets in Asia, South America, the Middle East and Africa. As large global private equity powerhouses extend their reach into new markets, home-grown private equity firms, many of whose principals learned the business working for those industry leaders, have sprung up in many jurisdictions to compete using their local know-how.

As the industry continues to become more geographically diverse, private equity professionals need guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. This review has been prepared with this need in mind. It contains contributions from leading private equity practitioners in 29 different countries, with observations and advice on private equity deal making and fundraising in their respective jurisdictions.

As private equity has grown, it has also faced increasing regulatory scrutiny throughout the world. Adding to this complexity, regulation of private equity is not uniform from country to country. As a result, the following chapters also include a brief discussion of these various regulatory regimes.

While no one can predict exactly how private equity will fare in 2017, it can confidently be said that it will continue to play an important role in the global economy. Private equity by its very nature continually seeks out new, profitable investment opportunities, so its further expansion into growing emerging markets is also inevitable. It remains to be seen how local markets and policymakers respond.

I want to thank everyone who contributed their time and labour to making this sixth edition of *The Private Equity Review* possible. Each of them is a leader in his or her respective market, so I appreciate that they have used their valuable and scarce time to share their expertise.

Stephen L Ritchie
Kirkland & Ellis LLP
Chicago, Illinois
March 2017

CANADA

Jonathan McCullough, James Beeby and Lisa Andrews¹

I GENERAL OVERVIEW

Capital raising by Canadian private equity funds continued to slow in 2016, with private equity funds raising C\$4.7² billion in the first nine months of 2016, which represents only 75 per cent of the C\$6.2 billion raised during the same period in 2015.³ This decline continues the trend that started in 2015 that saw an overall decrease in the total fundraising activity compared with 2014 and 2013. The C\$4.7 billion raised by private equity funds in the first nine months of 2016 represents only 55 per cent of the C\$14.4 billion raised in all of 2014 and only 29 per cent of the C\$16.1 billion raised in all of 2013, a record-breaking year.^{4, 5, 6}

Reflecting the fundraising slowdown in 2016, deal-making activity in Canada's buyout and related private equity market showed a marked decline during the first nine months of 2016.⁷ As of 30 September 2016, disclosed values of transactions, including both announced and completed transactions, was C\$14.3 billion, a decrease of 26 per cent over the same period in 2015.⁸ In addition to the decrease in deal size, the overall number of deals completed in the first nine months of 2016 was only 229, representing a 27 per cent decrease over the same period in 2015 and the fewest number of deals over the first three-quarters of a year since 2010.⁹

Canadian buyout and related private equity funds were less active in international transactions than they were in 2015, although 2016 was still the second-strongest year-to-date for Canadian private equity funds investing abroad.¹⁰ Canadian funds led or participated

1 Jonathan McCullough is a founding partner, James Beeby is a partner and Lisa Andrews is an associate at McCullough O'Connor Irwin LLP.

2 All figures in Canadian dollars unless otherwise specified.

3 Canada's Venture Capital & Private Equity Association: www.cvca.ca/wp-content/uploads/2016/11/CVCA_DataVis_Q32016_Canada_Final.pdf.

4 Canada's Venture Capital & Private Equity Association: www.cvca.ca/wp-content/uploads/2015/11/FINAL-Venture-Capital-First-3Q.pdf.

5 Canada's Venture Capital & Private Equity Association: www.cvca.ca/wp-content/uploads/2014/07/Canada_s_Buyout_Private_Equity_Market_in_Q3_2014_English.pdf.

6 PE Hub: www.pehub.com/canada/2014/12/29/canadian-private-equity-funds-add-14-4-bln-to-coffers-in-2014/.

7 PE Hub: www.pehub.com/wp-content/uploads/2016/11/Canada-Buyout-Overview-Q3-2016.pdf.

8 Ibid.

9 PE Hub: www.pehub.com/canada/2016/11/more-dollars-flow-to-fewer-canadian-pe-deals-in-2016s-first-half/.

10 PE Hub: www.pehub.com/wp-content/uploads/2016/11/Canada-Buyout-Overview-Q3-2016.pdf.

in a total of 83 deals totalling C\$70 billion, including Canadian and non-Canadian investors in the first nine months of 2016.¹¹ In the same period in 2015, Canadian funds led or participated in 109 deals totalling C\$108 billion.¹²

Overall, in 2016 private equity investments were strong in the Canadian information technology and healthcare sectors, more or less on pace with the last few years in the material and resource sectors and very slow in the energy sector. The energy sector saw 18 deals close by the end of October 2016 with a value of C\$3.1 billion compared to 36 deals closed with a value of C\$7.1 billion in all of 2015.¹³ In addition, approximately 47 per cent of Canadian private equity transactions through the end of October 2016 were valued below C\$25 million in size with business to business garnering nearly 40 per cent of all activity.¹⁴

