

# 2011 BCSECCOM 562

November 30, 2011

## **Headnote**

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions – Securities Act*, R.S.B.C. 1996, c. 418, section 76 – Other - Exemption from prospectus requirement for situations other than a corporate acquisition or reorganization; distributions to business associates; debt settlements; or distributions involving employee investment plans and consultants - Prospectus relief for distributions of debt securities that are analogous to debt securities of or guaranteed by any municipal corporation in Canada, or debt securities secured by or payable out of rates or taxes levied under the law of a jurisdiction of Canada on property in the jurisdiction or on certain other revenues - The filer's structure and obligations are analogous to a municipal finance authority and other municipal corporations in British Columbia; the filer's borrowing program provides comparable protections and rights for debt securityholders to those found in municipal borrowing programs; the filer will only issue debt securities; the filer will provide prospective purchasers of debt securities with a comprehensive disclosure document

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 61 and 76

In the Matter of  
the Securities Legislation of  
British Columbia and Ontario (the Jurisdictions)

and

In the Matter of  
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of  
First Nations Finance Authority  
(the Filer)

Decision

## **Background**

- ¶ 1 The securities regulatory authority or regulator in each of the Jurisdictions (Decision Maker) has received an application from the Filer for a decision under

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the securities legislation of the Jurisdictions (the Legislation) that the prospectus requirements of the Legislation do not apply to distributions of debt securities of the Filer (the Exemption Sought).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

- (a) the British Columbia Securities Commission is the principal regulator for this application;
- (b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in Alberta, Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon Territory, Northwest Territories and Nunavut Territory; and
- (c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

### **Interpretation**

- ¶ 2 Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

### **Representations**

- ¶ 3 This decision is based on the following facts represented by the Filer:
1. the Government of Canada introduced the *First Nations Fiscal and Statistical Management Act* (the Federal Act) in order to promote the inherent right of self-government for aboriginals;
  2. the Federal Act provides First Nations with access to capital markets available to other governments, strengthens the real property tax systems of First Nations, and provides greater representation for taxpayers by providing assistance to those First Nations that choose to exercise real property taxation jurisdiction on reserve lands;
  3. the Federal Act came into force on April 1, 2006;
  4. the Filer was established as a statutory corporation when the Federal Act came into force;

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5. in accordance with paragraph 74 (b) and section 142 of the Federal Act, the government of Canada made the Financing Secured by Other Revenues Regulations, which came into force on September 29, 2011 (the Regulation);
6. the Filer does not have any share capital, nor is it considered a “reporting issuer” (as defined in the Legislation) in any of the Jurisdictions;
7. from time to time, the Filer will issue debt "securities" as defined in Section 57 of the Federal Act (the Securities) to promote economic and social development through the application of real property tax revenues and other enumerated forms of revenue as provided for in the Federal Act and the Regulation to support borrowing on capital markets for the development of public infrastructure and other purposes set out in the Regulation that is otherwise available to other governmental bodies in Canada;
8. the Federal Act and the Regulation establish a structure for First Nation borrowing from the Filer where: (i) property taxes; and/or (ii) certain classes of other revenue described in the Regulation, including, certain tax revenues and fees imposed by a First Nation, royalties payable to a First Nation with respect to land and oil and gas, revenues from leases and other instruments authorizing the use of reserve land, revenues payable under contract to a First Nation, transfer payments received from a government in Canada, and certain interest earned on deposits, investments, or loans (Other Revenues), will be used to repay incurred debt; the structure is modeled on, and is substantially similar to, the British Columbia municipal model, as operated by the Municipal Finance Authority of British Columbia under the Municipal Finance Authority Act (British Columbia);
9. independent regulatory functions are provided by the First Nations Financial Management Board (the FMB), and additionally, in the case of First Nations supporting their borrowing with property tax revenues (Property Tax Borrowers), the First Nations Tax Commission (the FNTC); the FMB, and the FNTC with respect to property tax, fulfill a role substantially similar to the role of the Inspector of Municipalities under the Local Government Act (British Columbia) in respect of the regulation of municipalities in British Columbia; in order to become a Borrowing Member, the FMB must approve the financial management laws of such First Nations and certify under section 50(3) of the Federal Act that the financial performance and financial management systems of the First Nation are in compliance with practices and standards established by the FMB under subsection 55(1) of the Federal Act; the Federal Act also provides the FMB with the power to intervene in exceptional circumstances by way of co-management or third-party management arrangements;

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10. under the Federal Act and the Regulation:

- (a) in the case of Property Tax Borrowers the FNTC must approve: (i) First Nation property tax revenue laws before they are enacted; and (ii) borrowing laws of the First Nation authorizing borrowing by the First Nation from the Filer; and
- (b) the Filer shall not make a long-term loan to a borrowing member unless:
  - (i) in the case of Property Tax Borrowers, the FNTC has approved the borrowing laws of the borrowing member and the loan is to be paid out of the property tax revenues of the borrowing member in priority to other creditors of the borrowing member; or (ii) in the case of a First Nation supporting its borrowing with Other Revenues, such borrowing member is in compliance with section 79 of the Federal Act, as amended by section 17 of the Regulation and has directed payees, who are required to make payments comprising Other Revenues to it, to make such payments into a secured revenues trust account, which will be maintained by an independent third party trustee, which will deliver any funds then due and payable by such First Nations to the Filer, in priority to releasing such funds to the applicable First Nation;

11. under the Federal Act and Regulations, a First Nation applies to the Filer to become a borrowing member; the Filer only accepts the First Nation as a borrowing member if the FMB has issued a certificate to the First Nation under section 50(3) of the Federal Act; before a certificate is issued, the FMB may review the First Nation's financial management system or financial performance for compliance with standards established by the FMB under section 55 of the Federal Act and the regulations made under the Federal Act;

12. under the Federal Act and the Regulation, the Filer must establish:

- (a) a sinking fund to fulfill its repayment obligations to the holders of each Security issued by the Filer;
- (b) two separate debt reserve funds, one for each of the Property Tax derived funds and the Other Revenues derived funds to make payments or sinking fund contributions for which insufficient moneys are available from borrowing members; and
- (c) a Credit Enhancement Fund for the enhancement of the Filer's credit rating, which may also be used to temporally offset any shortfalls in the debt reserve funds;

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13. the Filer will engage a rating agency to conduct a formal credit rating for the Filer prior to its first issuance of Securities under this order;
14. the Filer will provide a bond circular to each prospective purchaser of Securities before that purchaser's first purchase of Securities that sets out:
  - (a) the terms and conditions of the Securities;
  - (b) the use of proceeds;
  - (c) a summary description of the Filer and its business;
  - (d) risk factors applicable to an investment in the Securities;
  - (e) the procedure to be followed to subscribe for Securities;
  - (f) the tax consequences of an investment in the Securities by a Canadian purchaser resident in Canada; and
  - (g) the most recent annual and interim financial statements for the Filer;
15. on August 19, 2008, the securities regulatory authority or regulator in each jurisdiction of Canada granted the Filer an order exempting the Filer from the prospectus requirements of the legislation (Previous Order); and
16. upon the making of this order, the Filer will no longer rely on the Previous Order.

### **Decision**

- ¶ 4 Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted, provided that this decision will terminate five years after the date of this decision.

Martin Eady, CA  
Director, Corporate Finance  
British Columbia Securities Commission