Going Public: The Art of the Prospectus

Stikeman Elliott LLP

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Prospectus Requirement

An initial public offering of securities of an issuer is the conventional way of “going public” in Canada. Securities laws generally require the filing of a prospectus to qualify for any non-exempt “distribution” of securities. In the absence of an exemption (see the section on exemption from prospectus requirements below), no person or company may “trade” in a security where such trade constitutes a “distribution” unless a prospectus has been filed. Securities originally distributed under a prospectus exemption are generally subject to resale restrictions that include the securities being held for a specified period of time and the issuer having been a reporting issuer for a specified period of time. Treasury offerings of securities not previously issued are generally distributions.

The objective of the prospectus requirement is to provide investors with complete and accurate information about the affairs of an issuer, thereby enabling them to make informed investment decisions about the securities being offered. Thus, the contents of a prospectus will vary depending on the nature of the security to be issued, the businesses in which the issuer and its subsidiaries are engaged and the particular requirements of the jurisdictions in which the offering will be made (for example, a prospectus filed in Quebec is subject to a French translation requirement). The prospectus must be comprehensible to readers and presented in an “easy-to-read” format.

Prospectus Preparation

Securities laws contain a number of specific requirements with respect to the required or permitted contents of a prospectus, which have generally been harmonized under National Instrument 41-101 *General Prospectus Requirements* (NI 41-101). Form 41-101F1 *Information Required in a Prospectus* requires an issuer to disclose extensive information about numerous matters concerning the company in the prospectus, including:

- its corporate structure;
- its use of proceeds;
- its financial statements (as well as those of relevant predecessor entities);
- the businesses carried on by it and its subsidiaries;
- risk factors relating to an investment in securities of the issuer;
- significant acquisitions (this includes recently completed acquisitions as well as proposed/probable acquisitions);
- legal proceedings affecting the issuer;
- its directors and officers and the compensation of its executives;
- outstanding options to purchase securities;

- the principal holders of its securities;
- prior issuances of securities;
- relationships between the issuer and an underwriter;
- its auditors; and
- any other material facts relating to the securities proposed to be issued and not otherwise disclosed.

Prospectus disclosure

The prospectus must contain "full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed". The significance of this standard is reinforced by the certificates, which the issuer, the underwriters and others must sign at the end of the prospectus. In the event that the prospectus contains a misrepresentation, the issuer and each underwriter that signs it (among others) may be found liable. An issuer is not liable if it can prove that the purchaser purchased the securities with knowledge of the misrepresentation. Directors and underwriters can rely on a due diligence defence in cases where, after conducting a reasonable investigation, they reasonably believed there was no misrepresentation in the prospectus.

Once an issuer has decided to proceed with a public offering and an informal underwriting relationship has been established, the issuer will normally establish a "working group", consisting of one or more senior officers of the issuer and representatives of the underwriters, the issuer's auditors and legal counsel for the issuer and the underwriters. Although responsibility for preparation of a draft preliminary prospectus rests with the issuer and its counsel, members of the working group will typically be assigned responsibility to prepare initial drafts of particular sections of the draft preliminary prospectus. This drafting exercise can last weeks or months depending on the complexity of the business and affairs of the issuer, the need to reorganize prior to going public and the level of intensity displayed by the working group. Once the decision to "go public" has been made, filing of a preliminary prospectus typically becomes an urgent matter because the issuer wishes to receive the proceeds of the offering as soon as possible, as the underwriters will have determined that the market is appropriately receptive to the offering, subject to potential adverse market changes occurring prior to closing. The issuer will also need to appoint a registrar and transfer agent in respect of its publicly traded securities and the identity of the registrar and transfer agent must be disclosed in the prospectus.

