

ASC NOTICE 7

DISTRIBUTION OF SECURITIES OUTSIDE ALBERTA

1. INTRODUCTION

1.1 The Alberta Securities Commission (the “Commission”) has received enquiries from the public relating to the procedures to be effected by issuers incorporated or continued under the laws of Alberta or whose head office is situated in Alberta (Alberta issuers) where a distribution of securities of an Alberta issuer is proposed to be made to investors who are not residents of Alberta. The Commission wishes to

1.1.1 clarify its position regarding these distributions and at the same time ensure that the fine balance between non-interference, by the Commission, of the capital marketplace in relation to financings outside of Alberta and integrity of the Alberta capital markets is maintained, and

1.1.2 outline the requirements that should be satisfied by Alberta issuers before a distribution of securities is made to investors outside of Alberta.

2. PROVISIONS OF THE SECURITIES ACT

2.1 The Commission takes a fairly broad interpretation of the definition of “trade” and “distribution” as set forth in the Alberta Securities Act (the “Act”). The basic prospectus requirement of the Act is contained in section 81(1) of the Act as follows:

“No person or company shall trade in a security on his own account or on behalf of any other person or company if the trade would be a distribution of the security unless

- a) a preliminary prospectus has been filed and Registrar has issued a receipt for it, and
- b) a prospectus has been filed and Registrar has issued a receipt for it”

2.2 The word “trade” is defined in section 1(x) of the Act and includes, in subclauses (i) and (v), the following:

“1(x)(i) any sale or disposition of a security for valuable consideration, whether the terms of payment are on margin, instalment or otherwise but does not include

- A) a purchase of a security, or
- B) except as provided in subclause (iv), a transfer, pledge or encumbrance of securities for the purpose of giving collateral for a bona fide debt;

1(x)(v) any act, advertisement, solicitation, conduct or negotiation made directly or indirectly in furtherance of anything referred to in subclauses (i) to (iv);”

2.3 The word “distribution”, when used in relation to trading in securities, is defined in section 1(f) of the Act and, in subclauses (i) and (iii), means the following:

“1(f)(i) a trade in securities of an issuer that have not been previously issued,

1(f)(iii) a trade in previously issued securities of an issuer from the holdings of any person, company or combination of persons or companies holding a sufficient number of any securities of that issuer to affect materially the control of that issuer, but any holding of any person, company or combination of persons or companies holding more than 20% of the outstanding voting securities of an issuer shall, in the absence of evidence to the contrary, be deemed to affect materially the control of that issuer,”

2.4 The word “underwriter” is defined in section 1(y) of the Act and means, in subclauses (i) and (ii), the following:

“1(y) underwriter” means a person or company that

- (i) as principal, agrees to purchase securities with a view to distribution or
- (ii) as agent, offers for sale or sells securities in connection with a distribution,

and includes a person or company that has a direct or indirect participation in the distribution,”

2.5 A “distribution” thus includes a sale by an issuer of its previously unissued securities to a purchaser, whether or not such purchaser is an underwriter acting as purchaser is exempt from the prospectus requirements of the Act by section 107(1)(u.1), the sale by the underwriter of such securities constitutes a distribution pursuant to section 111(1) of Act.

3. **STATEMENT OF PRINCIPAL**

- 3.1 In light of the provisions of the Act outlined in item 2, including the broad definition of “trade”, and depending on the connecting factors with Alberta, a distribution of securities outside Alberta by Alberta
- 3.2 However, where a distribution of securities effected outside of Alberta by Alberta issuers and where reasonable steps are taken by the issuer, underwriter and other participants effecting such distribution to ensure that such securities come to rest outside of Alberta, the Commission takes the position that a prospectus is not required under the Act and an exemption from the prospectus requirements is not necessary. Reasonable precautions and restrictions should be implemented by the issuer, underwriters and other participants in the distribution to ensure that the securities are not distributed or redistributed into Alberta or to Alberta residents and that such securities come to rest outside Alberta. Such precautions and restrictions should be designed to ensure that the entire distribution process results in the securities being held by or for the benefit of non-residents, as opposed to intermediaries in the distribution chain holding securities for resale to Alberta residents.

