

Chapter 4

CANADA

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I GENERAL OVERVIEW

After two consecutive years of very strong capital fundraising activity, capital raising by Canadian private equity funds slowed in 2015 with funds raising C\$6.2² billion in the first nine months of 2015, which represents only 73 per cent of the C\$8.4 billion raised in the same period in 2014 and 43 per cent of the C\$14.4 billion raised in all of 2014.^{3,4,5} In the previous three years, Canadian private equity funds raised C\$14.4 billion in 2014, a record C\$16.1 billion in 2013 and C\$4.6 billion in 2012.^{6,7}

In the first nine months of 2015, C\$6.2 billion of new capital was committed across 23 funds in 34 closings, with an average of C\$270 million raised per fund.⁸ This is consistent with the trend of raising capital across a number of small funds that began in

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2 All figures in Canadian dollars unless otherwise specified.

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

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

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

6 Canada's Venture Capital & Private Equity Association: http://www.cvca.ca/files/News/CVCA_Q3_2013_Media_Release_FINAL2.pdf.

7 Canada's Venture Capital & Private Equity Association: http://www.cvca.ca/files/Downloads/Canadas_Buyout_Private_Equity_Market_in_2012_English.pdf.

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

2014. This trend differs from the record capital raising year of 2013 where 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 fund capital raised by Canadian funds in 2013.⁹ In 2015 two funds raised over C\$1 billion – Catalyst Fund Limited Partnership V which raised more than US\$1.5 billion of capital and ARC Energy Fund 8 which raised C\$1.5 billion of institutional capital.^{10,11} In 2014, only one fund raised over C\$1 billion – Onex Capital Partners IV fund which raised C\$5.15 billion and was responsible for 36 per cent of all private equity capital raised in 2014.¹²

Despite slightly slower fundraising in 2015, deal-making activity in Canada's buyout and related private equity market has been robust. As of 30 September 2015, disclosed values of transactions, including both announced and completed transactions, exceeded the full year totals for three out of the last four years.¹³ A total of C\$20.1 billion was invested in 376 deals in 2015 with the private equity buyout dominating the deal types.¹⁴ In 2014, a total of C\$32.2 billion was invested in 410 deals including the C\$12.64 billion investment in the merger of Tim Hortons Inc with Burger King Worldwide Inc.¹⁵ Canadian buyout and related private equity funds were substantially more active in international transactions than they previously have been. Canadian funds led or participated in 113 deals in other countries, valued at approximately C\$124.7 billion compared to 83 transactions for only C\$8.9 billion in the same period last year.¹⁶

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

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- 9 Brookfield Asset Management Inc: http://www.brookfield.com/content/2013_press_releases/brookfield_closes_7_billion_global_infrastructure-38683.html.
 - 10 Canada's Venture Capital & Private Equity Association: <http://news.cvca.ca/catalyst-raise-s-over-usd1-5b-for-fifth-canadian-distressed-fund/2015/10/14/>.
 - 11 Canada's Venture Capital & Private Equity Association: <http://news.cvca.ca/arc-financial-raises-1-5b-for-8th-energy-fund/2015/06/08/>.
 - 12 Preqin: Private Equity - Funds in Market - Closed Funds 2014 as at 31 December 2014: <https://www.preqin.com/>.
 - 13 PE Hub: <https://www.pehub.com/canada/2015/10/26/canadian-pe-deal-making-ytd-robust-at-home-and-abroad/>.
 - 14 PE Hub: <https://www.pehub.com/canada/2016/01/21/canadian-vc-invested-hits-2-5-blm-in-2015-pe-deals-capture-20-1-blm/>.
 - 15 Reuters: <http://www.reuters.com/article/canada-investment-idUSL1N0VK2MW20150210>.
 - 16 PE Hub: <https://www.pehub.com/canada/wp-content/uploads/sites/2/2015/10/Canada-Buyout-Overview-Q3-2015.pdf>.

37 per cent, European investors were responsible for a further 37 per cent and, Asia-Pacific investors were responsible for 12 per cent, and 14 per cent was attributed to a combination of other countries or regions.¹⁷

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, Ontario Teachers' Pension Plan Board, the Caisse de Depot, Public Sector Pension Investment Board, Ontario Municipal Employees Retirement System, Alberta Investment Management Corporation and British Columbia Investment Management Corporation. 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 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 2015 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.