Upon filing the final prospectus, the issuer will become a "reporting issuer" in each jurisdiction in which a receipt is issued (or is deemed to be issued under the Passport System). As such, the issuer will be subject to continuous disclosure rules and ongoing reporting requirements (discussed in Section F – Life as a Canadian Public Company). These rules and requirements concern such things as the timely disclosure of material changes, the preparation and filing of quarterly and annual financial information, the solicitation of proxies and the preparation of annual information forms and information circulars.

Historical Financial Information Requirements

Financial statement requirements

Inclusion of the following financial statements in a prospectus satisfies the basic prospectus requirements (note that there have been some changes in terminology post-IFRS):

- Audited balance sheets as at the two most recently completed year-ends;
- Audited income statements, statements of changes in equity and cash flow statements for the three most recently completed financial years; An unaudited interim or "stub period" balance sheet for the most recently completed interim period ended more than 45 days before the date of the prospectus; and
- Unaudited income statements, statements of changes in equity and cash flow statements for the interim or "stub period" in the current financial year that ended more than 45 days before the date of the prospectus and for the comparable period in the prior financial year.

For audited statements, the auditor's report must, absent regulatory relief, express an unmodified opinion. The interim or stub period financial statements may be required to be updated in the final prospectus, depending upon the timing and length of the prospectus clearance process, and additional financial statements may be required for significant acquisitions (see also "Significant Acquisitions - Financial Information" later in this section).

Other required financial information

In addition to the historical financial statements outlined above, other historical financial information required in a prospectus includes:

- annual MD&A, which must include a discussion of liquidity and capital resources of the issuer (the contents of the MD&A are discussed in further detail under "Continuous Disclosure Obligations" in Section F – Life as a Canadian Public Company). If relevant, a discussion of the nature and magnitude of financial instruments (e.g. options, swaps, asset-backed securities) and their effect on liquidity and capital resources and on operations may be required;
- interim MD&A on interim financial statements included in the prospectus, which is similar to annual MD&A, but is focused on the most recent interim period and on discussing changes in the issuer's financial condition since the annual MD&A; and
- a description of any material changes in and to the company's share and loan capital since the date of the financial statements for the company's most recently completed financial period contained in the prospectus.

In light of ongoing MD&A reporting requirements for public companies, forward-looking disclosure of known trends and uncertainties that the issuer reasonably expects will impact on the results of its operations may be necessary or appropriate.

Forward-looking Information (FLI) - Future Oriented Financial Information (FOFI) and Financial Forecasts

The use of forward-looking information by Canadian public issuers, including future-oriented financial information (FOFI) and financial outlooks, is regulated by National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102). These requirements apply to all written disclosure of forward-looking information and provide that an issuer may not disclose forward-looking information unless it has a "reasonable basis" for the information. In addition, disclosure of any material forward-looking information must comply with each of the following elements:

- the information must be identified as forward-looking information;
- users must be cautioned that actual results may vary from the forward-looking information and material risk factors that could cause actual results to differ materially from the forward-looking information must be identified;
- the material factors or assumptions used to develop the forward-looking information must be stated; and
- the issuer must describe its policy for updating forward-looking information if it includes procedures in addition to those described in the section of NI 51-102 dealing with updates to FLI required in the Management's Discussion and Analysis (MD&A) or MD&A supplement.

FOFI and financial outlooks comprise a subset of FLI and, in addition to those set out above, further requirements exist for this category of FLI. In preparing FOFI or a financial outlook, a reporting issuer must:

- use assumptions that are reasonable in the circumstances;
- limit the period covered by the FOFI or financial outlook to a period for which the information in the FOFI or financial outlook can be reasonably estimated;
- use the accounting policies the reporting issuer expects to use to prepare its historical financial statements for the period covered by the FOFI or the financial outlook; state the date management approved the FOFI or financial outlook; and
- explain the purpose of the FOFI or financial outlook and caution readers that the information may not be appropriate for other purposes.

NI 51-102 also requires that a reporting issuer discuss in its MD&A disclosure relating to updates, comparison to actual results and withdrawal of material forward-looking information. Exceptions are available from the inclusion of such information in certain circumstances where the prescribed disclosure has already been included in a news release.

