



BC Interpretation Note 72-702

Distribution of Securities to Persons Outside British Columbia

This BC Interpretation Note provides guidance regarding the application of the *Securities Act* where an issuer distributes securities to a person outside the province.

A distribution of securities by an issuer with connections to British Columbia may, depending on the facts and circumstances surrounding the transaction, be subject to the *Securities Act* even if the initial purchaser is not located in British Columbia. There are two primary circumstances where an issuer must comply with the requirements of the *Securities Act* in making a distribution to a person outside the province. These are:

1. A Distribution from the Province - Where an issuer distributes securities from British Columbia, it must comply with the registration and prospectus requirements of the *Securities Act* or rely on exemptions from those requirements; and
2. An Indirect Distribution into the Province - Where an issuer located outside British Columbia distributes securities to a person outside the province and the securities are resold into British Columbia, or through a market in British Columbia, in a manner that indicates the securities did not come to rest outside the province, the resale will be considered a continuation of the distribution by the issuer. In these circumstances, the issuer must comply with the registration and prospectus requirements of the *Securities Act* or rely on exemptions from those requirements.

Where a distribution is made under a prospectus exemption, any subsequent trade of those securities in British Columbia will be deemed a distribution unless the resale requirements in National Instrument 45-102 *Resale of Securities*, including hold periods, are complied with.

As noted in section 1.3 of the Companion Policy to National Instrument 45-106 *Prospectus and Registration Exemptions*, a distribution may occur in more than one jurisdiction. In that case, the issuer must satisfy itself that it complies with the applicable laws of each relevant jurisdiction.

Distribution From British Columbia

The onus is on an issuer and its counsel to determine whether a distribution of securities to a person outside British Columbia is made from the province, based on the facts and circumstances of each particular transaction. The existence of any of the following factors would generally indicate that the distribution is made from British Columbia:

- (i) the issuer's mind and management is primarily located within British Columbia. This may be indicated if, for example, the issuer's head office or the residences of the issuer's key officers and directors are located in the province;
- (ii) the business of the issuer is administered from, and the operations of the issuer are conducted in, British Columbia; or
- (iii) acts, advertisements, solicitations, conduct or negotiations in furtherance of the distribution take place in British Columbia (including any underwriting or investor relations activities).

With respect to the third factor above, the Commission does not consider that every act that is related to or incidental to a distribution is in furtherance of the distribution. For example, the Commission would not consider that the presence of a single director in British Columbia participating in a conference call about a distribution nor the presence of the issuer's counsel or transfer agent in British Columbia to be sufficient in themselves to make the distribution a distribution from British Columbia. However, active advertising or solicitations being conducted from British Columbia would be sufficient for the Commission to consider that the distribution was occurring in British Columbia.

The above examples are indicative of the types of factors that an issuer should consider in determining whether it is making a distribution from British Columbia. However, they should not be viewed as an exhaustive list.

Where an issuer makes a distribution from the province, it may rely on the general registration and prospectus exemptions in the *Securities Act* and *Securities Rules*. In certain circumstances, an issuer may also rely on special exemptions provided under BCI 72-503 and BCI 72-504.

Securities distributed from British Columbia may be resold outside British Columbia during the hold period. However, if a holder resells the securities to a person in the province or through a market in the province before the expiry of any applicable hold period, the sale would be a distribution and a prospectus would be required, unless another exemption was available.

Indirect Distribution Into British Columbia

The definition of "distribution" in the *Securities Act* includes "a transaction or series of transactions involving further purchases and sales in the course of or incidental to a distribution." The term "distribution" can include both a direct single-step transaction and, depending on the circumstances, an indirect or multi-step transaction. An indirect distribution into British Columbia may occur, for example, where an issuer distributes securities from outside of the province to a person outside the province and shortly

thereafter that person, directly or indirectly, resells the securities into the province or through a market in the province. In that case, the distribution would not be completed when the person acquired the securities but would continue until the purchaser resold the securities into British Columbia. If the issuer knows or could reasonably foresee that the securities will be resold in British Columbia, the issuer would likely be considered to have made a distribution in the province, requiring compliance with the registration and prospectus requirements of the *Securities Act*.