Canadian private equity funds are typically international in the scope of their fundraising efforts. According to a report published in June 2013 by Canada's Venture Capital and Private Equity Association (CVCA) of the money invested into Canadian private equity funds during that year, North American investors were responsible for 37 per cent, European investors were responsible for a further 37 per cent, Asia-Pacific investors were responsible for 12 per cent, and 14 per cent was attributed to a combination of other countries or regions.¹⁵

In contrast to the performance of the Canadian private equity market as a whole, the Canadian venture capital market had a record-setting 2016. In 2016, 25 Canadian venture capital funds raised more than C\$2.2 billion in committed capital, which is up 86 per cent from the C\$1.2 billion raised in 2015 and is likely the highest fundraising levels in Canada since 2002, when C\$2.5 billion was raised.¹⁶ In addition, C\$2.5 billion was invested in 446 deals in the first nine months of 2016, which was the best first three-quarters of a year since 2001 and the largest number of deals completed in that time period since 2005.¹⁷ The information technology sector in Canada received the majority of the invested funds with 62 per cent of investments totals in the first nine months of 2016 with venture capital dealmaking spread across the country.¹⁸

i The Canadian market

The Canadian market for investment into private equity funds continues to be extremely concentrated and is dominated by a handful of institutional investors. These include Canada Pension Plan Investment Board (CPPIB), Ontario Teachers' Pension Plan Board (OTPP), the Caisse de Depot, Public Sector Pension Investment Board (PSP), Ontario Municipal Employees Retirement System, Alberta Investment Management Corporation and British Columbia Investment Management Corporation (bcIMC). These institutions have mature and sophisticated private equity investment programmes with the internal resources to pursue a direct investment strategy. Canadian institutional investors, led by those mentioned

11 Ibid.

12 Ibid.

13 Financial Post: <http://business.financialpost.com/investing/canadian-private-equity-tumbles-in-2016-as-venture-capital-hits-record-high>.

14 PitchBook 'Canada PE/VC Breakdown': http://files.pitchbook.com/pdf/PitchBook_2016_Canada_PE_VC_Breakdown_I.pdf.

15 Canada's Venture Capital & Private Equity Association: www.cvca.ca/files/Downloads/THINK_CANADA_AGAIN_UPDATE_2013_web.pdf.

16 Ibid.

17 PE Hub: www.pehub.com/wp-content/uploads/2016/11/Canada-VC-Overview-Q3-2016.pdf.

18 Ibid.

above, are continuing to deploy greater shares of their private asset allocations to direct investments, participating in transactions as co-investors or as part of syndicates, rather than as limited partners in managed funds. Canadian institutional investors in 2016 continued this trend of shifting allocations away from managed funds in favour of direct investment and co-investments with private equity managers and accordingly are investing with a smaller group of fund managers. Fund sponsors should be aware that often a key consideration for larger Canadian institutions in choosing which manager to back is the ability of the manager to provide co-investment or direct investment opportunities.

In addition to partnering with fund sponsors, these investors are increasingly partnering with each other in transactions. Examples include investments by CPPIB and OTPP in the Arco Norte toll roads in Mexico, PSP and the Caisse de Depot in global consulting business, Alix Partners and CPPIB and bcIMC along with others in Asciano, a ports, railroad and logistics enterprise in Australia.

Co-investment is seen as a way to access a greater share of attractive investment opportunities as well as a way to reduce the aggregate management fee and carried interest paid to the fund manager. Most co-investment opportunities are offered on a 'no-fee, no-carry' basis, or with a reduced fee or carried interest.

Increasingly, we are seeing sponsors using the potential for co-investment as a way of attracting fund commitments. Sponsors are tying co-investment opportunities to a requirement to make a fund investment and blending fund and co-investment management fee and carried interest terms so that investors can effectively reduce the standard '2 and 20' compensation model.

ii Trends in investment strategy

In recent years, Canadian institutional investors have focused increasingly on investments in 'real assets': infrastructure and real estate. In an uncertain global financial environment, these investments offer long-term, stable returns that better match the needs of pension beneficiaries.

The Canadian private equity marketplace has over recent years become more competitive and is increasingly efficient. Many attribute the decline in deal activity in 2016, despite record levels of available 'dry powder' or capital for investment, to the fact that many of the larger and mid-market opportunities are fully valued through robust auction processes. In this environment, some fund sponsors have adopted a platform strategy – acquiring a company in a particular industry with the intention of acquiring a number of smaller add-on businesses in the same industry that, because of their size, are not as efficiently priced.

