

# 2011 BCSECCOM 495

October 19, 2011

## Headnote

Multilateral Instrument 11-102 – *Passport System* – Securities Act s. 48 Adviser – Exemption from s. 34(b) requirement to be registered as an adviser – A person who resides outside of BC wants to advise BC residents – The person is hired under a written agreement with a BC registered dealer or adviser to provide advice to the BC registrant; the person is registered or qualified to provide the advice in the jurisdiction in which they reside; under a written agreement with its BC clients or the person, the BC registrant accepts responsibility for all losses resulting from inappropriate advice provided by the person.

## Applicable British Columbia Provisions

Securities Act , R.S.B.C. 1996, c. 418, s. 34(b) and 48

In the Matter of  
the Securities Legislation of  
British Columbia (the Jurisdiction)

and

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

and

In the Matter of  
Fidelity Investments Canada ULC (the Filer)

Decision

## Background

- ¶ 1 The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction (the Legislation) that the adviser registration requirement contained in the Legislation (the Adviser Registration Requirement) does not apply to advisers who may or may not be affiliated with or related parties of the Filer and who act as sub-advisers to the Filer (the Sub-Advisers) for the benefit of the Filer and the Filer's clients, comprised of investment funds managed by the Filer, third party investment funds and institutional investors resident in jurisdictions where the advisers are not registered (the FIC Clients) (the Requested Relief).

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

- (a) the British Columbia Securities Commission is the principal regulator for this application,
- (b) the Filer has provided notice that subsection 4.7(1) of Multilateral Instrument 11-102 Passport System (MI 11-102) is intended to be relied upon in Alberta, Manitoba, Saskatchewan, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, the Northwest Territories, Nunavut and Yukon (together with British Columbia, the Filing Jurisdictions).

### **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 Filer is a corporation continued under the laws of Alberta, having its head office in Toronto, Ontario.
  - 2. The Filer is registered in each of the Filing Jurisdictions and in Québec as a mutual fund dealer and as a portfolio manager.
  - 3. The Filer is also registered in Ontario as a mutual fund dealer, a portfolio manager, and under the Commodity Futures Act (Ontario) as a commodity trading manager.
  - 4. While the Ontario Securities Commission is ordinarily the principal regulator for the Filer, exemptive relief is not required in Ontario because of the application of OSC Rule 35-502 Non-Resident Advisers (OSC Rule 35-502). The jurisdiction with which the Filer has the most significant connection outside of Ontario is Québec, however relief is not needed there either due to the application of the general registration exemption order - Decision # 2009-PDG-0191. The British Columbia Securities Commission has been chosen as the principal regulator for this application because British Columbia is the jurisdiction where relief is needed with which the Filer has the most significant connection outside of Ontario and Québec.

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5. The Filer is not a member of the Mutual Fund Dealers Association of Canada (the MFDA) having been granted relief from the requirement for a mutual fund dealer to be a member of the MFDA by the applicable securities regulatory authorities in 2001.
6. The Filer is among Canada's largest mutual fund companies managing over \$68 billion (Cdn) in investment fund and institutional assets. It is the manager of a number of investment funds that it has established and will be the manager of other investment funds it expects to establish or acquire in the future.
7. The Filer uses, and will use from time to time, Sub-Advisers to provide portfolio management services to the Filer in respect of the FIC Clients who are resident in the Filing Jurisdictions in which the Filer is registered as an adviser in the category of portfolio manager.
8. Each Sub-Adviser is, or will be, registered or otherwise qualified under applicable laws in the jurisdiction where its head office is located to provide investment counselling and portfolio management services.
9. The Sub-Advisers are, and will be, either residents of a jurisdiction in Canada or of a non-Canadian jurisdiction.
10. Some of the Sub-Advisers are, and will be, either affiliates or related parties of the Filer. For this purpose, an affiliate means any entity that is controlled by FMR LLC, or other ultimate parent company of the Filer, as the case may be, and control and any derivation thereof, means the possession, directly or indirectly, of the power to direct or significantly influence the management and policies/business or affairs of an entity whether through ownership of voting securities or otherwise. Related party means an entity that directly or indirectly holds voting securities representing more than 20% of the outstanding voting rights attached to all outstanding voting securities of another entity.
11. Each FIC Client has, or will enter into, a written investment management agreement (an IMA) with the Filer which:
  - (a) provides the Filer with complete discretionary authority to purchase and sell securities on behalf of the FIC Client; and
  - (b) authorizes the Filer to delegate its discretionary authority over all or a portion of the FIC Client's assets to one or more of the Sub-Advisers.