Where an issuer makes a distribution that would not be considered to be made from British Columbia, but the issuer has a significant connection with the province or its capital markets, it may be prudent for the issuer to take precautions to ensure that any distribution it makes to a person outside the province is not subsequently resold into or through a market in the province in a manner that would be considered a distribution by the issuer.

There are a number of factors that should be considered in determining whether an issuer not located in British Columbia has a significant connection with the province or its capital markets. These include:

- the majority of trading in the issuer's securities is in British Columbia;
- the issuer is a reporting issuer in British Columbia;
- a significant portion of the issuer's assets are located in British Columbia;
- a significant portion of the issuer's revenues are derived from operations in British Columbia;
- a significant portion of the issuer's security holders are in British Columbia; and
- the issuer is incorporated or organized in British Columbia.

Depending on the factors that are present, the issuer, underwriter and other participants undertaking the distribution may be well advised to take steps to ensure that the securities remain outside British Columbia for the period during which a domestic purchaser would be required to hold the security. These steps will, in the absence of evidence to the contrary, protect the issuer from a subsequent determination that it distributed in British Columbia.

The steps and precautions that should be taken in connection with the distribution of securities to purchasers outside British Columbia to ensure that the securities remain outside of British Columbia will vary with the circumstances surrounding each distribution. Where the issuer's mind and management is located outside British Columbia and the offering is being made solely in another jurisdiction, such as another province of Canada or the United States, that has comparable disclosure requirements for public offerings and equivalent or longer hold periods for private placements applicable to the offering, these additional steps may not need to be taken. Section 153 of the *Securities Rules* requires that an investment fund that is a reporting issuer file with the Commission any documents filed with a securities regulator outside British Columbia or

with an exchange wherever situate where it contains information that is not already filed with the Commission and is material to investors. Section 11.1 of National Instrument 51-102 *Continuous Disclosure Obligations* requires a reporting issuer to file a copy of any disclosure material that it sends to its securityholders; in the case of an SEC issuer, any information filed with the SEC that is not already filed in a jurisdiction; and any disclosure material that it files with another provincial or territorial securities regulatory authority or regulator. This would include an offering document filed with another securities regulatory authority in Canada or with the Securities and Exchange Commission or state regulators in the United States.

Where the purchaser is resident in a jurisdiction without comparable disclosure and hold period requirements, some or all of the following steps or precautions might be advisable:

- (i) a restriction in the underwriting agreement against the underwriters selling the securities being offered to any British Columbia resident;
- (ii) a similar restriction in the banking group or selling group agreements requiring banking group members or selling group members not to offer securities to British Columbia residents;
- (iii) a clear and prominent statement on the front page of any record concerning the distribution provided to the purchaser stating that the offered securities are not qualified for sale in British Columbia and may not be offered and sold in British Columbia, directly or indirectly, on behalf of the issuer;
- (iv) a restriction in the subscription agreement against any of the offered securities being acquired by a British Columbia resident or by any person for subsequent resale, during the applicable hold period, to a British Columbia resident;
- (v) an "all sold" certificate by the underwriters that they have not, to the best of their knowledge, sold any securities to British Columbia residents;
- (vi) a statement provided in the confirmation slip sent by the underwriters to purchasers of the offered securities that it is the underwriters' understanding that the purchaser is not a resident of British Columbia;
- (vii) 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 British Columbia resident for the period during which a domestic purchaser would be required to hold the security; or
- (viii) a legend on the certificate representing the security stating that the security may not be traded in British Columbia until the expiry of the period during which a domestic

purchaser would be required to hold the security, except as permitted by the *Securities Act* and Regulations made under the *Securities Act*.

This interpretation note is effective September 28, 2009.

September 25, 2009

Sandra Jakab
Acting Executive Director

Ref: BCI 72-503 and BCI 72-504
Securities Act, ss. 34, 48, 61 and 76
Securities Rules, s. 153
Section 11.2 NI 51-102

This Notice may refer to other documents. These documents can be found at the B.C. Securities Commission public website at www.bcsc.bc.ca in the section Securities Law and Policy: Policies & Instruments.