

Headnote

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions*

Securities Act, s. 84 – exemption from prospectus delivery requirement - A registered dealer wants relief from the requirement to deliver a prospectus - The issuer is conducting an at-the-market distribution using the shelf procedures in Part 9 of National Instrument 44-102 *Shelf Distributions* and on the conditions specified in the order; the issuer will issue a news release announcing the ATM distribution and file the distribution agreement on SEDAR; the news release will indicate that the shelf prospectus and supplement have been filed and will specify where and how purchasers may obtain a copy

Securities Act, ss. 11 and 169 – *Confidentiality* - An applicant wants to keep an application and order confidential for a limited amount of time after the order is granted - The record provides intimate financial, personal or other information. The disclosure of the information before a specific transaction would be detrimental to the person affected; the information will be made available after a specific date

National Instrument 44-101 *Short Form Prospectus Distributions*, s. 8.1 - Disclosure - An issuer wants relief from the requirement to include in the prospectus a statement of purchasers' statutory rights in the prescribed form. The issuer is conducting an at-the-market distribution using the shelf procedures in Part 9 of National Instrument 44-102 *Shelf Distributions* and on the conditions specified in the order. The issuer will provide an amended statement of rights in the prospectus or prospectus supplement so that the prospectus properly describes applicable rights and purchasers are not misled.

National Instrument 44-102 *Shelf Distributions*, s. 11.1 – exemption from shelf distribution form requirements - An issuer wants relief from the requirement to include certain disclosure in the base shelf prospectus and an issuer's and underwriter's certificate in the required form - the issuer is conducting an at-the-market distribution using the shelf procedures in Part 9 and on the conditions specified in the order; the issuer has obtained exemptive relief from the prospectus delivery requirement and will include in the prospectus an amended certificate stating that the prospectus constitutes full, true and plain disclosure as of the date of each distribution of the securities.

Applicable Legislative Provisions

Securities Act, ss. 11, 84 and 169

National Instrument 44-101 s.8.1; 44-102, s. 11.1

August 12, 2020

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
Eldorado Gold Corporation (the Issuer)

and

BMO Nesbitt Burns Inc. and National Bank Financial Inc.
(together, the Canadian Agents)

and

BMO Capital Markets Corp. and National Bank of Canada Financial Inc.
(together, the US Agents)
(together, the Agents and, collectively with the Issuer, the Filers)

Decision

Background

¶ 1 The securities regulatory authority or regulator in each of the Jurisdictions (Decision Maker) has received an application from the Filers for a decision under the securities legislation of the Jurisdictions (the Legislation) for the following relief (the Exemption Sought):

- (a) that the requirement that a dealer, not acting as agent of the purchaser, who receives an order or subscription for a security offered in a distribution to which the prospectus requirement applies, send or deliver to the purchaser or its agent the latest prospectus (including the applicable prospectus supplement(s) in the case of a base shelf prospectus) and any amendment to the prospectus (the Prospectus Delivery Requirement) does not apply to the Agents or any other registered investment dealer acting on behalf of the Agents as a selling agent (a Selling Agent) in connection with any at-the-market distribution of common shares (Common Shares) of the Issuer (an ATM Distribution) as defined in National Instrument 44-102 *Shelf Distributions* (NI 44-102) in Canada and the United States pursuant to one or more substantially identical equity distribution agreements to be entered into between the Issuer and the Agents (an Equity Distribution Agreement); and

- (b) that the requirements to include each of the following in a prospectus supplement, or in any amendment to a prospectus supplement, do not apply to a prospectus supplement of the Issuer (the Prospectus Supplement) or in any amendment thereto in respect of an ATM Distribution:
- (i) a forward-looking issuer certificate of the Issuer in the form specified in sections 2.1 or 2.4, as applicable, of Appendix A to NI 44-102;
 - (ii) a forward-looking underwriter certificate in the form specified in sections 2.2 or 2.4, as applicable, of Appendix A to NI 44-102; and
 - (iii) a statement respecting purchasers' statutory rights of withdrawal and remedies for rescission or damages in substantially the form prescribed by Item 20 of Form 44-101F1 *Short Form Prospectus*,
- (collectively, the Prospectus Form Requirements).

The Decision Makers have also received a request from the Filers for a decision that the application and this decision be kept confidential and not be made public until the earliest of (i) the date on which the Filers enter into the Equity Distribution Agreement, (ii) the date on which the Filers jointly advise the Decision Makers that there is no longer any need for the application and this decision to remain confidential, and (iii) the date that is 90 days after the date of this decision (the Confidentiality Relief).

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 the Application;
- (b) the Filers have provided notice that section 4.7(1)(c) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador; 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* or 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 Filers:

The Issuer

1. the Issuer is a corporation incorporated under the *Canada Business Corporations Act*; the head office of the Issuer is located in Vancouver, British Columbia;

2. the Issuer is a reporting issuer or the equivalent under the securities legislation of each province of Canada and is in compliance with the requirements under applicable securities legislation and is not in default of securities legislation in any jurisdiction of Canada;
3. the Common Shares are listed on the Toronto Stock Exchange (the TSX) and the New York Stock Exchange (the NYSE);
4. the Issuer is subject to reporting obligations under the United States *Securities Exchange Act of 1934*, as amended (the US Exchange Act), and files its continuous disclosure documents with the Securities and Exchange Commission (the SEC) in the United States;

The Agents

5. each of the Canadian Agents is registered as an investment dealer under the securities legislation of each of the provinces and territories of Canada, is a member of the Investment Industry Regulatory Organization of Canada, and is a participating organization of the TSX;
6. each of the US Agents is a broker-dealer registered with the SEC under the US Exchange Act;
7. none of the Agents is in default of any requirements under applicable securities legislation in any of the jurisdictions of Canada;

