

# Employee share plans in Canada: regulatory overview

Todd Miller, George Waggott, Cindy Wan and Stephen D Wortley  
McMillan LLP

[global.practicallaw.com/4-503-4465](http://global.practicallaw.com/4-503-4465)

## EMPLOYEE PARTICIPATION

### 1. Is it common for employees to be offered participation in an employee share plan?

Share-based employee share plans are commonly used by employers to compensate and reward their workforce and align the interests of participants to those of shareholders.

### 2. Can employees be offered a share plan where the shares to be acquired are in a foreign parent company?

Employees can be invited to participate in a share plan that provides for the acquisition of shares of the foreign parent company of their Canadian employer, with the related securities and employment considerations being substantially similar to plans offered by Canadian companies. The relevant tax considerations may vary in certain circumstances (see *Question 4*).

## SHARE OPTION PLANS

### 3. What types of share option plan are operated in your jurisdiction?

#### Share option plan

Share options have traditionally represented (and continue to represent) a significant component of Canadian executive compensation. While certain features of such plans will vary depending on, among other things, the size of the issuer, its jurisdiction and the liquidity of its shares, most plans are designed with a view towards maximising the potential tax benefits to participants.

#### Grant

### 4. What rules apply to the grant of employee share option plans?

#### Share option plan

**Discretionary/all-employee.** Share options can be granted to employees on a discretionary basis, and in most cases do not need to be offered to all employees on the same terms.

**Non-employee participation.** Share options can also be granted to non-employee directors and to certain types of consultants or contractors. Different tax considerations generally apply.

**Maximum value of shares.** There is generally no limit on the total value of shares that can be granted on a per employee or a per company basis. However, a company listed on the TSX Venture

Exchange (TSXV) is subject to maximum limits (see *Question 22, TSX Venture Exchange (TSXV)*). In addition, the number of shares that a particular company may issue could be limited by its by-laws or constitution documents.

**Market value.** The exercise price of options of listed companies must generally be equal to or greater than the market value on the date of grant. Unlisted companies are generally not subject to this limitation unless provided for under the relevant option document.

### 5. What are the tax/social security implications of the grant of the option?

#### Share option plan

Generally speaking, there are no tax or social security implications associated with the granting of options.

#### Vesting

### 6. Can the company specify that the options are only exercisable if certain performance or time-based vesting conditions are met?

#### Share option plan

It is permissible (and relatively common) for options to be exercisable only after certain performance or time-based vesting conditions have been satisfied.

### 7. What are the tax/social security implications when the performance or time-based vesting conditions are met?

#### Share option plan

Generally speaking, the fulfilment of performance or time-based vesting conditions does not, in and of itself, give rise to tax or social security obligations (either on the part of the option holder or the issuer).

#### Exercise

### 8. What are the tax/social security implications of the exercise of the option?

#### Share option plan

One of the attractive attributes of share options as a compensation tool is that, when properly structured, they can provide the recipient with a greater after-tax benefit than cash compensation of an equivalent amount.

Generally speaking, employment income is fully taxed at an employee's applicable marginal tax rate in the year it is received. However, qualifying share options provide the opportunity for capital gains-like treatment in respect of the associated option benefit where all of the following conditions are met (referred to hereafter as the Capital Gains-Like Treatment Conditions):

- The employee deals at arm's length with his employer.
- The shares to be acquired under the relevant option are "prescribed shares" (meaning, in highly simplified terms, plain vanilla common shares that have no fixed dividend or liquidation entitlements, nor any conversion, redemption or put rights).
- The exercise price of the option is not less than the fair market value (FMV) of the underlying shares as of the option grant date.

If the Capital Gains-Like Treatment Conditions are satisfied, then only half of the option benefit received by the employee (that is, the amount by which the FMV of the shares at the time the option is exercised exceeds the option's exercise price (plus the amount, if any, paid by the employee to acquire the option)) is taxable.