Canadian institutional investors had all but abandoned the venture capital asset class due primarily to a long period of disappointing returns and in response, both the federal and several provincial governments stepped in. As a result of the programmes established by the federal and provincial governments, particularly the Venture Capital Action Plan (VCAP), which is described more below, in 2016 institutions once again began investing in venture capital funds such as Georgian Partners, which raised C\$485 million, twice the size of its predecessor fund, Relay Ventures, which raised C\$200 million and iNovia Capital, which raised C\$175 in its fourth early-stage information technology fund.¹⁹

19 PE Hub: www.pehub.com/canada/2016/12/canadian-venture-funds-collect-2-2-billion-in-2016-as-fundraising-hits-14-year-high/.

On 14 January 2013 the former Prime Minister of Canada announced the federal government's VCAP which is a C\$400 million initiative designed to 'increase private sector investments in early-stage risk capital and to support the creation of large-scale venture capital funds led by the private sector.'²⁰ The federal government, in partnership with private sector investors and the governments of Ontario and Quebec, has created four private sector-led venture capital funds of funds: (1) Northleaf Venture Catalyst Fund which is managing C\$300 million; (2) Teralys Capital Innovation Fund which is managing C\$375 million; (3) Kensington Venture Fund which is managing C\$306 million; and (4) HarbourVest Canada Growth Fund which is managing C\$375 million.²¹ Of the C\$1.356 billion committed, private sector investors have committed a total of C\$904 million, the federal government has committed C\$339.5 million and provincial governments have committed C\$112.5 million.²² In addition, the federal government has invested a total of C\$50 million in four high-performing funds focused on investment opportunities in the life sciences and information and communication technologies sectors: Lumira Capital II, Real Ventures Fund III, CTI Life Sciences Fund II and Relay Ventures III.²³

In October 2015, a federal election was held and a federal Liberal government was elected, replacing the federal Conservative government which had formed the federal government for the previous nine years. The Liberal government has renewed its support of the VCAP as part of its Innovation Agenda.²⁴

The Immigrant Investor Venture Capital Program, which was announced by the former federal government on 16 December 2014, has been cancelled by the federal government due to lack of interest.

The current federal government reintroduced the federal portion of the labour-sponsored venture capital corporation tax credits (LSVCC) in the 2016 budget which had been phased out starting in 2015 by the former federal government.^{25, 26} The proposed LSVCC will permit individual taxpayers to claim a 15 per cent federal tax credit in respect of the 'net cost' of an 'approved share' of an LSVCC.²⁷

In addition to the federal government, several provincial governments have also launched initiatives to promote venture capital investment in their respective provinces. The provincial government of British Columbia established the BC Renaissance Capital Fund Ltd (BCRCF) in 2008 as a fund of funds to promote venture capital investment in four key technology sectors, namely, digital media, information technology, life sciences and clean tech.²⁸ The BCRCF has committed a total of C\$90 million to eight fund managers which have, together with co-invest partners, invested C\$385 million in 34 British Columbia companies.²⁹ As a successor to the BCRCF, the government of British Columbia launched

20 The Prime Minister of Canada: www.pm.gc.ca/eng/node/21985.

21 Government of Canada, SME Research and Statistics 'Venture Capital Action Plan Performance Metrics' www.ic.gc.ca/eic/site/061.nsf/eng/03032.html.

22 Ibid.

23 Ibid.

24 Government of Canada: <http://news.gc.ca/web/article-en.do?nid=1130649>.

25 PE Hub: www.pehub.com/canada/2016/01/13/will-canadian-private-capital-see-sunny-days-in-2016/.

26 Canada Revenue Agency: www.cra-arc.gc.ca/gncy/bdgt/2013/qa03-eng.html.

27 Government of Canada, 'Growing the Middle Class', Budget 2016, <http://www.budget.gc.ca/2016/docs/plan/budget2016-en.pdf>.

28 The BC Renaissance Capital Fund: <http://bciif.ca/about-brcf/overview/>.

29 Ibid.

the C\$100 million BC Tech Fund in October 2016, which is a fund of funds managed by Kensington Capital Advisors Inc and which also will make direct investments targeted in the technology sector, including digital media, information communications technology, life sciences and healthcare, and clean technology.³⁰

The provincial government of Alberta established the Alberta Enterprise Corporation to promote the development of a local venture capital industry in their province. To date, Alberta Enterprise Corporation has committed a total of C\$105 million to nine venture funds.³¹ The government of Alberta has agreed to provide an additional C\$75 million in funding to the Alberta Enterprise Corporation with C\$25 million of funds available in 2015–2016 and C\$50 million of funds available in 2016–2017.³²

The provincial government of Ontario, in collaboration with several institutional investors, launched a C\$205 million fund known as the Ontario Venture Capital Fund (OVCF) which closed in 2008 and is structured as a fund of funds.³³ The provincial government of Ontario has also committed up to C\$50 million to the Northleaf Venture Capital Fund jointly with the federal government under the VCAP.