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 so-called 'real assets': infrastructure and real estate. In an uncertain global financial environment, these investments offer long-term, stable returns, which better match the needs of pension beneficiaries. Much of the activity was outbound, with Canadian investors investing in excess of C\$96 billion in large-scale acquisitions in foreign markets up to November 2015, including 24 outbound transactions with a value of C\$1 billion or more.^{18,19}

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

18 PE Hub: <https://www.pehub.com/canada/2015/12/23/go-with-the-capital-flow-in-cross-border-ma/>.

19 PE Hub: <https://www.pehub.com/canada/wp-content/uploads/sites/2/2015/10/Canada-Buyout-Overview-Q3-2015.pdf>.

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 C\$400 million Venture Capital Action Plan (VCAP), in 2015 institutions once again began investing in venture capital funds, such as iNovia Capital, which raised C\$175 million for its most recent fund, C\$25 million over its minimum target.²⁰ Investors in iNovia Capital's most recent fund include Québec pension fund Caisse de dépôt et placement du Québec, Investissement Québec, Teralys Capital and HarbourVest Partners LLC.²¹ Both Teralys Capital and HarbourVest Partners LLC manage venture capital funds of funds established under the VCAP programme – Teralys Capital Innovation Fund and HarbourVest Canada Growth Fund, respectively.^{22,23}

On 19 October 2015, a federal election was held and a federal Liberal government was elected, replacing the federal Conservative government that had formed the federal government for the previous nine years. There is speculation that the Liberal government will cease to support VCAP due to its close association with the previous government and, as such, the status of VCAP moving forward is uncertain.²⁴

Similarly, the future of the Immigrant Investor Venture Capital Program, which was announced by the former federal government on 16 December 2014, is unclear as a result of its strong association with the former federal government and its early stage of existence.^{25,26} If the programme continues as previously announced, 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 fund in order to proceed with immigrating to Canada under the programme. These funds will then be invested in innovative Canada-based start-ups with high growth potential.²⁷

The current federal government has committed to reintroducing the federal portion of the labour-sponsored venture capital corporation tax credits (LSVCC), which was phased out in 2015 and eliminated for taxation years after 2016 by the former

20 Betakit: <http://betakit.com/inovia-capital-raises-175-million-for-new-venture-capital-fund/>.

21 Ibid.

22 Teralys Capital: http://www.teralyscapital.com/pdf/2014-11-10_SecuresFundFederalGovernmentVenture.pdf.

23 PE Hub: <https://www.pehub.com/canada/2015/04/16/harbourvest-canada-growth-fund-lands-197-mln-in-initial-close/>.

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

25 Ibid

26 Canadian Broadcasting Corporation: <http://www.cbc.ca/news/politics/canada-seek-s-50-millionaire-immigrant-investors-under-pilot-program-1.2875518>.

27 Government of Canada: <http://news.gc.ca/web/article-en.do?nid=915049>.

federal government.^{28,29} It is unlikely that the details of the LSVCC and any other federal initiative relating to the federal government's support of the venture capital market will be available until the federal budget is released in the spring of 2016.

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.³⁰ To date, the BCRCF has invested in eight venture capital funds based in either the US or Canada that collectively hold over C\$7.5 billion under management.³¹ The BCRCF has committed C\$90 million to fund managers and placed C\$67 million of capital with such managers.³² The government of British Columbia also recently announced a C\$100 million technology innovation fund that will provide venture capital funding in the province to start-up companies.^{33,34}

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.³⁵ On 30 October 2015, the government of Alberta announced that it was providing C\$50 million in funding to the Alberta Enterprise Corporation with C\$25 million of funds available in each of 2015–2016 and 2016–2017.³⁶

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.³⁷ 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.

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

29 Canada Revenue Agency: <http://www.cra-arc.gc.ca/gncy/bdgt/2013/qa03-eng.html>.

30 The BC Renaissance Capital Fund: <http://bciiif.ca/about-brcrf/overview/>.

31 Ibid.

32 Ibid.

33 Vancouver Sun: http://www.vancouversun.com/business/announces+million+tech+innovation+venture+fund/11574297/story.html?__lsa=255a-996b.

34 The Globe and Mail: <http://www.theglobeandmail.com/report-on-business/bc-unveils-details-of-100-million-fund-for-flourishing-tech-sector/article27648035/>.

35 Alberta Enterprise Corporation - Annual Report: 2012-2013: <http://www.alberta-enterprise.ca/wp-content/uploads/2013/07/AEC-Annual-Report-lowres-FINAL.pdf>.

36 Government of Alberta: <http://www.alberta.ca/release.cfm?xID=387663D9DB4A1-04A5-180E-BB09B7AF775313E5>.

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

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 the 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

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 track record of the investment team, Canadian investors voice a number of common considerations in making fund investment decisions. Some of these are listed 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.