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12. The Filer agrees under each IMA that it enters into to be responsible for any loss arising out of the failure of a Sub-Adviser:
  - (a) to exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of the Filer and the FIC Client for whose benefit the investment advice is, or portfolio management services are, to be provided; or
  - (b) to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances,and acknowledges that it cannot be relieved by the FIC Clients from this responsibility (collectively, the Assumed Obligations).
13. The Filer delivers, or arranges to deliver, to FIC Clients all applicable reports and statements required under the Legislation or IMA.
14. The Filer has entered into, or will enter into, an agreement with each Sub-Adviser which will set out the obligations and duties of each party in connection with the investment counselling and portfolio management services provided to each FIC Client and under which the Sub-Adviser agrees to act as a Sub-Adviser to the Filer for the benefit of the FIC Clients.
15. If there is any direct contact between a Sub-Adviser and a FIC Client in connection with the provision of investment counselling or portfolio management services, an advising representative of the Filer, duly registered in the Filing Jurisdiction where the FIC Client is resident, will be present either in person or by telephone.
16. Each Sub-Adviser who provides portfolio management services with respect to the assets of FIC Clients would be considered to be acting as an “adviser” within the meaning of the Legislation, and in the absence of the Requested Relief, would be subject to the Adviser Registration Requirement unless otherwise exempt.
17. There are no exemptions from the Adviser Registration Requirement that the Sub-Advisers may rely on to provide investment counseling or portfolio management services to the FIC Clients.
18. The Sub-Advisers who are not otherwise registered in Ontario are not required to register as advisers under the Securities Act (Ontario) as they

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are able to rely on the exemption from registration in section 7.3 of OSC Rule 35-502 – Non-Resident Advisers (OSC Rule 35-502).

19. The Sub-Advisers who are not otherwise registered in Québec are not required to register as advisers under the Securities Act (Québec) as they are able to rely on a general registration exemption order (Decision # 2009-PDG-0191) for an exemption from adviser registration (Québec Exemption).

### Decision

- ¶ 4 The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Requested Relief is granted in respect of the Sub-Advisers provided that:

- (a) the Filer is registered in good standing under the Legislation in a category that permits it to provide investment counselling and portfolio management services;
- (b) the obligations and duties of each Sub-Adviser are set out in a written agreement entered into by the Filer and each Sub-Adviser;
- (c) the Filer contractually agrees with the FIC Clients to be responsible for the Assumed Obligations and the Filer is not relieved by the FIC Clients from the Assumed Obligations;
- (d) each Sub-Adviser that is not resident in Canada will be licensed or otherwise legally permitted to provide portfolio management services under the applicable laws of the jurisdiction where its head office is located;
- (e) each Sub-Adviser that is resident in a jurisdiction of Canada is registered as an adviser in such jurisdiction;
- (f) a Sub-Adviser will not have any direct contact with a FIC Client in connection with the provision of investment counselling or portfolio management services unless an advising representative of the Filer, duly registered in the Filing Jurisdiction where the FIC Client is resident, is present either in person or by telephone; and

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- (g) for each Filing Jurisdiction, this decision will terminate 90 days after the coming into force of any rule, regulation, blanket order or ruling under the securities legislation of the Filing Jurisdiction that provides an equivalent exemption.

Sandra Jakab

Director, Capital Markets Regulation  
British Columbia Securities Commission