iii Investor cooperation

An interesting feature of the Canadian market is the relatively high degree of cooperation among institutional investors, particularly the smaller and more nimble institutions. This is likely due to the concentration in the market, which results in many of the same investors pursuing the same opportunities, the maturity and sophistication of the investment programmes and relative freedom from the types of prescriptive investment restrictions often faced by pension plans and other institutional investors in other jurisdictions. This cooperation includes sharing investment opportunities and due diligence, jointly engaging advisers and in some cases aggregating commitments to meet minimum investment thresholds for such rights as advisory committee and co-investment participation.

iv Current limited partner considerations and concerns

While the foremost considerations in fund selection are whether the fund fits within the investment strategy and allocations of the investor (buyout, mezzanine, distressed, infrastructure, growth, geographical and sector focus and the like) and the track record of the investment team, Canadian investors voice a number of common considerations in making fund investment decisions. Some of these are discussed below.

Alignment of interests

The focus on alignment of interests extends beyond a consideration of the amount of the general partner's capital commitment to the fund, to such matters as entitlement to portfolio company fees (with a 100 per cent set-off now market), indemnification, standard of care and fiduciary duty and treatment of conflicts of interest.

30 BC News.

31 Alberta Enterprise Corporation - Annual Report: 2015-2016: www.alberta-enterprise.ca/wp-content/uploads/2011/08/ABENT-7686-Annual-Report_Online.pdf.

32 Ibid.

33 Ontario Venture Capital Fund: www.ovcf.com/AboutOVCF/Overview/tabid/37/Default.aspx.

ILPA Compliance

Canadian institutional investors have embraced the Institutional Limited Partner Association (ILPA) principles and generally will expect that reporting, capital calls and distribution notices will comply with the ILPA templates, and that governance and other terms will meet the ILPA guidelines or that there is a satisfactory explanation as to why they do not. Several investors use the ILPA scorecard as part of the due diligence process.

Expense shifting and hidden revenues

Canadian limited partners are increasingly alert to practices where portfolio companies pay fees to affiliates (such as on co-investments which are not subject to the management fee offset) or employ senior advisers associated with the sponsor or outsource management functions at the expense of the limited partnership. Additionally, the US Securities and Exchange Commission has been requiring managers registered under the Investors Advisors Act of 1940 to provide detailed disclosure of expenses that are being charged to the partnership and, for the first time, investors are seeing that some 'grey area' expenses that they had assumed were for the manager's account are being charged to the fund. These include expenses such as industry conferences, access to databases, promotion and the manager's own registration and compliance fees.

II LEGAL FRAMEWORK FOR FUNDRAISING

i Preferred vehicle for private funds

The structure used in Canada almost exclusively as a vehicle for private funds is the limited partnership. Limited partnerships are governed by provincial law and may be formed under the laws of most provinces in Canada. Investors in a limited partnership are afforded limited liability so long as they do not actively participate in management of the business, while the general partner (usually a company or another limited partnership) is subject to unlimited liability. It is unusual for Canadian private equity funds to be established using an offshore structure, except where offshore investors participate. Parallel vehicles are often created for non-Canadian investors and Canadian private equity funds may also establish feeder vehicles for certain types of investors, depending on their specific tax characteristics. Limited partnerships are fiscally transparent under Canadian income tax laws. Otherwise, there is generally no difference in treatment for domestic and foreign investors under Canadian law.

ii Key documents and terms

The relationship between the investor and the general partner in a Canadian private equity fund is primarily governed by a limited partnership agreement, a subscription agreement and often a side letter. The terms of the limited partnership agreement are often the subject of protracted negotiation with key investors. Due to the concentrated nature of the Canadian marketplace, institutional investors are generally able to negotiate more 'investor-friendly' terms than may be the case in international funds. As with most jurisdictions, the main negotiated terms in the limited partnership agreement are as follows.

Investment restrictions

It is common for Canadian funds to be subject to significant restrictions on use of capital. These restrictions include concentration limits, geographic requirements, diversification of industries (or restrictions preventing investment in certain industries), limits on borrowing and related-party transaction restrictions;

Distributions and priority payments

Canadian institutional investors generally prefer a 'European' style or cumulative distribution waterfall to the 'deal by deal' model favoured by US buyout funds. Carried interest typically remains at 20 per cent, although increasingly investors are requiring a split of distributions within the catch-up step of the waterfall. Provisions for the priority payment of distributions and clawback provisions in the event that excess carry is paid to the general partner or investment manager are frequently the subject of negotiations with institutions often pushing for clawbacks to be calculated and paid prior to termination (and sometimes more frequently).

Management fee

The quantum of the management fee is often the focus of negotiation, and some fund sponsors will offer fee discounts to early investors or to investors committing greater amounts of capital. Managers looking for a more tax efficient alternative for payment of management fees will structure the fee as a priority payment through the waterfall. A 100 per cent offset for fees received from portfolio companies is now the standard in Canadian funds.