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 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. 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 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 listed below.

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.

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 claw-backs 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. Managers have also begun looking at more tax-efficient alternatives for the payment of management fees and it is now relatively common for management fees to be structured 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 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 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 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). 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 management of portfolio companies.

iv 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 that 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 the 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 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 Canada's Constitution

would allow for the creation by the federal government of a national securities regulator.³⁸ In December 2011, the SCC ruled against the federal government's attempt to create a national securities regulator.³⁹

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 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.⁴⁰ 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.⁴¹

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 September 8, 2014.⁴² The proposed PCMA and the CMSA were broadly criticised for the shape of the proposals, lack of consultation and excessive discretionary authority, among other criticisms.⁴³ In moving forward with the creation of the CMRA, on 15 April 2015, the ministers from each of the participating provinces announced the members of the nominating committee that is to recommend candidates for the initial board of directors for the CMRA.⁴⁴ On 25 August 2015, a revised consultation draft of the PCMA and draft initial regulations were published for comment with the comment period closing on 23 December 2015.⁴⁵ Fifty comments on the PCMA were received from interested

38 *Reference re Securities Act*, 2011 Supreme Court of Canada.

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

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

41 Ibid.

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

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

44 Cooperative Capital Markets Regulatory System: <http://ccmr-ocrmc.ca/cooperative-capital-markets-regulatory-system-important-developments/>.

45 Cooperative Capital Markets Regulatory System: <http://ccmr-ocrmc.ca/milestone-reached-in-the-transition-to-the-cooperative-capital-markets-regulatory-system-2/>.

parties by 23 December 2015.⁴⁶ The federal and provincial governments have not yet responded to the comments, provided on the revised draft of the PCMA. A revised consultation draft of the CMSA is to be provided at a later date.⁴⁷

It was initially projected that the CCMR would be in place by the autumn of 2015, however, the CCMR is now expected to be in place by the autumn of 2016.^{48,49} Although the provinces of Alberta and Quebec have indicated that they will not be participating in CMRS or CMRA, given that 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.⁵⁰

IV OUTLOOK

Given that (1) the Economist Intelligence Unit ranked Canada as the number one place to do business in the G-7 and the fourth-best investment location in the world for 2014–2018 (up three places from 2009–2013); and that (2) the IESE Business School ranked Canada in third place in their 2015 annual 'Venture Capital and Private Equity Country Attractiveness Index'; and (3) Forbes ranked Canada seventh in its list of 'Best Countries for Business 2015', there is continued reason to be optimistic about the outlook for the Canadian economy and for Canadian private equity in particular.^{51,52,53} A weak Canadian dollar, depressed commodity prices and the general Canadian economic outlook will likely have an impact on fundraising by Canadian private equity funds and on cross-border deal activity. We expect more inbound investments in 2016 from American buyers taking advantage of a strong US dollar and discounted assets. Further, the newly elected federal government has promised stimulus through significant investments in infrastructure assets.

As noted above, CVCA members noted that European investors were responsible for 37 per cent of the money invested into Canadian private equity funds.⁵⁴ On

46 Cooperative Capital Markets Regulatory System: <http://ccmr-ocrmc.ca/publications/legislation/>.

47 Ibid.

48 CTV News: <http://www.ctvnews.ca/politics/national-securities-watchdog-coming-by-2015-ottawa-says-1.1905420>.

49 Government of Ontario: <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>.

50 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>.

51 Economist Intelligence Unit: http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=BER_final_2014.pdf&mode=wp&campaignid=bizenviro 2014.

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

53 Forbes: <http://www.forbes.com/pictures/mli45femig/7-canada/>.

54 Canada's Venture Capital & Private Equity Association http://www.cvca.ca/files/Downloads/Think_Canada_Again_Update_2013_web.pdf.

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’.^{55,56} The trade negotiation mandate of CETA was made public in December 2015 and will need to be approved by the European Council and the European Parliament.⁵⁷ As a result of this, it appears that the outlook for investment into Canadian private equity funds by European investors is also very encouraging.

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McCullough O’Connor Irwin LLP

Jonathan McCullough is a founding partner of the firm and has been practising 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: *Lexpert 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* and *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 and 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

55 *Financial Post*: <http://business.financialpost.com/2014/09/26/stephen-harper-eu-leader-s-meet-amid-ceta-cloud/>.

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

57 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>.

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 practising law relating to the venture capital industry for over 18 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.

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