The question of whether forecasts in a prospectus need to be revised in respect of results that come to light after filing of the prospectus, but prior to the closing of an IPO, was canvassed in the Supreme Court of Canada decision of *Kerr v. Danier Leather*. Upholding the ruling of the Ontario Court of Appeal, the Supreme Court held that a company and its directors were not liable for forecasts contained in an IPO prospectus that subsequently became inaccurate. The disclosure requirements under the Ontario *Securities Act* were found to impose no obligation on the issuer to update a forecast in the prospectus to reflect results as at the date of closing. Under securities laws, once a receipt for the final prospectus is issued, only a material change in the business, operations or capital of the issuer must be disclosed. The Supreme Court of Canada found that changes to forecasted financial results were likely to be “material facts” but not “material changes.”

Significant Acquisitions - Financial Information

NI 41-101 and its related forms require the inclusion in a prospectus of financial statements for an acquired business, where such an acquisition is considered a “significant acquisition”. Generally, the disclosure requirements under NI 41-101 have been harmonized with those of NI 51-102 *Continuous Disclosure Obligations* and the latter instrument’s significance tests have been adopted. A standard two years of historical financial statements will be required for significant acquisitions (plus any applicable interim periods), along with pro forma statements, based on the historical financial statements that are required. The disclosure requirements are based on the principle that issuers should be required to include in their prospectus the disclosure that would otherwise have been required in a business acquisition report (BAR) had they been a reporting issuer and, therefore, required to file a BAR.

An acquisition is considered "significant" if the reporting issuer's proportionate share of consolidated assets, consolidated investments or consolidated income from continuing operations associated with such an acquisition exceeds 20% of the issuer's consolidated assets or consolidated income from continuing operations. A 40% significance level for consolidated assets or consolidated investments is used for IPO venture issuers, although this has been proposed to be increased to 100%. Acquisitions falling below the threshold levels need not be disclosed using a long form prospectus.

Historical financial statements for a significant probable acquisition are also required, the test being the same as for significant acquisitions. An acquisition is probable if a reasonable person would believe that the likelihood of completion is high. Required historical financial statement disclosure in this context is generally similar to that outlined with respect to a significant acquisition.

Clearing the Prospectus with the Securities Commission

Preliminary prospectus

Once the decision to "go public" has been made, an issuer must file a preliminary prospectus, which will be reviewed and commented on by the OSC only, if the OSC is its principal regulator, or the OSC and its principal regulator in other cases. As described above, the clearing of the preliminary prospectus is often an urgent matter, as generally the issuer is anxious to receive the proceeds of the offering and the underwriters (or agents) have determined that the markets are appropriately receptive to the offering, subject to adverse market changes occurring prior to closing, and are eager to commence the "road shows" with registered representatives (e.g. salespersons) and potential purchasers regarding the issuer and the proposed offering. If the principal regulator is the OSC, the receipt of the OSC results in a deemed receipt from each jurisdiction in which the prospectus was filed under the Passport System. If the principal regulator is not the OSC, the receipt of the principal regulator would result in a deemed receipt from all Passport System regulators and, if the OSC cleared the prospectus, of the OSC.

With the preliminary prospectus, the issuer will file various supporting documents including a personal information form completed by each of its directors and executive officers disclosing their names, addresses, birthdates and certain additional personal information. Each such person will be subject to a security check. The purpose of the security check is for the regulators to satisfy themselves that there are no reasonable grounds to believe that the business of the issuer will not be conducted with integrity and in the best interests of its securityholders.

Under amendments to marketing rules implemented in 2013, a new "testing the waters" exemption from the prospectus requirement now permits issuers to solicit expressions of interest prior to filing a preliminary prospectus where the issuer has a reasonable expectation of filing a preliminary long form prospectus in respect of an IPO. Pursuant to this exemption, an investment dealer that is authorized in writing to do so by the issuer is permitted to make solicitations to accredited investors. The exemption is intended to allow issuers to assess interest in a potential public offering before incurring costs related to the offering.