Advisory board

Canadian partnership agreements typically provide for an advisory board to oversee conflicts of interest, review valuations and to provide approval of other matters specified in the limited partnership agreement. Advisory boards are generally structured so that participation by nominees of an investor does not constitute 'taking part in the management' of the fund and therefore does not typically void the limited liability of the investor. It is common for investors to ask for legal opinions from fund counsel to this effect. Canadian common law is less developed on this point than other jurisdictions, and the legislation is antiquated and unclear, making the provision of these opinions a challenge. Some law firms are prepared to provide only heavily qualified reasoned opinions. The limited partnership legislation in Manitoba and Quebec is superior in this regard, in that there should be no loss of limited liability for purely internal participation in the affairs of the limited partnership, such as through voting as a limited partner or being part of an advisory committee.

Key person clause

This clause is intended to ensure that the fund maintains an appropriate level of staffing by key investment professionals on the basis that the investor has hired specific individuals as external managers of the particular investment strategy. The exact number of key persons and requirement for devotion of time will differ from fund to fund and is often the subject of negotiation. Typically, this type of clause will provide that investors' requirements to fund new investments will automatically be suspended until the key person default has been remedied. Investors will usually continue to be required to fund expenses of the fund and to complete

investments in process and follow-on investments in existing portfolio companies during the suspension period. If the key person default has not been remedied within a set period (usually six to 12 months), it is common for the fund's investment period to then terminate;

Investor remedies

It is common for Canadian limited partnership agreements to include a number of other investor protection rights including provisions allowing for early termination of the investment period or partnership term (both with cause and without cause) and provisions allowing for removal of the general partner or investment manager (both with and without cause). What constitutes 'cause' for these purposes is often the subject of negotiation, as is the investor approval level necessary to trigger such clauses. Typically 'cause' will include fraud, wilful and material breach of the limited partnership agreement, breach of fiduciary duty, negligence (sometimes but not always limited to gross negligence) and material breach of law. As cause may be difficult to prove, a no-cause removal right may be the only practical means for investors to remove the general partner and is therefore of great importance to investors.

As discussed above, a number of Canadian institutional investors have adopted the ILPA principles as 'best practices'. Funds attempting to raise commitments from these institutional investors should expect negotiations to match terms to the ILPA recommendations and may be asked to provide a list setting out compliance and non-compliance with these recommendations.

Side letters are common in Canadian private equity funds and serve to fill in some of the gaps in the limited partnership agreement or to provide investor-specific protections. It is standard for side letters to include a 'most favoured nations' clause, which may or may not be limited to allowing investors to elect clauses from other side letters based on committed capital.

iii Registration of advisers and fund managers

In Canada, any person who is in the business of advising another about the sale or purchase of securities must be registered as an adviser. Accordingly, managers must be registered as advisers (unless there is an applicable exemption). A partner, director or officer of an adviser who advises on securities must also be personally registered as an adviser. Under the laws of certain jurisdictions, only Canadian corporations or partnerships can be registered as advisers. General partners and offshore managers of a private equity fund that are actively involved in managing portfolio investments need not normally be registered in this way.

In Canada, any person who acts as a manager of an investment fund is required to be registered as an investment fund manager. An investment fund is defined as a mutual fund, or a fund whose primary purpose is to invest money, but that is not formed for the purposes of exercising control over or managing an issuer. Most private equity funds seek to exert some degree of control or management over their portfolio companies and are therefore exempt from this requirement. Hedge fund managers, and in some circumstances mezzanine funds, may be required to register as investment fund managers if they are not actively involved in the management of portfolio companies.

iv Exemptions from registration for offshore sponsors

There are certain exemptions from the registration requirements for dealers and advisers under Canadian securities laws that apply to 'international dealers' and 'international advisers' and in respect of dealings with 'foreign securities', which are those securities issued by an

issuer incorporated, formed or created under the laws of a foreign jurisdiction or a security issued by a government of a foreign jurisdiction. Offshore sponsors seeking investment from Canadian-based institutions will look to fit within these exemptions rather than register in Canada. An international dealer may, without registering as a dealer under Canadian securities laws, generally (1) trade in a foreign security as long as the trade is with an adviser or dealer registered under Canadian securities laws and the security is a foreign security or debt security for which a prospectus has not been filed with Canadian securities regulators and (2) trade in a foreign security with an investment dealer registered under Canadian securities laws or any security with an investment dealer as long as the investment dealer is purchasing as principal. An international adviser may, without registration as an adviser under Canadian securities laws, generally act as an adviser to a 'permitted client' under Canadian securities laws, if the adviser does not advise that client on securities of Canadian issuers, unless providing that advice is incidental to its providing advice on a foreign security.