Alternatively, a favourable treatment comparable to that described above (irrespective of whether the Capital Gains-Like Treatment Conditions are satisfied) may be available where:

- The option in question pertains to shares in a Canadian-controlled private corporation (CCPC).
- The employee does not, after exercising his option, dispose of the shares for at least two years.

Share option benefit amounts are generally included in an employee's income in the year the particular option is exercised. However, in the case of an option to acquire shares of a CCPC, the income inclusion is deferred until the year in which the acquired shares are disposed of.

An exercise of options generally requires the employee and his employer to make social security contributions. However, in most situations, the annual individual limits for social security contributions will have already been exceeded on account of the employee's other compensation.

## Sale

### 9. What are the tax and social security implications when shares acquired on exercise of the option are sold?

#### Share option plan

A sale of such shares generally gives rise to a capital gain (or capital loss) in the hands of the relevant employee to the extent the proceeds of disposition of the shares exceed (or are less than):

- The employee's cost base in the shares (which will, among other things, include the option exercise price and share option benefit amount).
- All reasonable costs associated with the disposition.

50% of any capital gains are included in the employee's income and taxed at his applicable marginal rate. On the other hand, if the share sale results in a capital loss, 50% of that capital loss can be deducted from taxable capital gains in that year, subject to the detailed rules set out in the Income Tax Act (Canada). Excess deductible capital losses over taxable capital gains can generally be carried back three years and carried forward indefinitely.

There are no social security contributions required in respect of capital gains arising from a disposition of shares.

## SHARE ACQUISITION OR PURCHASE PLANS

### 10. What types of share acquisition or purchase plan are operated in your jurisdiction?

The following are some of the main types of share acquisition or purchase plans commonly utilised in Canada:

- Employee share purchase plan (ESPP).
- Free share plan.
- Restricted share plan (RSP).
- Performance share plan (PSP).
- Deferred share plan (DSP).

#### ESPP

An ESPP generally entitles employee participants to purchase shares of their employer (or a related company) during specified intervals (usually quarterly or annually) at a set price which may be equal to FMV or at a discount to FMV. These plans are typically offered to a broader range of employee participants than share options, and minimum share holding periods often apply.

An employer can provide financial assistance or other incentives in connection with employee purchases, including interest-free or low-interest loans, matching payments or the provision of additional shares free of charge.

Private companies which have ESPPs often require participants to enter into a unanimous shareholders agreement, to avoid a proliferation of activist minority shareholders.

#### Free share plan, RSP, PSP, DSP

A free share plan, RSP, PSP, or DSP, each involves a commitment from a company to issue shares to participants at no charge. As the shares are often awarded conditionally (see *Question 13*), recipients are not, in most cases, entitled to dividends or any voting rights until the conditions are met. Such a plan is normally known as a PSP where the conditions or number of shares which can be received are based on performance results and a DSP where payment or settlement is deferred until the death, termination or retirement of the participant.

RSPs, PSPs and DSPs can be settled by any of the following:

- In cash (see *Questions 16 to 21*).
- By the issuance or delivery of the company's shares.
- By a combination of shares and cash.

Any company can offer these types of plans. While traditionally less common in the Canadian environment, DSPs have recently increased in popularity as a means to compensate directors.

#### Acquisition or purchase

### 11. What rules apply to the initial acquisition or purchase of shares?

#### ESPP

**Discretionary/all-employee.** ESPPs can be offered to employees on a discretionary basis, and do not need to be offered to all employees on the same terms.

**Non-employee participation.** Non-employee directors and certain types of consultants can participate in an ESPP. However, the tax consequences to such participants will in many cases differ in comparison to employees.

**Maximum value of shares.** There is no limit on the total value of shares that may be offered on a per employee or per company basis.

**Payment of shares and price.** There is no limit on the amount of share price discount which a company can offer. The employer may fund all or a portion of the acquisition price through loans, and may contribute matching payments or award additional free shares. Employee contributions are often paid by way of payroll deductions.