After a preliminary prospectus has been filed and receipted, the "waiting period" commences. Historically, Canadian securities laws only expressly permitted for the distribution of the preliminary prospectus or the solicitation of expressions of interest from prospective purchasers during the waiting period. The distribution of communications such as notices, circulars, advertisements or letters was also permitted provided certain requirements were met.

While such distributions are still permitted, under the 2013 amendments, dealers may now also distribute "standard term sheets" and "marketing materials". Both of these terms have specific defined meanings under the amended rules and are accompanied by specified filing and other requirements and restrictions. Roadshows may also be conducted, and are not restricted in terms of who may attend, provided applicable conditions are satisfied. Other marketing activities during the waiting period are regulated.

Comment letters and responses

After the receipt is issued for the preliminary prospectus, the principal regulator reviews the preliminary prospectus to ensure that the issuer has complied with the statutory prospectus requirements and provides a comment letter to the issuer outlining any “deficiencies”. If the principal regulator is not the OSC, the OSC will also review the materials and advise the principal regulator of any concerns. One or more (usually two) comment letters may be issued.

The issuer (with the assistance of the underwriters, the issuer’s auditors and legal counsel for the issuer and the underwriters) will then respond in writing to the comment letter and agree to make changes to the disclosure in the preliminary prospectus as suggested, or explain why such changes are inappropriate or unnecessary. The response letter typically commences a negotiation exercise with respect to any disclosure issues in the preliminary prospectus.

Once discussions with the principal regulator reach a satisfactory resolution, required changes to the preliminary prospectus are made by the issuer and, after pricing, the final prospectus (together with a black-lined copy showing changes from the preliminary prospectus) is filed. A receipt for the final prospectus is then issued.

Conditional listing

Generally, an original listing application is made to a stock exchange after a receipt is received for the preliminary prospectus upon which a conditional listing is granted to the issuer, subject to the fulfillment of certain standard conditions. These conditions include obtaining a receipt for the final prospectus, the closing of the offering, minimum distribution of securities and delivery of certain documentation to the exchange.

Prospectus Liability

Civil liability for misrepresentation

A prospectus must provide full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed. Where a prospectus or any amendment to the prospectus contains a misrepresentation at the time of purchase, a purchaser who bought a security offered during the period of distribution is deemed to have relied on the misrepresentation, and as such has a statutory right of action for damages against:

- the issuer or a selling securityholder on whose behalf the distribution is made;
- each underwriter of the securities who is required to sign the prospectus;
- every director of the issuer at the time the prospectus or the amendment to the prospectus was filed;
- every person or company whose consent has been filed pursuant to a requirement of the regulation (e.g. lawyers and accountants) but only with respect to reports, opinions or statements that have been made by them; and
- every person or company (e.g. the CEO and the CFO) who signed the prospectus or the amendment to the prospectus other than the persons or companies included in the first four bullet points above.

Further, where the purchaser purchased the security from a person or company referred to in the first or second bullet point above, or from another underwriter of the securities, the purchaser may elect to exercise a right of rescission against such person, company or underwriter, in which case the purchaser will have no right of action for damages against such person, company or underwriter. The starting point for an action in damages is the existence of a misrepresentation in the prospectus at the time of purchase of securities offered by the prospectus. A "misrepresentation" is:

- an untrue statement of "material fact", being a fact that would reasonably be expected to have a significant effect on the market price or value of the securities issued or proposed to be issued; or
- an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in light of the circumstances in which it was made.

Under the Ontario *Securities Act*, no action may be commenced to enforce the statutory right of action for damages or rescission more than:

- in the case of an action for rescission, 180 days after the purchaser purchased the subject securities; or
- in the case of an action for damages, the earlier of (i) 180 days after the purchaser first had knowledge of the misrepresentation, and (ii) three years after the date on which the purchaser purchased the subject securities.