Both an international dealer and international adviser must meet the following criteria to rely on the international dealer and international adviser exemptions: (1) their head office, principal place of business or company must be located in a foreign jurisdiction; (2) the international dealer or international adviser must be registered under the securities legislation of the foreign jurisdiction in which its head office or principal place of business is located in a category of registration that permits it to carry on the activities in that jurisdiction that registration as a dealer or adviser, as applicable, would permit it to carry on in Canada; (3) the international dealer or international adviser engages in the business of a dealer or adviser, as applicable, in the foreign jurisdiction in which its head office or principal place of business is located; (4) if an international dealer, the person or company is trading as principal or agent for the issuer of the securities, a permitted client, or a person or company that is not a resident of Canada; (5) if an international adviser, as at the end of its most recently completed financial year, not more than 10 per cent of the aggregate consolidated gross revenue of the adviser, its affiliates and its affiliated partnerships was derived from the portfolio management activities of the adviser, its affiliates and its affiliated partnerships in Canada; and (6) the international dealer or international adviser has submitted to the securities regulatory authority a submission to jurisdiction as required under Canadian securities laws. In addition, the international dealer and international adviser must notify the client that, among other things, it is not registered in Canada to make the trade or provide the advice, as applicable, and it must notify the applicable Canadian regulator that it has relied on the exemption.

v Solicitation and prospectus exemptions

The solicitation and sale of interests in a private equity fund is regulated by provincial securities laws in the jurisdiction of residence of the investor as well as any applicable laws in the governing jurisdiction of the fund. Although there are differences in securities legislation applicable in each province, the legislation is generally similar and the discussion below is equally applicable to investors in all provinces.

Under Canadian law, a fund may not issue securities to an investor without either delivering a prospectus (which must be filed and cleared with applicable provincial securities regulators) to investors or relying upon an exemption from the prospectus requirement. Fundraising for private equity funds in Canada (by both domestic and foreign funds) is generally conducted on a private placement basis to qualifying investors on the basis of one or more available prospectus exemptions. The most commonly used prospectus exemptions available in Canada for capital raising permit the issuance of securities to:

- a* accredited investors (a class of persons which includes institutional and government investors, high net-worth individuals and corporations); or
- b* any person, other than an individual, purchasing securities as principal for a purchase price (or a commitment) of at least C\$150,000 in cash, on a net present-value basis.

It should be noted that the terms of these prospectus exemptions are currently under review by securities regulatory authorities in Canada in connection with the creation of the Co-operative Capital Markets Regulatory System and the Capital Markets Regulatory Authority, which are discussed in more detail below.

Private equity funds (and any other issuer proceeding by way of private placement) may only solicit expressions of interest from potential investors who qualify under one or more prospectus exemptions. It is common for funds to solicit interest from qualifying persons by way of a private placement memorandum describing the fund and its terms, its investment mandate and its principals and their investing history. The private placement memorandum is not subject to review by securities regulators in Canada but it is required to be filed with regulators in certain provinces. Fund managers should be aware that under the laws of most provinces, where a private placement memorandum or similar disclosure document has been delivered to prospective investors, any misrepresentation of a material fact or failure to state a material fact in that document will give rise to statutory or contractual rights for damages and rescission on the part of investors in those Provinces. It is common for international funds raising commitments in Canada to prepare a Canadian ‘wrap’ describing these rights and other Canadian legal particularities.

Advertising in connection with the sale of securities is strictly controlled under Canadian securities laws. With the exception of government bonds, no general advertising for the sale of securities is permitted over radio or television unless the securities are qualified by a prospectus. Limited advertising can be made to investors where prospectus exemptions are available.

III REGULATORY DEVELOPMENTS

Unlike most developed economies, Canada does not have a national securities regulator. Pursuant to Canada’s Constitution, each province and territory has authority over securities regulation within its respective borders and accordingly, each province has its own set of securities regulations and its own securities regulator, although to a great extent regulations have been harmonised across the various provinces and territories. In recent years, there has been concerted effort on the part of Canada’s federal government to establish a federal securities regulator. In May 2010, the federal government brought before the Supreme Court of Canada (SCC) the issue of whether Canada’s Constitution would allow for the creation by the federal government of a national securities regulator.³⁴ In December 2011, the SCC ruled against the federal government’s attempt to create a national securities regulator.³⁵

As a result of this defeat at the SCC, rather than attempting to impose a national securities regulatory system, the federal government, together with voluntary participation of certain provincial governments, is now working to create a cooperative securities regulator

34 Reference re Securities Act, 2011 Supreme Court of Canada 66.

35 Parliament of Canada – Library of Parliament – Proposed Federal Securities Regulator: Constitutional Aspects: www.parl.gc.ca/Content/LOP/ResearchPublications/2012-29-e.pdf.