4. **OPERATION OF THE PRINCIPAL**

- 4.1 Every issuer that is an Alberta issuer, that proposes to make a distribution of securities outside of Alberta to persons or companies that are not Alberta residents and where the securities come to rest outside of Alberta, shall not be required to file a prospectus with the Commission provided that the Alberta issuer or the issuer’s dealer implements adequate precautions or restrictions in connection with the distribution to ensure that the securities do not come to rest in Alberta. These precautions or restrictions may include, but are not limited to, the following:
- 4.1.1 a restriction in the underwriting agreement against the underwriters selling the securities to any Alberta resident;
- 4.1.2 a restriction in the banking group or selling group agreements against the banking group members or selling group members selling the securities to Alberta residents;
- 4.1.3 an “all-sold” certificate by the underwriters, addressed to the Commission, that they have not, to the best of their knowledge, sold any securities to Alberta residents;
- 4.1.4 a statement provided in the confirmation slip sent by underwriters to purchasers of the offered securities that it is the underwriters’ understanding that the purchaser is not a resident of Alberta; or

- 4.1.5 a provision in the transfer agency agreement between the transfer agent and the issuer requiring the transfer agent not to register securities in the name of any Alberta resident for a period of time (e.g. 90 days) from the date of closing.
- 4.2 In Eurobond or Eurodollar financings sufficient precaution will generally have been taken where
 - 4.2.1 the offering documents contain a legend stating that the securities are not qualified for sale in Alberta and may not be offered or sold directly or indirectly in Alberta;
 - 4.2.2 the underwriter contractually agree that they will observe the restriction in item 4.2.1 regarding the prohibition of the offering in Alberta; and
 - 4.2.3 the securities to be distributed are initially issued in temporary form and are not exchangeable for definitive securities 90 days after completion of the offering and are beneficially owned by Alberta residents.
- 4.3 In other cases other factors may be relevant. Including the class and nature of the securities being distributed, the attractiveness to Alberta investors of such securities, the likelihood that, absent such restrictions or precautions, the securities would come to rest in Alberta whether a market for the class of securities being distributed or any other securities of the same class already exists in Alberta, the likelihood of the development in the future of a market in Alberta for the securities being distributed, the way in which the distribution is proposed to be effected, the relationship between the capital markets of Alberta and the jurisdictions in which the securities are being distributed and the ease of access of one to the other, whether or not the underwriters and other participants in the distribution are, or are affiliated with, investment dealers that conduct substantial activities in Alberta and the presence of the issuer in Alberta (whether through the conduct of business in Alberta, a number of shareholders resident in Alberta, the issuer being closely followed by Alberta investors or otherwise).
- 4.4 In cases of exempt distribution outside of Alberta where hold periods would have been applicable if the distribution had taken place in Alberta, the Commission takes the view that the restrictions made or precautions taken to ensure that the securities come to rest outside of Alberta need not be effective beyond the time for the hold period which would have applied had the distribution been made in Alberta.
- 4.5 An Alberta issuer may make an application pursuant to section 116 of the Act to obtain clarification from the Commission as to whether the restrictions or precautions to be implemented under the proposed distribution are adequate.

- 4.6 The onus is on the issuer, underwriters and other participants in the distribution to determine the number and nature of the restrictions to be implemented and precautions to be taken.

5. ALBERTA REGISTRANTS

- 5.1 Each Alberta registrant has the duty to take reasonable steps to ensure that trades in securities effected by or through such registrant do not involve trades of securities into Alberta or to Alberta residents without compliance with the prospectus requirements of the Act or in reliance on an exemption therefrom. More particularly, a registrant who sells, on behalf of one of his clients, securities in Alberta or who purchases securities outside Alberta must take reasonable steps to ensure that the transaction does not involve the distribution of securities not qualified in Alberta coming to rest in Alberta or with Alberta residents.
- 5.2 All Alberta registrants should establish standard procedures to prevent unlawful distributions of securities into Alberta and to ensure that the registrant meets its continuing responsibility to know both its clients and the securities being sold by or to its clients.

6. THE INTEGRITY OF THE ALBERTA CAPITAL MARKETS AND THE JURISDICTION OF THE ALBERTA SECURITIES COMMISSION

- 6.1 The Commission will not hesitate to intervene, to the extent of its powers, in distributions of securities outside of Alberta which negatively impact upon the integrity of Alberta capital markets.
- 6.2 Where the Commission becomes aware of distribution outside of Alberta by Alberta issuers that bring the reputation of Alberta's capital markets into disrepute, the Commission is of the view that it has the jurisdiction, for the due administration of the Act and in order to preserve the integrity of the Alberta capital markets, to exercise its cease trade powers or to take other appropriate action against issuers, underwriters and other participants so distributing securities outside Alberta.

Effective date: March 15, 1987

#2833793 v1