#### Free share plan, RSP, PSP, DSP

**Discretionary/all-employee.** These can be offered to employees on a discretionary basis, and do not need to be offered to all employees on the same terms.

**Non-employee participation.** Non-employee directors and certain types of consultants can participate in a free share plan, RSP, PSP or DSP. However, the tax consequences to such participants in many cases differ in comparison to employees.

**Maximum value of shares.** There is generally no limit on the total value of shares that can be granted on a per employee or per company basis. However, a company listed on the TSX Venture Exchange is subject to maximum limits (see *Question 22*).

**Payment of shares and price.** Shares issued under these plans do not necessarily require cash payment; consideration can be in the form of the participants' services to the company.

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### 12. What are the tax/social security implications of the acquisition or purchase of shares?

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#### ESPP

Whether taxes or social security contributions are payable when shares are acquired depends in large part on the plan's design, including in particular whether the employee either:

- Is entitled to acquire the shares at a price that is below FMV.
- Receives some form of contribution from his employer in connection with the plan.

Generally speaking, such discounts and contributions are taxable and give rise to social security contribution obligations (subject to the annual contribution limits).

#### Free share plan, RSP, PSP, DSP

Shares acquired under these plans are generally taxable on receipt and give rise to social security contribution obligations (subject to the annual contribution limits), based on the FMV of the shares. Notably, such FMV may in some cases be less than the regular trading price of the shares, to the extent there are any trading restrictions applicable to the shares.

Where shares are issued directly to an employee and are subsequently forfeited during any applicable restriction period, the employee will generally not be eligible for a deduction against the amount included in his income at the time of receipt. However, a deduction may be available where the forfeited shares were held in trust and the issuing corporation re-acquires the shares from the trust.

In most cases, no employer deduction is available for shares issued to an employee or to a trust for the benefit of the employee.

#### Vesting

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### 13. Can the company award the shares subject to restrictions that are only removed when performance or time-based vesting conditions are met?

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#### ESPP

A company is generally free to impose restrictions under an ESPP that are only removed when stipulated conditions are met. However, this is uncommon.

#### Free share plan, RSP, PSP, DSP

It is market practice for shares to be granted subject to vesting conditions including a holding period and continued employment. Performance conditions can be imposed or the plan can be structured so that the number of shares to be received will depend on the achievement of performance objectives within a certain time.

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### 14. What are the tax and social security implications when the performance or time-based vesting conditions are met?

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#### ESPP

No taxes or social security contributions generally arise simply as a result of any applicable vesting conditions having been satisfied.

#### Free share plan, RSP, PSP, DSP

No taxes or social security contributions generally arise simply as a result of any applicable vesting conditions having been satisfied.

#### Sale

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### 15. What are the tax and social security implications when the shares are sold?

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#### ESPP

The amount of any employment benefit realised at the time shares are acquired is included in the cost base of the shares for capital gains/loss computation purposes. (See also *Question 9* in relation to computation of capital gains and losses.)

#### Free share plan, RSP, PSP, DSP

The position is the same as for ESPPs (see *above, ESPP*).

#### PHANTOM OR CASH-SETTLED SHARE PLANS

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### 16. What types of phantom or cash-settled share plan are operated in your jurisdiction?

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Under phantom share or cash-settled share plans, employees receive a notional interest in the shares of the subject company potentially entitling them to receive a cash payment in the future. Various types of awards can be offered under such plans, including:

- Share appreciation rights (SARs).
- Restricted share units (RSUs).
- Performance share units (PSUs).
- Deferred share units (DSUs).

#### SAR

A SAR entitles a participant to a payment in cash equal to the increase in the market value of a company's shares during a defined vesting period, measured from the award date.

As the SAR mirrors the appreciation of the company's actual shares during a defined vesting period, it can be offered in combination with option-like arrangements, allowing the participant to exercise the award and acquire the employer's shares rather than receive the appreciated value in cash.