in Canada. To that end, the federal government has signed agreements in principle with the provinces of Ontario, British Columbia, New Brunswick, Saskatchewan, Prince Edward Island and the Yukon Territory for the creation of a unified securities regulatory authority.³⁶ The federal government and the governments of the participating provinces and territory have collaboratively developed draft legislation for the provincial capital markets and complementary federal legislation and also entered into a memorandum of agreement.³⁷

The drafts of a Provincial Capital Markets Act (PCMA) and a Federal Capital Markets Stability Act (CMSA) which will create the proposed legislative framework for the Co-operative Capital Markets Regulatory System (CMRS) and the Capital Markets Regulatory Authority (CMRA) were released for public comment on 8 September 2014.³⁸ The proposed PCMA and the CMSA were generally broadly criticised for the shape of the proposals, lack of consultation and excessive discretionary authority, among other criticisms.³⁹

Consultation drafts of the PCMA and the CMSA and related materials have been published and commented upon. In July 2016, the initial board of directors of the CMRA was announced.⁴⁰ At the same time, it was announced that participating jurisdictions had agreed to use their respective best efforts to enact the uniform PCMA and the CMSA by 30 June 2018, with the CMRA expected to be operational in 2018.⁴¹

Although the provinces of Alberta and Quebec have indicated that they will not be participating in CMRS or CMRA, given that the participating provinces and territory collectively make up more than two-thirds of Canada's capital market, it follows that the CMRS and CMRA will nevertheless carry substantial clout.⁴²

IV OUTLOOK

Given that the Economist Intelligence Unit ranked Canada as the No. 1 place to do business in the G7 and the No. 4 best investment location in the world for 2014–2018 (up three places from 2009–2013); the IESE Business School ranked Canada as No. 3 in its 2016 annual 'Venture Capital and Private Equity Country Attractiveness Index'; and Forbes ranked Canada No. 10 in its list of 'Best Countries for Business 2016', there is continued reason to be optimistic about the outlook for the Canadian economy and for Canadian

36 The Globe and Mail – Ottawa renews push for national securities regulator: www.theglobeandmail.com/report-on-business/flaherty-new-securities-regulator/article14407154/.

37 Ibid.

38 Financial Post: <http://business.financialpost.com/2014/12/22/terence-corcoran-70-thumbs-down-for-new-national-securities-regulator-plans/>.

39 Financial Post: <http://business.financialpost.com/2014/12/22/terence-corcoran-70-thumbs-down-for-new-national-securities-regulator-plans/>.

40 Cooperative Capital Markets Regulatory System: <http://ccmr-ocrmc.ca/capital-markets-regulatory-authority-initial-board-directors-new-implementation-timelines-announced/>.

41 Cooperative Capital Markets Regulatory System: <http://ccmr-ocrmc.ca/capital-markets-regulatory-authority-initial-board-directors-new-implementation-timelines-announced/>.

42 The Financial Post - Ottawa, BC and Ontario agree to establish a co-operative securities regulator: <http://business.financialpost.com/2013/09/19/flaherty-announces-historic-cooperative-market-watchdog-with-ontario-b-c>.

private equity in particular.^{43, 44, 45} A weak Canadian dollar, depressed commodity prices and the general Canadian economic outlook will likely have an impact in the near term on fundraising by Canadian private equity funds and on cross-border deal activity. We expect more inbound investments in 2017 from American buyers taking advantage of a strong US dollar and discounted assets.

One notable effect of the incoming US administration is the possible change in the special tax treatment that Canadian public pensions currently enjoy in cross-border transactions with the US. Canadian public pensions are exempt from paying capital gains in the US and are tax exempt in Canada and as a result, they do not pay capital gains taxes in either Canada or the US.⁴⁶ Cross-border investing is therefore advantageous for Canadian public pensions. As the incoming administration has threatened to disrupt trade agreements with Canada, the tax advantage received by Canadian pension plans may be impacted and cross-border private equity reduced in general.⁴⁷

As noted above, CVCA members noted that European investors were responsible for 37 per cent of the money invested into Canadian private equity funds.⁴⁸ On 26 September 2014 it was announced that Canada and the EU had entered into a Comprehensive Economic and Trade Agreement (CETA), which is expected to, among other things, increase the number of EU companies that 'will invest in Canada to take advantage of Canada's preferential access to the United States and other markets, while non-EU companies will invest in Canada to take advantage of [Canada's] preferential access to both the EU and the United States.'^{49, 50} On 30 October 2016, Canada ratified CETA and the ministers of all 28 European Union Member States have approved it.⁵¹ The European Parliament must still ratify CETA, at which point it will take effect on a provisional basis. The investment provisions in CETA set out rules as to how investors and their investments must be treated by the host country and provide investors with greater certainty, stability and protection for their investments and to secure access to each other's respective markets.⁵² Given these facts, it appears that the outlook for investment into Canadian private equity funds from European investors is also very encouraging.

