

# 2009 BCSECCOM 175

February 23, 2009

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications - *Securities Act*, s. 88 – cease to be a reporting issuer in BC - The issuer's securities are traded only on a market or exchange outside of Canada - Canadian residents own less than 2% of the issuer's securities and represent less than 2% of the issuer's total number of security holders; the issuer does not intend to do a public offering of its securities to Canadian residents, will not be a reporting issuer in a Canadian jurisdiction, is subject to the reporting requirements of UK securities laws, and all shareholders receive the same disclosure

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, s. 88

In the Matter of  
the Securities Legislation of  
British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Quebec  
(the Jurisdictions)

and

In the Matter of  
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of  
British Airways PLC  
(the Filer)

## **MRRS Decision Document**

## **Background**

The local securities regulatory authority or regulator (the Decision Maker) in the Jurisdictions has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the Legislation) that the Applicant be deemed to have ceased to be a reporting issuer in the Jurisdictions (the Requested Relief);

Under the Mutual Reliance Review System for Exemptive Relief Applications:

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- (a) the Ontario Securities Commission is the principal regulator for this application; and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

### **Interpretation**

Defined terms contained in the National Instrument 14-101 Definitions have the same meaning in this decision unless they are defined in this decision.

### **Representations**

This decision is based on the following facts represented by the Filer:

1. The Filer is a corporation incorporated under the laws of England and Wales (the UK).
2. The Filer's Shares (as defined below) are currently listed and posted for trading on the London Stock Exchange (LSE) and there are no securities of the Filer listed or posted for trading on any stock exchange or market in Canada.
3. The Filer is a reporting issuer in each of the Jurisdictions and is not in default of its obligations as a reporting issuer in any of the Jurisdictions, other than, prior to September 4, 2007, its obligation to file the interim certificates required under Multilateral Instrument 52-109 *Certification of Disclosure In Issuers' Annual and Interim Filings*.
4. The Filer became a reporting issuer under the Legislation on February 11, 1987 after it received a receipt for a final prospectus in respect of the initial public offering of its American Depositary Shares (ADS), each representing ten ordinary shares (Shares) of the Filer held by a depositary, Citibank N.A. (the Depositary), and thereafter listed its ADS, as evidenced by American Depositary Receipts, on the Toronto Stock Exchange (the TSX). The Filer was voluntarily delisted from the TSX in December 2001. The principal reason for delisting the ADS was that few of the Filer's ADS were traded on the TSX in the year prior to delisting.
5. The Filer's ADS distributed to residents of Canada under a prospectus are not subject to any resale restrictions in a jurisdiction in Canada. Any Shares issued upon the conversion of ADS are not subject to resale restrictions in a jurisdiction in Canada, provided that the trade is not a control distribution and the Filer is a reporting issuer at the time of the resale.

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6. Immediately after the Filer is not a reporting issuer in the Jurisdictions, the Filer's ADS will not be subject to any resale restrictions in a jurisdiction in Canada. Immediately after the Filer is not a reporting issuer in the Jurisdictions, the Filer's Shares, including any Shares issued upon the conversion of ADS, will not be subject to any resale restrictions in a jurisdiction in Canada, provided that the trade is made in accordance with s. 2.14(1) of National Instrument 45-102 – *Resale of Securities*. Canadian residents may trade the Filer's Shares on the LSE through Canadian investment dealers (or their affiliates) that are members of the LSE and are registered or authorised by the Financial Services Authority of the UK.
7. Prior to September 4, 2007, the Filer was registered with the U.S. Securities and Exchange Commission (the SEC) by virtue of having its ADS registered under Section 12 of the U.S. *Securities Exchange Act of 1934* (the 1934 Act). Accordingly, the Filer was, prior to September 4, 2007, an SEC foreign issuer pursuant to National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* (NI 71-102). The Filer voluntarily deregistered under the 1934 Act by filing a Form 15F on June 5, 2007, which permits certain non-US issuers to terminate, provided there is no objection by the SEC thereto, their 1934 Act registration and reporting requirements. Accordingly, from and after September 4, 2007, the Filer is a "designated foreign issuer" under NI 71-102.
8. As an SEC foreign issuer the Filer filed annual CEO and CFO certificates relating to its annual report pursuant to section 302(a) of the *Sarbanes-Oxley Act of 2002* (SOX) with the SEC and, pursuant to section 4.1(1) of Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (MI 52-109), filed such certificates with the Decision Makers as soon as reasonably practicable after they were filed with the SEC.
9. Due to its status as an SEC registrant and a "foreign private issuer" under the 1934 Act, prior to September 4, 2007 the Filer was not required to file or furnish interim CEO and CFO certificates relating to its quarterly reports and therefore did not file interim certificates under Part 3 of MI 52-109. Consequently, the Filer is in default of the requirement to file interim certificates in respect of its interim filings for each of the 3-month, 6-month and 9-month interim periods ended between June 30, 2004 and June 30, 2007.
10. Relief from the interim certificate requirements in Part 3 of MI 52-109 has previously been granted by the Decision Maker in British Columbia in *Re Isotis S.A.* dated June 28, 2005 and by the Decision Maker in Ontario in *Re Sony Corporation* dated December 9, 2004 (the Prior Decisions). The Filer did not apply for this relief.