Any type of company can offer this type of plan. Such plans are common among publicly-traded companies, and among closely-held companies looking to introduce incentive-based compensation without diluting control or introducing minority shareholders.

#### **RSU, PSU, DSU**

RSU, PSU and DSU plans generally entail the granting of a notional unit that is of equal value to a share in the company. Unlike shares, notional units do not provide voting rights, but can be structured to permit the crediting of additional units to participants as dividends are paid on the company's shares.

RSUs generally include time-based vesting and continued employment conditions. Where the vesting or number of units to be granted is subject to performance benchmarks (such as EBITDA or revenue), the term PSU is typically referred to. In a DSU typically payment or settlement is deferred until the death, termination or retirement of the participant.

Any type of company can offer these types of plans. Such plans are common among publicly-traded companies, and among closely-held companies looking to introduce incentive-based compensation without diluting control or introducing minority shareholders. DSUs allow a company to incorporate longer-term goals into their compensation programme and are popular as a means of compensating boards of directors. RSU, PSU and DSU plans are used as an alternative to traditional share incentive compensation mechanisms such as share options and SARs, and are in many cases viewed as a form of executive compensation that is more closely linked to performance.

#### **Grant**

#### **17. What rules apply to the grant of phantom or cash-settled awards?**

##### **SAR**

**Discretionary/all-employee.** SARs can be offered to employees on a discretionary basis, and do not need to be offered to all employees on the same terms.

**Non-employee participation.** Non-employee directors and certain types of consultants can participate. However, the tax consequences to such participants will often differ in comparison to employees.

**Maximum value of awards.** There is no maximum value.

##### **RSU, PSU, DSU**

**Discretionary/all-employee.** RSU, PSU and DSUs can be offered to employees on a discretionary basis, and do not need to be offered to all employees on the same terms.

**Non-employee participation.** Non-employee directors and certain types of consultants can participate. However, the associated tax consequences to these participants will often differ in comparison to employees.

**Maximum value of awards.** There is no maximum value.

#### **18. What are the tax/social security implications when the award is made?**

##### **SAR**

Generally speaking, there are no tax or social security contributions payable as a result of an SAR award, although the potential application of certain anti-avoidance rules under Canadian tax laws (salary deferral arrangement rules (SDA rules)) should be carefully considered.

##### **RSU, PSU, DSU**

Generally speaking, there are no tax or social security contributions payable as a result of an RSU, PSU or DSU award, although the potential application of SDA rules should be carefully considered.

##### **Vesting**

#### **19. Can phantom or cash-settled awards be made to vest only where performance or time-based vesting conditions are met?**

##### **SAR**

SARs can be structured to vest only when performance or time-based conditions are met.

##### **RSU, PSU, DSU**

RSU, PSU and DSU awards can be structured to vest only when performance or time-based conditions are met.

#### **20. What are the tax/social security implications when performance or time-based vesting conditions are met?**

##### **SAR**

In most cases, tax and social security contribution obligations are incurred when the right to payment under the SAR arises. These obligations do not typically arise on vesting in and of itself, subject to the application of the SDA rules.

##### **RSU, PSU, DSU**

In most cases, tax and social security contribution obligations are incurred when the right to payment under the RSU, PSU, or DSU arises. These obligations do not typically arise on vesting.

##### **Payment**

#### **21. What are the tax and social security implications when the phantom or cash-settled award is paid out?**

##### **SAR, RSU, PSU, DSU**

In relation to all types of awards, tax and social security contributions (subject to annual social security contribution limits) are generally payable in respect of the taxation year when entitlements are paid to the employee (to the extent not taxed previously, including by reason of the SDA rules). An employer deduction is generally available in respect of these amounts.

## CORPORATE GOVERNANCE GUIDELINES, MARKET OR OTHER GUIDELINES

### 22. Are there any corporate governance guidelines, market rules or other guidelines that apply to any of the above plans?