43 Economist Intelligence Unit: www.eiu.com/Handlers/WhitepaperHandler.aspx?fi=BER_final_2014.pdf&mode=wp&campaignid=bizenviro2014.

44 The IESE Business School – University of Navarra: <http://blog.iese.edu/vcpeindex/>.

45 Forbes: www.forbes.com/best-countries-for-business/list/.

46 Pitchbook 'PE/VC Breakdown 2016:1': http://files.pitchbook.com/pdf/PitchBook_2016_Canada_PE_VC_Breakdown_I.pdf.

47 Ibid.

48 Canada's Venture Capital & Private Equity Association: www.cvca.ca/files/Downloads/THINK_CANADA_AGAIN_UPDATE_2013_web.pdf.

49 Financial Post: <http://business.financialpost.com/2014/09/26/stephen-harper-eu-leaders-meet-amid-ceta-cloud/>.

50 Government of Canada: <http://international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/understanding-comprendre/overview-apercu.aspx?lang=eng#p2>.

51 European Commission: <https://news.ontario.ca/mof/en/2015/07/key-outcomes-of-inaugural-meeting-of-the-council-of-ministers-of-the-cooperative-capital-markets-reg.html>.

52 European Commission: <https://news.ontario.ca/mof/en/2015/07/key-outcomes-of-inaugural-meeting-of-the-council-of-ministers-of-the-cooperative-capital-markets-reg.html>.

ABOUT THE AUTHORS

JONATHAN MCCULLOUGH

McCullough O'Connor Irwin LLP

Jonathan McCullough is a founding partner of the firm and has been practicing corporate and securities law for more than 30 years. He has spoken at numerous legal education conferences, has published articles on corporate law issues and has participated on an advisory committee to a Canadian stock exchange. He is recognised as a leading practitioner in the following publications: *Expert Magazine*, *Best Lawyers in Canada*, *Who's Who Legal of Business Lawyers*, *IFLR's Guide to the World's Leading Private Equity Lawyers*, *PLC's Cross-Border Private Equity Handbook*, *Expert Guides – Private Equity*, *Chambers Canada*.

A focus of his practice is private fund transactions, acting on behalf of both fund sponsors and institutional investors in organising domestic and international private funds to invest in buyouts, mezzanine, venture capital, infrastructure and timber assets. He is familiar with all aspects of structuring, negotiating and completing such investments and with standards for investment policies, fees, returns and governance in this emerging asset class. Additionally, he has significant experience in assisting such funds with transactions, including investments, mergers and acquisitions, recapitalisations and exits. Additionally, he has significant experience in advising participants in investment consortiums on international governance arrangements.

JAMES BEEBY

McCullough O'Connor Irwin LLP

Mr Beeby is a partner of McCullough O'Connor Irwin LLP has extensive experience in advising clients with respect to all aspects of private equity investing, including formation of private equity funds, hedge funds and venture capital funds, buy-outs, debt and equity investments, co-investments and exit transactions. Mr Beeby is also experienced in structuring and negotiating transactions and in establishing proper governance standards for private equity managed businesses. Mr Beeby's clients include private equity funds and institutional investors and he is familiar with all commonly used structures for fund formation and private equity investments.

Mr Beeby obtained an LLB (Hons) from Warwick University (England) and an LLB from the University of British Columbia and has been practicing law relating to the venture capital industry for over 20 years. Mr Beeby is recognised as a leading practitioner by *Best*

Lawyers in Canada and *Lexpert Magazine* and has spoken publicly on a number of legal issues and has authored numerous articles on the topics of fund formation and private equity investing.

LISA ANDREWS

McCullough O'Connor Irwin LLP

Lisa Andrews is an associate of the firm. She obtained a Bachelor of Arts from the University of British Columbia in 2008 and her JD also from the University of British Columbia in 2012. Ms Andrews was admitted to the Law Society of British Columbia in 2013 and joined the firm in 2014.

Ms Andrews practises in the areas of securities, corporate and private equity law. Her practice includes advising public and private companies on a broad range of matters, including general corporate matters, public and private offerings, mergers and acquisitions, continuous disclosure requirements and other regulatory requirements.

Ms Andrews is a member of the Securities Law, Business Law and Banking Law subsections of the Canadian Bar Association.

MCCULLOUGH O'CONNOR IRWIN LLP

Suite 2600, Oceanic Plaza
1066 West Hastings Street
Vancouver
British Columbia V6E 3X1
Canada
Tel: +1 604 687 7077
Fax: +1 604 687 7099
jmccullough@moisolicitors.com
jbeeby@moisolicitors.com
landrews@moisolicitors.com
www.moisolicitors.com