The Private Equity Review

Fourth Edition

Editor
Stephen L Ritchie

Law Business Research

The Private Equity Review

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Fourth Edition

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EDITOR'S PREFACE

The fourth edition of *The Private Equity Review* comes on the heels of a solid but at times uneven 2014 for private equity. Deal activity and fundraising were strong in regions such as North America and Asia, but were flat to declining in Western Europe. Nevertheless, private equity continues to play an important role in global financial markets, not only in North America and Western Europe, where the industry was born, 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 26 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 2015, 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 fourth 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 2015

Chapter 3

CANADA

Jonathan McCullough, James Beeby and Lisa Andrews[1]

I GENERAL OVERVIEW

Capital raising by Canadian private equity funds in recent years continues to be very strong, with the total of capital raised in 2014 being higher than the amount raised in any previous year other than 2013. During 2014, Canadian private equity funds raised a total of approximately C$14.4 billion, which was 10 per cent less than the C$16.1 billion raised in 2013 but 313 per cent higher than the C$4.6 billion raised in 2012.[2, 3, 4]

In 2014, C$14.4 billion of new capital was invested across 25 funds, with an average of C$576 million raised per fund.[5] A key difference between the funds raised in 2013 and the funds raised in 2014 is that four private funds managed by Brookfield Asset Management were responsible for C$12.7 billion raised in 2013, representing nearly 72 per cent of all private funds capital raised by Canadian funds in 2013, while 2014 has seen private funds capital spread across more funds, with only one fund raising

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

3 Canada's Venture Capital & Private Equity Association: www.cvca.ca/wp-content/uploads/2014/10/CVCA_Q3_2013_Media_Release_FINAL2.pdf.

4 Canada's Venture Capital & Private Equity Association:www.newswire.ca/en/story/1116521/canada-s-buyout-private-equity-market-in-2012-dollar-flows-total-11-6b-deal-volume-highest-on-record.

5 PE Hub (see footnote 2).

over C$1 billion – the US$5.15 billion Onex Capital Partners IV fund, which was responsible for 36 per cent of all private equity funds raised in 2014.[6, 7]

In 2014, the major Canadian private equity fund closings included the above-mentioned US$5.15 billion Onex Partners IV, which raised more than 14 per cent more than its target of US$4.5 billion and is the largest fundraise in Onex Corp's history; and the C$600 million Clairvest Equity Partners V, which had an initial target of C$500 million and an initial close of C$518 million in committed capital.[8, 9, 10, 11]

With respect to fundraising momentum in 2014, private equity funds in Canada reported an average of four months to reach their first close and an average of 15 months to reach their final close. On average, these funds hit 55 per cent of their target size as of their first close and reached an average of 110 per cent of their target size as of their final close.[12] As of 31 December 2014, there were 10 Canadian private equity funds in the market currently raising capital that had not yet reached a first close. Of these funds, 27 per cent were fundraising for seven to 12 months, 27 per cent for 13 to 18 months and 46 per cent were fundraising for 19 months or longer.[13]

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 & 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 for a further 37 per cent and Asia-Pacific investors for 12 per cent, while 14 per cent was attributed to a combination of other countries and regions.[14]

i The Canadian market

The Canadian market for investment into private funds is extremely concentrated and is dominated by a handful of institutional investors. These include Canada Pension Plan Investment Board, Ontario Teachers' Pension Plan Board, Caisse de Depot, Public Sector Pension Investment Board, Ontario Municipal Employees Retirement System, Alberta

6 Brookfield Asset Management Inc: www.brookfield.com/content/2013_press_releases/brookfield_closes_7_billion_global_infrastructure-38683.html.

7 Preqin: Private Equity – Funds in Market – Closed Funds 2014 as at 31 December 2014: www.preqin.com.

8 Onex Corp: www.onex.com/Assets/PDFs/460_5.pdf.

9 Reuters PE Hub: www.pehub.com/canada/2014/05/13/onex-partners-ivs-5-15-bln-close-suggests-springtime-for-pe-fund-raising.

10 Preqin: Private Equity – Fundraising Momentum – Closed Funds 2014 as at 31 December 2014: www.preqin.com.

11 Canada's Venture Capital & Private Equity Association: http://canadianprivateequity.com/clairvest-equity-partners-v-closes-600m/2014/07/28.