Defences for misrepresentation

The statutory civil liability remedy available to purchasers for misrepresentations contained in a prospectus avoids some of the problems with common law actions for misrepresentation, such as establishing detrimental reliance.

Under the Ontario *Securities Act*, no person or company is liable for damages or rescission if the person or company proves that the purchaser purchased the securities with knowledge of the misrepresentation.

Underwriters and directors are only liable if:

- they failed to conduct such reasonable investigation as to provide reasonable grounds for a belief that there had been no misrepresentation; or
- they believed that there had been a misrepresentation.

Establishing that a reasonable investigation was conducted has become known as the "due diligence defence".

Due Diligence

Generally, due diligence is undertaken by the underwriters, with the assistance of their counsel, in order to ensure that the prospectus contains full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed. Due diligence also allows the underwriters to rely on a due diligence defence to any action alleging misrepresentation in the prospectus, which might be brought against them under statutory civil liability provisions.

The due diligence process typically involves extensive discussions with senior management of the issuer during preparation of the preliminary prospectus, inspection of the issuer's principal assets, review of the issuer's material agreements (e.g., financing agreements), review of the issuer's financial statements and financial plan, and discussions with senior management of the issuer, its auditors and other outside advisors or experts (e.g., geologists) prior to filing each of the preliminary prospectus and the final prospectus, at which time a formal list of questions is addressed to senior management of the issuer and its auditors. Although legal counsel typically undertake much of the legal due diligence and assist with business due diligence, due diligence generally is undertaken for the benefit of the underwriters and remains their responsibility. Directors and signing officers may also wish to have issuer's counsel undertake similar enquiries for their benefit.

The Underwriting Agreement

The underwriting agreement defines the essential terms of the relationship between the issuer and the underwriters in the IPO process, including:

- the size and price of the issue;
- the underwriters' compensation and reimbursement of expenses;
- whether it is a primary and/or secondary offering;
- whether it is a "best efforts" agency arrangement (in which the underwriter agrees, subject to certain conditions, to use its best efforts to find purchasers for the issuer) or a "firm commitment" underwriting (in which the underwriter commits, subject to certain conditions, to purchase the whole issue from the issuer and assumes the risk of reselling to purchasers);
- the scope of the offering and restrictions on underwriters' authority to sell in different jurisdictions; and
- the conditions of closing of the offering.

In the case of an IPO, the underwriting agreement is typically entered into immediately after "pricing" the deal (which typically occurs after the close of the markets on a day after the preliminary prospectus has been cleared by the relevant Securities Commission(s) but immediately before the final prospectus is filed). Prior to signing the underwriting agreement, the issuer and the underwriters are typically bound only by an engagement letter, which may, among other things, require the issuer to reimburse the underwriters some or all of their expenses in connection with preparation for the IPO in the event that it does not proceed (and possibly lost fees if another transaction is instead completed).

The underwriting agreement generally requires the issuer to use its best efforts to obtain all necessary receipts for the final prospectus within a specified time period, and imposes on the issuer (and selling securityholders) an obligation to prepare and file any amendment to the prospectus required to be filed by applicable securities laws during the period of distribution. This can be a significant obligation for an issuer if the underwriters remain in distribution longer than expected, and time limits are sometimes negotiated. The underwriting agreement also requires the issuer to notify the underwriters promptly of any material change in the affairs of the issuer, any change in any material fact contained in the prospectus or any new material fact not stated in the prospectus.

The underwriting agreement typically requires the issuer to deliver a variety of documents to the underwriters upon filing the final prospectus, including:

- signed copies of the prospectus;
- French language (translation) opinions from the issuer's Quebec counsel (as to non-financial contents of the prospectus) and the auditors (as to the financial contents of the prospectus);
- a comfort letter from the issuer's auditors as to any financial and accounting information contained in the prospectus;
- evidence of the listing of offered shares on relevant stock exchanges; and
- commercial copies of the prospectus in specified quantities, within specified time periods and at specified locations.