There are a number of different guidelines, rules and obligations that can apply to companies operating share plans in Canada. Public companies must abide by the rules pertaining to equity-based incentive plans of the public stock exchange on which they are listed. Rules relating to the timing of exercise and reporting of awards also apply in relation to insiders of companies. The rules of two of Canada's largest stock exchanges are discussed below.

#### Toronto Stock Exchange (TSX)

Companies listed on the TSX must meet its requirements regarding equity-based share incentive plans, including appropriate shareholder approvals, restrictions on the type of plan that can be implemented, disclosure about the plan and the reporting of any grants, cancellations, amendments and exercises.

With some exceptions, the TSX requires shareholder approval for the implementation of, and certain amendments to, any "security-based compensation arrangement". The latter is an arrangement involving the issuance or potential issuance from treasury of a TSX-listed company's securities, and such arrangements are subject to TSX review. TSX rules do not apply to compensation arrangements where securities are not issued from treasury, such as awards which can only be settled in cash, or where securities are purchased on the secondary market.

A plan must set a maximum, either as a fixed percentage of the outstanding securities of the company (in which case the plan must be re-approved by shareholders every three years) or a fixed number. Plans and any amendments must be filed with the TSX. The TSX also requires monthly reporting of any grants, exercises or cancellations under a plan.

The TSX does not regulate any of the following:

- Vesting conditions.
- Maximum term requirements.
- Terms relating to leavers.

#### TSX Venture Exchange (TSXV)

The TSXV rules apply to equity-based share incentive plans of companies listed on it (generally, early stage companies), and are more prescriptive than the TSX rules. TSXV rules require certain restrictions to be included in share plans. It is also advisable to engage in discussions with the TSXV when introducing less common types of plans, such as DSUs, in case their rules have changed.

Most TSXV-listed companies must grant options under a plan approved by shareholders and generally cannot grant individual awards. The plan must also be accepted by the TSXV. A plan can reserve up to a maximum of both:

- 10% of the issued shares of the company on a rolling basis.
- 20% of the issued shares as at the date of shareholder approval of the plan.

The TSXV rules require share option plans to include certain provisions, including:

- Limits on the number of options that can be reserved to any one person with lower limits for options granted to consultants and persons providing investor relations activities.
- A maximum term of ten years from the date of grant.

- A provision that options will expire within a reasonable period (generally 12 months) following the date an option holder leaves.

TSXV acceptance is required when a company institutes or amends a plan, and on a yearly basis for plans with a rolling maximum. A company must also file a report with the TSXV at the end of any month in which an option is granted or amended and has further disclosure requirements where the recipients of the option grant are directors or executive officers. The TSXV allows companies in some circumstances to grant options to purchase shares at a discount to the market price of between 15% and 25% depending on the closing share price and subject to other minimum limits and a four-month hold period. However, if options are granted at a discount, the tax/social security advantages associated with Capital Gains-Like Treatment may be lost (see *Question 8*).

## EMPLOYMENT LAW

### 23. Is consultation or agreement with, or notification to, employee representative bodies required before an employee share plan can be launched?

Subject to any agreement with an employee representative body, such as a trade union which represents participating employees, or a collective agreement requiring notification concerning changes to remuneration, no consultation or notification is required before an employee share plan is launched. In limited cases, applicable Canadian labour law may require the disclosure of proposed share plan implementations or changes in the course of collective bargaining.

### 24. Do participants in employee share plans have rights to compensation for loss of options or awards on termination of employment?

A number of Canadian cases have awarded terminated employees damages for the lost opportunity to buy shares under an option plan or other share-based incentive arrangement. Damages are often claimed for one or both of the:

- Value of awards which were not granted or received as a result of the termination of employment.
- Lost opportunities resulting from the allegedly improper forced exercise of options or denial of vesting.