12 Preqin (see footnote 10).

13 Ibid.

14 Canada's Venture Capital & Private Equity Association: www.cvca.ca/wp-content/uploads/2014/07/THINK_CANADA_AGAIN_UPDATE_2013_web.pdf.

Investment Management Corporation and British Columbia Investment Management Corporation. These institutions have mature and sophisticated private investment programmes with the internal resources to pursue a direct investment strategy. Despite continued robust private fund fundraising in 2014, the above-mentioned institutional investors 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 2014 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 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.

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. Additionally, at least for infrastructure investments, the co-investment may offer an opportunity to retain or acquire a larger interest in the investment when the fund sponsor wishes to exit.

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. However, institutional investors can face significant constraints in accessing infrastructure investments directly. One constraint is that, except for the seven or eight largest institutional investors in Canada who have a pool of capital large enough to make equity investments of C$100 million or more, and substantial internal resources for assessing and managing direct investments, most smaller institutions do not have the capital and human resources to invest directly in infrastructure projects, and most therefore seek exposure through fund investments. Unfortunately, the traditional sponsor's 2/20 compensation model does not work well for assets with an expected IRR of nine to 12 per cent, and investors typically seek longer-term investments than are possible within the traditional 10-year fund term. Smaller institutions are becoming increasingly creative in overcoming these hurdles, either by organising their own fund on terms tailored to the asset class and then hiring a manager, as was done by the Infrastructure Coalition LP; by participating in funds through secondary investments, where the discount on the purchase price improves the return; or by joining in syndicates to participate directly in a specific opportunity.

Canadian institutional investors have 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 have stepped in.

On 14 January 2013, the Prime Minister announced the federal government's Venture Capital Action Plan (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'.[15] The VCAP will provide for C$250 million of federal government money to create a new, private sector-led, fund of funds in partnership with institutional and strategic investors, as well as interested provinces; C$100 million to recapitalise existing private sector-led funds of funds; and an aggregate of C$50 million to be invested across three to five existing high-performing venture capital funds in Canada.[16] It is anticipated that the C$400 million under the VCAP will be deployed over the next seven to 10 years.

In 2014, the federal government committed to three newly formed funds under the VCAP: the Northleaf Venture Capital Fund in January 2014, the Teralys Capital Innovation Fund in November 2014 and the Kensington Venture Fund in November 2014. The three funds have aggregate commitments of C$656.5 million with commitments by:

a institutional and corporate investors of C$438.2 million;

b the federal government of up to C$165.3 million;

c the provincial government of Ontario of up to C$50 million (to the Northleaf Venture Capital Fund); and

d the provincial government of Quebec of up to C$62.5 million (to the Teralys Capital Innovation Fund).[17, 18, 19]

Both provincial governments have agreed to commit C$1 for every C$2 in additional commitments by the private sector in their respective funds, and the federal government has agreed to the same for both Nothleaf Venture Capital Fund and Teralys Capital Innovation Fund up to a fixed amount.[20, 21] The aggregate target for commitments to the three funds is C$975 million.[22, 23]

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) to promote venture capital investment in four key technology sectors, namely, digital media, information technology, life sciences and clean tech.[24] To date, the BCRCF has invested in eight venture capital funds based in either the US or Canada that collectively hold C$2.5 billion under management.[25] The BCRCF has

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

16 Ibid.

17 Government of Canada: www.fin.gc.ca/n14/14-007-eng.asp.

18 Government of Canada: www.fin.gc.ca/n14/data/14-161_1-eng.asp.

19 *The Globe and Mail*: www.theglobeandmail.com/report-on-business/small-business/sb-money/business-funding/canadian-venture-capital-fund-raises-160-million/article21637299.

20 Government of Canada (see footnote 17).

21 Government of Canada (see footnote 18).

22 Government of Canada (see footnote 17).

23 Government of Canada (see footnote 18).

24 The BC Renaissance Capital Fund: www.bcrcf.ca/BCRCF/About.

25 Ibid.

committed C$90 million to fund managers and placed C$54 million of capital with such managers.[26]

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 C$100 million to various venture funds.[27]

The provincial government of Ontario, in collaboration with several institutional investors, launched a C$200 million fund known as the Ontario Venture Capital Fund, which closed in 2008 and is structured as a fund of funds.[28] 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.