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11. The authorized share capital of the Filer as of February 29, 2008 was £378,000,000 which consisted of 1,512,000,000 Shares of £0.25 each. As of February 29, 2008, there were 1,153,104,981 Shares issued and outstanding, including Shares underlying the issued and outstanding ADS that are held by the Depositary. As of February 29, 2008 there were 2,474,087 ADS outstanding worldwide.
12. As of February 29, 2008, according to the Filer's shareholders' register and a report of registered and beneficial holders (the Report) there were 309 direct and indirect beneficial shareholders of the Filer resident in Canada, holding in the aggregate approximately 5,877,013 Shares, representing approximately 0.51% of the Filer's issued and outstanding Shares.
13. The Shares are not held through CDS Clearing and Depository Services Inc. or an equivalent national depository in the UK. However, all beneficial shareholders hold indirectly through registered shareholders, which include several global custodians and nominees. The Report was compiled by examining all registered shareholders holding at least 250,000 Shares, which represented shareholders holding approximately 87.2% of the issued and outstanding Shares of the Filer. The global custodians (the Custodians) that hold for multiple beneficial owners are then identified and a request is made pursuant to s. 793 of the UK Companies Act 2006 for each Custodian to identify the beneficial owner(s) of the Shares.
14. In the event that the Custodian holds on behalf of other custodians or nominees, the s. 793 request for information may be made directly to such custodians or nominees. Where a registered holder is not a Custodian but is known to act as a nominee for one or more beneficial owners, i.e., investment fund managers, the Report may also include beneficial ownership information obtained directly from the beneficial owners.
15. The Depositary for the ADS maintains the register for the ADS. As of January 28, 2008, the Depositary reports that there were 90 direct beneficial holders of ADS resident in Canada holding in the aggregate 4,825 ADS, representing 48,250 Shares or approximately 0.004% of the Filer's issued and outstanding Shares.
16. The Depositary has also reported to the Filer on the number of beneficial owners of ADS (the Citibank Report). The Citibank Report is based on information provided to the Depositary by Broadridge Financial Solutions, Inc. (Broadridge), which contacts all of their bank and broker clients and

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requests information regarding the number of accountholders that are beneficial holders of ADS.

17. Beneficial shareholders are broken up into two components, Objecting Beneficial Owners (OBOs) and Non-Objecting Beneficial Owners (NOBOs). Broadridge can produce a list of all NOBOs for a given record date, but cannot produce a list of OBOs because Broadridge is not permitted to disclose those shareholders that are objecting beneficial owners. Broadridge can, however, provide issuers with OBO information in reference to the number of shareholders and the total number of securities they hold.
18. As of February 27, 2008, the Citibank Report discloses that there were 13 dealers that are members of the Investment Dealers Association of Canada (now known as the Investment Industry Regulatory Organization of Canada), registered in one or more of the Jurisdictions (each a Registrant), with 521 accountholders (the Accountholders) holding 52,566 ADS, representing 525,660 Shares or approximately 0.05% of the Filer's issued and outstanding Shares. Amongst the Accountholders, there were 70 non-objecting beneficial owners (as defined in National Instrument 54-101 - *Communication with Beneficial Owners of Securities of a Reporting Issuer*) of ADS resident in Canada holding in the aggregate 10,964 ADS, representing 109,640 Shares or approximately 0.01% of the Filer's issued and outstanding Shares.
19. Thus, based on the information described in paragraphs 15 and 18 and assuming that all the Accountholders were Canadian residents, there are 611 direct and indirect beneficial holders of ADS in Canada holding an aggregate of 57,391 ADS, representing 573,910 Shares or approximately 2.3% of the Filer's issued and outstanding ADS. However, the Filer believes that a significant proportion of the Accountholders are not Canadian residents; accordingly, the Filer is satisfied that it is able to make the representations in paragraph 23.
20. Except as disclosed in paragraphs 12, 15 and 18, the Filer does not have information regarding the number of beneficial shareholders and ADS holders resident in Canada but believes the number is insignificant.
21. Other than the ADS (including Shares issued upon conversion of the ADS), none of the Filer's securities have been distributed by the Filer to residents of Canada.
22. Accordingly, based upon the information described in paragraphs 12, 15 and 18 taken from the Filer's register, the Citibank Report and the Report, there are 309 direct and indirect beneficial Canadian shareholders and 611 direct