Employee's counsel typically claim that certain unvested or lapsed options would have vested and that the participant would have benefited from an increase in the share price if not for the termination of employment. A plan's termination trigger is often a chief source of dispute, with the dismissed employee claiming that the trigger for any post-employment exercise period should not commence until the end of the lawful notice period. Each case will depend on the interpretation of the relevant plan rules and any related agreements.

Subject to contrary rules, employees who are terminated for cause or who resign before options vest have no claim for share option benefits or other incentive-related damages. There is further comfort in this regard from a recent court decision, *Levinsky v TD Bank*, which held that a vesting condition tied to continued employment (without reference to post-employment conduct) was enforceable. Employees also generally have no claim under Canadian employment law where the employer retains a discretion regarding whether or not to operate the plan and who will be granted options, provided such discretion is not exercised in an arbitrary or discriminatory manner. The key issue in this area is to have clearly drafted employment agreements and plan rules that are consistently enforced limiting employee claims.

## EXCHANGE CONTROL

### 25. How do exchange control regulations affect employees sending money from your jurisdiction to another to purchase shares under an employee share plan?

Canadian currency is not subject to any foreign exchange controls. However, there may be exchange control regulations in place in the destination jurisdiction.

### 26. Do exchange control regulations permit or require employees to repatriate proceeds derived from selling shares in another jurisdiction?

Canadian currency is not subject to any foreign exchange controls, however there could be exchange control regulations in place in the foreign jurisdiction.

## INTERNATIONALLY MOBILE EMPLOYEES

### 27. What is the tax position when an employee who is tax resident in your jurisdiction at the time of grant of a share option or award leaves your jurisdiction before any taxable event affecting the option or award takes place?

So long as they remain Canadian residents at the time of the taxable event, Canadian residents are taxable on share awards granted to them before they moved from Canada. Generally, employees who have been transferred to Canada will be taxed on share awards that were exercised or settled while they were Canadian residents.

Applicable tax treaties (if any) may affect the tax treatment of the option or award.

### 28. What is the tax position when an employee becomes tax resident in your jurisdiction while holding share options or awards granted abroad and a taxable event occurs?

If an option or other award is received as a result of employment in Canada and is subsequently exercised or settled when the recipient has become a non-resident, the benefit is nevertheless generally treated as being sourced to Canada.

If an employee received an award while a non-resident of Canada and employed outside Canada, and the award is exercised or settled while he is employed in Canada but not a Canadian resident, the benefit would generally not be taxable in Canada.

However, it should be noted that applicable tax treaties may materially affect the tax treatment described above.

## SECURITIES LAWS

### 29. What are the requirements under securities laws or regulations for the offer of and participation in an employee share plan?

Typical employee share plans can generally operate in reliance on statutory exemptions from the following requirements under securities laws in Canada:

- That a prospectus be prepared and filed with securities regulatory authorities in the applicable jurisdictions.

- That proper registration as a securities dealer be completed in the applicable jurisdictions to engage in the business of trading in securities.

If the requirements to qualify for a statutory exemption (see *Question 30*) are not met, an application must be made to the applicable securities regulators for an exemption order waiving the prospectus and registration requirements in the jurisdictions in which participants are resident. The time required for resolution of an application varies depending on the issue, and filing fees vary by jurisdiction.

Additional minor filing and fee requirements may apply depending on the Canadian jurisdiction in which trades take place. Companies are not required to provide any prescribed information to a participant in an employee share plan if the prospectus exemption is relied on.

### 30. Are there any exemptions from securities laws or regulations for employee share plans? If so, what are the conditions for the exemption(s) to apply?

Exemptions from the prospectus and registration requirements are generally available for the grant of share options or similar equity-based incentives and the issuance of the underlying shares.

The main exemption from the prospectus requirement is available when a company offers its securities to employees, executive officers, directors or consultants of the company issuer or a related entity and participation in the offering is voluntary. Accordingly, this exemption is not available when the securities being offered are units of a separate shareholding vehicle that is not controlled by or under common control with the company.