On 16 December 2014, the government announced the Immigrant Investor Venture Capital Program, which is set to begin in 2015.[29] Under the Program, each individual approved under Canadian immigration laws as a high-net-worth business immigrant will be required to make a C$2 million non-guaranteed investment for 15 years into the Immigrant Investor Venture Capital (IIVC) fund in order to proceed with immigrating to Canada under the Program. These funds will then be invested in innovative Canada-based start-ups with high growth potential.[30] It is expected that the pilot Program will involve 50 investors for a total of C$100 million invested into the IIVC fund.[31]

iii Investor co-operation

An interesting feature of the Canadian market is the relatively high degree of co-operation 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 the relative freedom from the types of prescriptive investment restrictions often faced by pension plans and other institutional investors in other jurisdictions. This co-operation 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.

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26 Ibid.

27 Alberta Enterprise Corporation – Annual Report: 2012–2013: www.alberta-enterprise.ca/wp-content/uploads/2013/07/AEC-Annual-Report-lowres-FINAL.pdf.

28 Canadian Broadcasting Corporation: www.cbc.ca/news/canada/kitchener-waterloo/ontario-premier-launches-300m-venture-capital-fund-in-kitchener-1.2505447.

29 Canadian Broadcasting Corporation: www.cbc.ca/news/politics/canada-seeks-50-millionaire-immigrant-investors-under-pilot-program-1.2875518.

30 Government of Canada: news.gc.ca/web/article-en.do?nid=915049.

31 Ibid.

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, etc.) 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 as follows:

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 allocation to the fund now market), indemnification, standard of care and fiduciary duty and treatment of conflicts of interest.

ILPA compliance

Canadian institutional investors have embraced the Institutional Limited Partner Association (ILPA) principles; as such, they 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 that 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.

Investment period and term extensions

As many of the funds raised in 2008 and 2009 prior to or during the global financial crisis have come to the end of their investment periods, limited partners are increasingly being asked to extend the term of the investment period. Many older funds, having exercised their right to extend for two or more one-year periods, have also sought extensions to the term of the fund. Canadian limited partners are often flexible in granting such extensions, but will look for fee reductions during the extended terms.

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. 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. A limited partnership with any non-resident limited partners is deemed to be non-Canadian, and all limited partners are subject to a 25 per cent withholding tax on dividend or interest income (subject to reduction under any applicable treaties). For this reason, parallel vehicles are commonly created for non-Canadian investors. Otherwise, there is generally no difference in treatment for domestic investors 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 and a subscription agreement. 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. Where provincial incentive funds are participating in a private fund, it is also common for those funds to require the private equity fund to commit a certain amount of time to investigating potential portfolio investments in the applicable province or to invest a portion of its capital in the applicable province, or both.

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 claw-back 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 recently funds have started to offer fee discounts to early investors or to investors committing greater amounts of capital. Certain institutional investors have attempted to replace management fees altogether with a budget-based expense reimbursement approach, although this approach has failed to gain widespread traction within the market. Managers have

also begun looking at more tax-efficient alternatives for payment of management fees, such as priority payment through the waterfall although to date, the direct payment of management fees remains the standard mechanism. 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 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. Many 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 participating on 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 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 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 Canadian institutional investors should expect negotiations to match terms to the ILPA recommendations and may be asked to provide a list setting out compliance or 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 that 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). Under the laws of certain jurisdictions, only Canadian corporations or partnerships can be registered as advisers. A partner, director or officer of an adviser who advises on securities must also be personally registered as an adviser. 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 management of portfolio companies.

iv Solicitation and prospectus exemptions

The solicitation and sale of interests in a private equity fund are 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 the applicable provincial securities regulators) to investors or relying upon an exemption from the prospectus delivery 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 accredited investors (a class of persons that includes institutional and government investors, high-net-worth individuals and corporations); or any person

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 the securities regulatory authorities in Canada.