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and indirect beneficial holders of ADS in Canada. Assuming that all of the Accountholders are Canadian residents, which, as described in paragraph 19, the Filer believes to be a conservative assumption, there are a total of 920 Canadian resident securityholders (which consists of ADS holders and shareholders) known to the Filer representing 0.4% of the total number of securityholders worldwide.

23. Based upon the diligent enquiries set out in paragraphs 11 through 21, above, residents of Canada do not:
- (a) beneficially own, directly or indirectly, more than 2% of a class or series of the Filer's outstanding securities worldwide, and
  - (b) represent, directly or indirectly, more than 2% of the total number of securityholders of the Filer worldwide.
24. The Filer has not distributed any of its securities to residents of Canada since it was delisted from the TSX, other than securities distributed to employees of the Filer or its affiliates under the Filer's stock plans in reliance on the prospectus and registration exemptions set out in Division 4 of National Instrument 45-106 - *Prospectus and Registration Exemptions* (NI 45-106) or, prior to the coming into force of NI 45-106, equivalent exemptions under the securities legislation of the Jurisdictions.
25. The Filer has no present intention of seeking public financing by way of an offering of its securities in any jurisdiction of Canada. However, the Filer may from time to time distribute securities to its employees or employees of its affiliates in reliance on the prospectus and registration exemptions set out in Division 4 of NI 45-106.
26. The Filer is subject to the continuous disclosure requirements and reporting obligations of the UK and the LSE (collectively, the UK securities laws). For the most part, these requirements originate under the Listing Rules and the Disclosure and Transparency Rules set out by the UK Financial Services Authority (FSA) in the FSA Handbook. These requirements are similar to the requirements under the laws of the Jurisdictions and are, pursuant to Part 5 of NI 71-102, generally acceptable for purposes of complying with the continuous disclosure requirements in the Jurisdictions.
27. The Filer is subject to secondary market liability pursuant to section 90A of the Financial Services and Markets Act 2000. Section 90A applies to any annual financial report, half-yearly financial report or interim management statement published in response to the requirements of the FSA's

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Transparency Rules and to any preliminary announcement made in advance of the annual financial report in so far as the preliminary announcement contains information intended to appear in substantially the same form in the annual report. The Filer is liable to pay compensation to a person who acquires Shares and suffers a loss in respect of them as a result of either any untrue or misleading statement in a publication to which that section applies, or the omission from any such publication of any matter required to be included in it. For greater certainty, the Filer is not liable to pay such compensation to a person who acquires ADS or Shares issued upon the conversion of ADS. The Filer shall only be so liable if a director either knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading, or knew the omission to be dishonest concealment of a material fact. A loss is not regarded as suffered as a result of the statement or omission in the publication unless the person suffering it acquired the relevant shares in reliance on the information in the publication and at a time, and in circumstances in which, it was reasonable for him to rely on that information.

28. The Filer has undertaken in favour of the securities regulatory authorities of the Jurisdictions that it will deliver to its securityholders resident in the Jurisdictions, in the same manner and at the same time as delivered to its securityholders resident in the UK, all disclosure material required by UK securities laws to be so delivered.
29. On November 27, 2007, the Filer issued and filed a press release announcing that it has submitted an application to the Decision Makers to cease to be reporting issuer in the Jurisdictions and, if relief is granted, the Filer will not be a reporting issuer or the equivalent in any jurisdiction in Canada.

### **Decision**

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the Decision has been met.

The decision of the Decision Makers under the Legislation is that the Requested Relief is granted.

David L. Knight  
Ontario Securities Commission

Paulette L. Kennedy  
Ontario Securities Commission