The underwriting agreement typically contains numerous representations and warranties in favour of the underwriters, including:

- general representations as to the accuracy and completeness of the prospectus disclosure; and
- specific representations as to organization of the issuer and its material subsidiaries, issued and outstanding capital, qualifications to conduct business in compliance with applicable laws, options or other rights to purchase unissued securities, no conflict between the terms of the offering and the issuer's constating documents and material agreements, and the absence of material undisclosed litigation, liabilities, defaults or violations of law.

The scope of specific representations about the issuer, its business operations and its financial affairs is a matter for negotiation between the issuer and the underwriters in the context of the particular transaction. Representations from selling securityholders range from simple representations concerning ownership of the securities being sold to representations mirroring those made by the issuer.

The underwriting agreement will contain an indemnity in favour of the underwriters (and their directors, officers, etc.) from the issuer (and sometimes from selling securityholders) in respect of any untrue statement in the prospectus (excluding statements or facts relating solely to the underwriters), non-compliance by the issuer with applicable securities laws and any order or investigation based on an untrue statement or omission in the prospectus or restricting the distribution or trading of the issuer's securities. It will also contain termination rights in favour of the underwriters which, if exercised, permit the underwriters to "walk away" from their underwriting commitment. These termination rights triggers can be the subject of negotiation between the issuer and the underwriters, and typically include:

- any investigation or order that operates to prevent or restrict distribution of the subject securities or trading in the issuer's securities (e.g., a cease trade order);
- any occurrence of national or international consequence which, in the opinion of the underwriters, seriously adversely affects the financial markets or the business of the issuer;
- in an IPO, the state of the financial markets is such that, in the opinion of the underwriters, the offered securities cannot be profitably marketed; and
- the occurrence of a material change which, in the opinion of the underwriters, would reasonably be expected to have a significant adverse effect on the market price or value of the securities.

French Language

Any entity that carries on business in Province of Quebec, which may include the distribution of securities or the solicitation of purchasers in the province of Quebec, will be subject to the Quebec Charter of the French Language. The Charter states, among other things, that "contracts pre-determined by one party, contracts containing printed standard clauses, and the related documents, must be drawn up in French". They may be drawn up in another language as well at the express wish of the parties. The Charter does not distinguish between contracts governed by the laws of Quebec and those governed by other laws, and any agreements entered into with potential purchasers in Quebec would, as a result of the statutory provisions, be required to be either in the French language or indicate that the contract and any documents incorporated therein by reference were drawn up in the English language at the express wish of the parties. In addition, the *Securities Act* (Quebec) imposes a French language requirement, subject to certain exceptions, on offering documents such as prospectuses and offering memoranda, as well as certain continuous disclosure documents.

Exemptions from the Prospectus Requirement

There are a number of options available for distributing securities on a prospectus exempt basis, generally referred to as exempt distributions or private placements. Private placements have, for the most part, been harmonized across the country in the form of National Instrument 45-106 *Prospectus and Registration Exemptions* (NI 45-106). The instrument provides a range of prospectus exemptions for both private and public issuers of securities.

While NI 45-106 provides the exemptions most often relied upon exemptions, some jurisdictions, including Ontario, continue to retain certain additional local exemptions.

The prospectus exemptions available under NI 45-106 are generally divided into the following categories: capital raising; transaction specific; exemptions for investment funds; employee, executive officer, director and consultant exemptions; and miscellaneous exemptions.

The most frequently used among the capital raising exemptions are the "accredited investor" and "minimum investment amount" exemptions. The "accredited investor" exemption provides a prospectus exemption for trades to qualified persons, including individuals. Included among the qualified entities are certain types of banks and other financial institutions, trust companies, pension funds, registered charities, investment funds, domestic and international governmental bodies and entities other than individuals or investment funds with net assets of C$5 million. An individual may also qualify as an "accredited investor" if he or she, alone or with a spouse, owns financial assets having an aggregate net realizable value over C$1 million; has net assets of at least C$5 million; or has net income before taxes in excess of C$200,000 alone, or C$300,000 together with his or her spouse.