The main exemption from the dealer registration requirement is available when both of the following conditions are met:

- The trade is made according to a plan or programme providing for the acquisition of securities of the issuer by employees, executive officers, directors or consultants of the issuer or a related entity.
- The securities are distributed by the issuer, a related entity, a controlling shareholder or a plan administrator.

Securities acquired by employees, executive officers, directors or consultants in reliance on the above exemptions are restricted securities and the resale of such securities is subject to the prospectus requirements unless certain conditions are met. In general, securities of publicly traded companies that have been "reporting issuers" in a Canadian jurisdiction for more than four months are generally freely tradeable, except as may be limited by the provisions of the company's plan or the related grant agreements. Securities of companies that are not "reporting issuers" in Canada can also be traded without triggering the prospectus requirement if the following conditions are met:

- Residents of Canada do not own more than 10% of the outstanding securities of a class or series.
- Residents of Canada do not represent more than 10% of the total number of owners of such class or series.
- The securities are sold on a foreign stock market or to persons outside of Canada.

## OTHER REGULATORY CONSENTS OR FILINGS

### 31. Are there any other regulatory consents and filing requirements and/or other administrative obligations for an offer of and participation in an employee share plan?

Companies listed on the TSX or TSXV must pre-clear or receive the approval of the exchange to offer employee share plans, and file

regular reports relating to activity under the plan (see *Question 22*). The continuous disclosure obligations applicable to listed companies require annual disclosure of the terms of any security based compensation arrangements and any amendments. Additional disclosure is generally required with respect to total compensation paid to the chief executive officer (CEO), chief financial officer (CFO) and three other highest paid executive officers, and insiders of public companies must also report in relation to awards under option or share-based plans.

### 32. Are there any data protection requirements or obligations for an offer of and participation in an employee share plan?

Canadian privacy and data protection laws may apply to certain information which is collected, used, disclosed and stored in conjunction with the operation of an employee share plan. While the applicable legal regime varies among the Canadian provinces and in the federal sphere, certain employees are subject to the protections of the Personal Information Protection and Electronic Documents Act (PIPEDA). For those who are subject to PIPEDA, consent may be required to collect, use or disclose personal information, which includes information about an identifiable individual but does not include the name, title, business address or telephone number of an employee of an organisation. There are numerous exceptions to PIPEDA, and in certain provinces there is limited or no comparable legislation. The practice among organisations operating share plans in Canada is to generally ensure that a personal information policy has been adopted which is clear, understandable, and readily available. In addition, plan participants are typically required to consent to the collection, use and disclosure of their personal information. Any such consent is usually subject to the condition that the information only be used and disclosed for the purposes of operating the plan or managing the employment relationship.

## FORMALITIES

### 33. What are the applicable legal formalities?

#### Translation requirements

Documents are typically made available in English and, in the case of plans that are offered to Québec-based participants, French. Applicable law in the province of Québec, including the Charter of the French Language, requires that plan documents be available in the French language.

#### E-mail or online agreements

Applicable Canadian legislation allows for individuals to enter into binding agreements electronically. There are Canadian federal regulations which distinguish between electronic signatures and ones which are created through an authenticated and secure procedure. In circumstances where a company operating a share plan might be concerned about being able to prove the validity of an electronic signature in court, the use of a secure electronic signature is recommended.

#### Witnesses/notarisation requirements

There is no legal obligation in Canada to obtain notarised or witnessed copies of agreements signed as a part of operating an employee share plan. In practice, the use of notarised documents is very rare. For certain agreements, such as a legal release, the documents are often witnessed to establish that the individual signed the agreement by consent. The use of a witness also assists if the identity of the signatory is later disputed.