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 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 their 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 the Constitution would allow for the creation by the federal government of a national securities regulator;[32] however, in December 2011, the SCC ruled against the federal government's attempt to create such a regulator.[33]

As a result of this defeat at the SCC, rather than attempting to impose a national securities regulatory system, the federal government is now attempting to create a 'co-operative' securities regulator in Canada with the consent of willing provinces. To that end, in September 2013, the federal government announced that it had signed

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

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

an agreement in principle with the provinces of Ontario and British Columbia for the creation of a unified securities regulatory authority.[34] In July 2014, the governments of New Brunswick and Saskatchewan also agreed in principle to the creation of a unified securities regulatory authority.[35] The federal government and the governments of Ontario, British Columbia, New Brunswick and Saskatchewan have collaboratively developed draft legislation for the provincial capital markets and complementary federal legislation, and also entered into a memorandum of agreement.[36] Prince Edward Island joined the initiative as of 30 September 2014.[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 and the Capital Markets Regulatory Authority, were released for public comment on 8 September 2014 for a 60-day comment period that was extended to 90 days.[38] More than 70 comments on the PCMA and the CMSA were received from interested parties by 8 December 2014.[39,40] The proposed PCMA and the CMSA were generally broadly criticised for, *inter alia*, the shape of the proposals, lack of consultation and excessive discretionary authority.[41] The federal and provincial governments who support the initiative have not yet issued a response to the comments.

If this initiative proceeds, a co-operative regulator may be in place by the autumn of 2015.[42] Although the key provinces of Alberta and Quebec have indicated that they will not be participating in this agreement, given that Ontario and British Columbia collectively make up two-thirds of Canada's capital market, it follows that any such co-operative securities regulator will nevertheless carry substantial clout.[43]

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

35 Canadian Securities Transition Office: http://csto-btcvm.ca/home.aspx.

36 Ibid.

37 Ibid.

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

39 Ibid.

40 Cooperative Capital Markets Regulatory Systems: http://ccmr-ocrmc.ca/publications/comment-letters.

41 *Financial Post* (see footnote 38).

42 CTV News: www.ctvnews.ca/politics/national-securities-watchdog-coming-by-2015-ottawa-says-1.1905420.

43 *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.

IV OUTLOOK

Given that the Economist Intelligence Unit ranked Canada as the number one place as to do business in the G-7 and as the fourth-best investment location in the world for 2014–2018 (up three places from 2009–2013), and that the IESE Business School ranked Canada in second place in their 2014 annual 'Venture Capital and Private Equity Country Attractiveness Index', there is continued reason to be optimistic about the outlook for the Canadian economy and for Canadian private equity in particular.[44, 45]

As noted above, CVCA members noted that European investors were responsible for 37 per cent of the money invested into Canadian private equity funds.[46] On 26 September 2014, it was announced that Canada and the EU have entered into a comprehensive economic and trade agreement, which was approved in principal in October 2013 and which is expected to, *inter alia*, 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'.[47, 48] Given these facts, it appears that the outlook for investment into Canadian private equity funds by European investors is also very encouraging.

44 Economist Intelligence Unit: www.eiu.com/public/topical_report.aspx?campaignid=bizenviro2014.

45 The IESE Business School – University of Navarra: http://blog.iese.edu/vcpeindex/ranking-2014.

46 Canada's Venture Capital & Private Equity Association (see footnote 14).

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

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

Appendix 1

ABOUT THE AUTHORS

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Jonathan McCullough is a founding partner of the firm and has been practising corporate and securities law for more than 25 years. He has spoken at numerous legal education conferences, published articles on corporate law issues and participated on an advisory committee to a Canadian stock exchange. He is recognised as a leading practitioner in the following publications: *Lexpert Magazine*, *Best Lawyers in Canada*, *International Who's Who of Business Lawyers*, IFLR's *Guide to the World's Leading Private Equity Lawyers*, PLC's *Cross-Border Private Equity Handbook* and *Expert Guides – Private Equity*.

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, merchant banking, 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.

JAMES BEEBY

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James Beeby is a partner at McCullough O'Connor Irwin LLP, a Vancouver-based law firm whose practise includes a strong focus on private equity. Mr Beeby 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, buyouts, 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

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Mr Beeby obtained an LLB (Hons) from Warwick University (England) and an LLB from the University of British Columbia, and has been practising law relating to the venture capital industry for over 14 years. Mr Beeby is recognised as a leading practitioner by *Best Lawyers in Canada* and *Lexpert Magazine*, has spoken publicly on a number of legal issues and has authored numerous articles on the topics of fund formation and private equity investing.

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Lisa Andrews is an associate at 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 securities and corporate 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.

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