The "minimum investment amount" exemption is available to any person or entity that purchases as principal securities of a single issuer that have an acquisition cost of a minimum of C$150,000 at the time of the trade.

In addition to these two most frequently used exemptions, an additional exemption is also available to private issuers. If an entity is not a reporting issuer or an investment fund, it may rely on the private issuer exemption provided it has not distributed securities other than to a prescribed list of investors and its securities are subject to restrictions on transfer and beneficially owned by no more than 50 persons, not including employees and former employees of the issuer or its affiliates. Other capital raising exemptions include exemptions in certain jurisdictions for trades to family, friends and business associates of the issuer (which exemption is not available in Ontario), for trades to founders, control persons and family (which are available only in Ontario), for trades made pursuant to a prescribed form of offering memorandum (which exemption is not available in Ontario), trades to affiliates and trades made under rights offerings or pursuant to dividend or distribution reinvestment plans.

Securities regulators are also currently considering new capital raising prospectus exemptions that would, among other things, introduce a "crowdfunding" exemption to allow reporting and non-reporting issuers to raise money from non-accredited investors and an exemption for trades to existing security holders (which would be somewhat more flexible than the traditional rights offering exemption) and extend to Ontario the exemptions available to family, friends and business associates of the issuer and for trades made pursuant to a prescribed form of offering memorandum.

Transaction exemptions include exemptions for distributions related to business combinations and reorganizations, assets acquisitions, take-over bids and issuer bids and securities issued for debt. NI 45-106 also makes available specific exemptions for investment funds as well as for issuances to employees, executive officers, directors and consultants. These may apply to issuances of equity securities themselves or to grants and exercises of securities issued as equity compensation, such as stock options.

Documentation used in connection with a private placement may vary depending upon the size and nature of the issuer, the exemption relied upon and the identity and relationship of the purchaser to the issuer. Generally, however, the documentation consists of a subscription agreement, and where applicable, an agency or underwriting agreement. The documentation may also include an offering memorandum but this is not mandatory (unless the offering memorandum exemption is being relied upon). The subscription agreement, or similar document, typically contains contractual representations, warranties and covenants between the issuer and the purchaser. It also generally includes or is accompanied by some form certificate whereby the purchaser provides confirmation of the necessary elements of any prospectus exemption being relied upon, if applicable. For example, if the exemption relied upon is the "accredited investor" exemption, the purchaser will usually be asked to complete a certificate that indicates which category of accredited investor applies to the purchaser. While an offering memorandum is not required to be prepared when relying on the accredited investor and other exemptions, if one is delivered, some provinces and territories also provide a statutory right of action to purchasers where an offering memorandum contains a misrepresentation.

About the Firm

When Heward Stikeman and Fraser Elliott first opened the firm's doors in 1952, they were united in their pledge to do things differently to help clients meet their business objectives.

In fact, they made it their mission to deliver only the highest quality counsel as well as the most efficient and innovative services in order to steadily advance client goals.

Stikeman Elliott's leadership, prominence and recognition have continued to grow both in Canada and around the globe. However, we have remained true to our core values.

These values are what guide us every day and they include:

- Partnering with clients – mutual goals ensure mutual success.
- Finding original solutions where others can't – but they must also be grounded in business realities.
- Providing clients with a deep bench of legal expertise – for clear, proactive counsel.
- Remaining passionate about what we do – we relish the process and the performance that results from teamwork.

A commitment to the pursuit of excellence – today, tomorrow and in the decades to come – is what distinguishes Stikeman Elliott when it comes to forging a workable path through complex issues. Our duty and dedication never waver.

This is what makes Stikeman Elliott the firm the world comes to when it counts the most.

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