#### Employee consent

There may be issues under Canadian employment laws if the terms of a share plan are significantly changed. However, provided the actions taken are more administrative in nature, the risk of employment claims is relatively low. The ability to make deductions from employee wages or salary is significantly restricted by Canadian employment standards legislation. As a general rule, employers cannot make deductions from wages unless expressly authorised to do so. Relevant instances of authorised deductions include provisions of applicable statutes, such as tax or social security legislation. Employers are also permitted to make other deductions from wages or salary provided the employee has signed an express written consent to the relevant deductions. Any such consent needs to specify the amount and nature of the deduction.

## DEVELOPMENTS AND REFORM

### 34. Are there any current trends, developments and reform proposals that have or will affect the operation of employee share plans?

#### Trends and developments

The trend of decreased use of share option plans for directors in favour of the use of DSPs and DSUs as a means of compensating boards of directors continues, as such plans are generally viewed more favourably by investor groups than share option plans.

#### Reform proposals

There are currently no significant reform proposals.

## ONLINE RESOURCES

### Canadian Stock Market

W [www.tmx.com](http://www.tmx.com)

This is the website of TMX Group, an integrated, multi-asset class exchange group. Includes the Toronto Stock Exchange Company Manual and the TSX Venture Exchange Corporate Finance Manual. English and French versions are equally authoritative.

### Canadian Legal Information Institute (CanLII)

W [www.canlii.org](http://www.canlii.org)

This is the website of Canadian Legal Information Institute, a non-profit organisation managed by the Federation of Law Societies of Canada. This website provides access to court judgments, tribunal decisions, statutes and regulations from all Canadian jurisdictions, including the Securities Act of each province and territory in Canada. English and French versions are equally authoritative.

## Practical Law Contributor details



### Todd Miller

McMillan LLP  
**T** +1 416 865 7058  
**F** +1 416 865 7048  
**E** todd.miller@mcmillan.ca  
**W** www.mcmillan.ca

**Qualified.** Ontario, Canada, 1995

**Areas of practice.** Income tax; corporate/commercial.

#### Recent transactions

- Regular adviser to numerous US and European multinationals in connection with the design and implementation of employee stock and deferred compensation programmes.
- Tax counsel on numerous domestic M&A transactions and cross-border financing and repatriation projects.



### George Waggott

McMillan LLP  
**T** +1 416 307 4221  
**F** +1 416 865 7048  
**E** george.waggott@mcmillan.ca  
**W** www.mcmillan.ca

**Qualified.** British Columbia, Canada; Ontario, Canada, 1996; England and Wales, 2001

**Areas of practice.** Employment and labour relations law, including executive compensation.

#### Recent transactions

- Counsel to numerous employers on employment and labour relations matters arising across Canada. This includes advice on executive compensation, employment agreements, and employee share plans.
- Counsel to one of the world's largest listed companies defending a substantial share options claim filed by a former senior executive.



### Cindy Wan

McMillan LLP  
**T** +1 416 865 7190  
**F** +1 416 865 7048  
**E** cindy.wan@mcmillan.ca  
**W** www.mcmillan.ca

**Qualified.** Ontario, Canada, 2001

**Areas of practice.** Securities and corporate law, including executive compensation, investment funds and private placements.

#### Recent transactions

- Canadian adviser to European and American law firms and multinational and Canadian companies in the implementation of employee incentive programmes.
- Obtaining discretionary exemptive relief from securities commissions in Canada in respect of French employee stock programmes featuring third-party shareholding vehicles (FCPEs) and leverage through third party financing.



### Stephen D Wortley

McMillan LLP  
**T** +1 604 691 7457  
**F** +1 604 685 7084  
**E** stephen.wortley@mcmillan.ca  
**W** www.mcmillan.ca

**Qualified.** British Columbia, Canada, 1985

**Areas of practice.** Mergers and acquisitions; capital markets; going private transactions; IPOs and alternative IPOs; corporate governance; stock exchange listings; takeover bids; foreign investment review.

**Recent transactions.** Advisor to a number of listed companies in connection with the implementation of employee incentive programmes, including for companies domiciled outside of Canada.