

# BLAKE, CASSELS & GRAYDON

Legal Aspects of CANADA/U.S.  
CROSS BORDER SECURITIES OFFERINGS

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## CANADA/U.S. CROSS BORDER SECURITIES OFFERINGS

The U.S. Securities and Exchange Commission (the "SEC") has released details of a proposal under which qualified Canadian issuers could use a Canadian prospectus vetted in Canada to register securities in the United States. In specified circumstances, Canadian disclosure documents could also be used in rights and exchange offerings involving U.S. shareholders and for meeting U.S. proxy and continuous disclosure requirements. Also, in specified circumstances, compliance with Canadian take-over bid and insider trading laws would be accepted in lieu of compliance with U.S. laws.

Concurrently, the Ontario Securities Commission and the Commission des valeurs mobilières du Québec have proposed a parallel integrated disclosure system to permit U.S. issuers to use U.S. disclosure documents in Canada.

If implemented, the new system should reduce compliance costs for issuers currently offering securities in Canada and the U.S. and facilitate new cross-border offerings by other issuers. The proposals will encourage the inclusion of U.S. shareholders in Canadian rights and exchange offerings. Canadian and U.S. regulators have solicited comments by October 31, 1989.

### PRIMARY OFFERINGS OF SECURITIES

Under the proposal, a Canadian issuer with a 3 year reporting history and currently in compliance with Canadian reporting requirements would be permitted to use a Canadian prospectus to satisfy SEC registration requirements in a cross-border offering provided that it meets minimum size tests for market value and public float. For a non-convertible, investment grade preferred share or debt offering (an "investment grade issue"), eligibility would require a total market value of common stock of at least Cdn. \$180 million and a public float, including non-voting common stock, of Cdn. \$75 million. For other offerings, eligibility would require a Cdn. \$360 million common stock value and a public float of Cdn. \$75 million.

Where these requirements are met, a Canadian prospectus could be used in the United States if the issuer appoints a U.S. agent for service and adds a warning legend to the prospectus respecting Canadian tax consequences, pursuing remedies in Canada and Canadian financial statements. Reconciliation with

U.S. GAAP would not be required for investment grade issues. For other securities, reconciliation with U.S. GAAP would be required, with full disclosure of all information required by Regulation S-X and U.S. GAAP, including segment information and supplemental oil and gas data. Canadian auditors would be required to follow existing Canadian guidelines regarding additional comments for U.S. readers on to contingencies and going concern considerations.

Issuers would be subject to U.S. provisions imposing civil and criminal liability for fraud. Compliance with the U.S. Trust Indentures Act of 1939 would be required for debt offerings, but Canadian trustees could be used.

#### RIGHTS OFFERINGS

Issuers with a 3 year reporting history would be entitled to use a Canadian rights offering circular or prospectus for registering the securities to be issued pursuant to the rights in the U.S. provided that U.S. residents constitute less than 20% of the holders of the class and the offering will not increase the capital of that class by more than 25%. The exercise period must not exceed 90 days and the rights cannot be transferable to U.S. residents who are not already shareholders.

#### EXCHANGE OFFERINGS

Bidders with a 3 year reporting history and a market value of common stock of at least Cdn. \$75 million would be permitted to use a Canadian prospectus in the U.S. if the target is a Canadian corporation; less than 20% of the securities are held by U.S. residents; and the bidder offers its securities on identical terms to U.S. and Canadian shareholders of the target. Consistent with Canadian law, cross-border exchange offers would commence immediately upon mailing the take-over bid circular.

#### TAKE-OVER BIDS

Cross-border take-over and issuer bids for shares of a Canadian issuer subject to Canadian take-over bid rules could proceed in the U.S. without compliance with the tender offer requirement of the Williams Act if less than 20% of the shareholders of the affected class are U.S. residents and the

offer is made to all U.S. holders. Exempt bids, such as those conducted through a stock exchange, would continue to be subject to U.S. requirements.

The SEC is considering taking a no-action position to allow a bidder to purchase securities during a bid other than pursuant to the bid if the purchases are not to create trading activity or increase the stock price. This would accommodate Canadian law which permits purchases of up to 5% of the securities in the market during the bid.

#### CONTINUOUS DISCLOSURE

Canadian issuers incurring U.S. continuous reporting obligations as a result of a cross-border offering under the new system would be able to use Canadian forms and unreconciliated annual and interim financial statements to satisfy U.S. requirements.

Canadian issuers with Cdn. \$360 million market value of common shares (Cdn \$180 million for an investment grade issue, and public float of Cdn. \$75 million that incur continuous reporting obligations by virtue of listing on a U.S. exchange or having a specified number of U.S. shareholders would also be permitted to file Canadian continuous disclosure documents in the U.S. For non-investment grade issues, the issuer would have to provide a quantified reconciliation of net income, balance sheet line items and earnings per share.

Canadian issuers subject to U.S. proxy regulations could rely on Canadian documents without pre-filing to meet U.S. requirements for routine annual meetings, but not for special meetings.

Only persons required to report their security holdings in Canada would be required to report insider trades to the SEC and the Canadian forms of insider reports would suffice for U.S. purposes.

(For a copy of the proposals or for assistance in preparing comments for submission, call Al Hudec 260-9610 or Bill Jenkins, 260-9616.)