Proposed ATM Distribution

8. subject to mutual agreement on terms and conditions, the Filers propose to enter into the Equity Distribution Agreement for the purpose of ATM Distributions involving the periodic sale of Common Shares by the Issuer through the Agents, as agents, under the base shelf prospectus procedures prescribed by Part 9 of NI 44-102;
9. the Issuer has filed a final base shelf prospectus dated August 26, 2019 (the Shelf Prospectus) in each of the provinces of Canada and with the SEC providing for the distribution from time to time of securities of the Issuer, including Common Shares, debt securities, convertible securities, warrants, rights, subscription receipts and units comprised of the foregoing; the Shelf Prospectus constitutes an “unallocated shelf” within the meaning of Part 3 of NI 44-102; the Issuer has included in the Shelf Prospectus a forward-looking certificate of the Issuer in the form prescribed by section 1.1 of Appendix A to NI 44-102;
10. prior to making an ATM Distribution, the Issuer will have filed the Prospectus Supplement in each of the provinces of Canada and with the SEC describing the terms of the ATM Distribution, including the terms of the Equity Distribution Agreement and otherwise supplementing the disclosure in the Shelf Prospectus;
11. upon entering into the Equity Distribution Agreement, the Issuer will immediately:
 - (a) issue and file a news release pursuant to section 3.2 of NI 44-102 to announce the Equity Distribution Agreement and that the Shelf Prospectus and the Prospectus Supplement have been filed on SEDAR and to disclose where and how purchasers may obtain copies; and

- (b) file the Equity Distribution Agreement on SEDAR;
12. the Equity Distribution Agreement will limit the number of Common Shares that the Issuer may issue and sell pursuant to any ATM Distribution thereunder to an amount not to exceed 10% of the aggregate market value of the outstanding Common Shares calculated in accordance with Section 9.2 of NI 44-102;
 13. the Issuer will conduct ATM Distributions through the Agents, as underwriters, directly or through a Selling Agent, through the facilities of the TSX, the NYSE, or any other “marketplace” (as defined in National Instrument 21-101 Marketplace Operation) in Canada or the United States (each, a Marketplace);
 14. the Canadian Agents will act as the underwriters on behalf of the Issuer in connection with the sale of the Common Shares on the TSX or any other Marketplace in Canada (a Canadian Marketplace) pursuant to the Equity Distribution Agreement, directly by the Canadian Agents or through one or more Selling Agents, and will be paid an agency fee or commission by the Issuer in connection with such sales; the Canadian Agents will sign an underwriter’s certificate in the Prospectus Supplement filed on SEDAR in the form set out in section 30 below;
 15. the Canadian Agents will effect the ATM Distribution on any Canadian Marketplace, either themselves or through one or more Selling Agents; if sales are effected through a Selling Agent, the Selling Agent will be paid a seller’s commission for effecting the trades on behalf of the Canadian Agents; a purchaser’s rights and remedies under Canadian securities legislation against the Agents, as underwriters of an ATM Distribution, will not be affected by a decision to effect the sale directly or through a Selling Agent;
 16. the Equity Distribution Agreement will provide that, at the time of each sale of Common Shares pursuant to an ATM Distribution, the Issuer will represent to the Agents that the Shelf Prospectus, as supplemented by the Prospectus Supplement, including the documents incorporated by reference in the Shelf Prospectus and any applicable amendment or supplement to the Shelf Prospectus or the Prospectus Supplement (together, the Prospectus) contains full, true and plain disclosure of all material facts relating to the Issuer and Common Shares; the Issuer would, therefore, be unable to proceed with sales pursuant to an ATM Distribution when it is in possession of undisclosed information that would constitute a material fact or a material change in respect of the Issuer or the Common Shares;
 17. after the date of the Prospectus Supplement and before the termination of any ATM Distribution, if the Issuer disseminates a news release disclosing information that, in the Issuer’s determination, constitutes a “material fact” (as defined in the Legislation), the Issuer will identify such news release as a “designated news release” for the purposes of the Prospectus; this designation will be made on the face page of the version of such news release filed on SEDAR (any such news release, a Designated News Release); the Prospectus Supplement will provide that any such Designated News Release will be deemed to be incorporated by reference into the Prospectus; a Designated News Release will not be used to update disclosure in the Prospectus by the Issuer in the event of a “material change” (as defined in the Legislation);

18. if, after the Issuer delivers a sell notice to the Agents directing the Agents to sell Common Shares on the Issuer's behalf pursuant to the Equity Distribution Agreement (a Sell Notice), the sale of Common Shares specified in the Sell Notice, taking into consideration prior sales, would constitute a material fact or material change, the Issuer will suspend sales under the Equity Distribution Agreement until either (i) it has disseminated and filed a Designated News Release, in the case of a material fact, or has filed a material change report or amended the Prospectus, or (ii) circumstances have changed such that the sales would no longer constitute a material fact or material change;
19. in determining whether the sale of Common Shares specified in a Sell Notice would constitute a material fact or material change, the Issuer will take into account a number of factors, including, without limitation (i) the parameters of the Sell Notice, including the number of Common Shares proposed to be sold and any price or timing restrictions that the Issuer may impose with respect to the particular ATM Distribution, (ii) the percentage of the outstanding Common Shares that the number of Common Shares proposed to be sold pursuant to the Sell Notice represents, (iii) the trading volume and volatility of the Common Shares, (iv) sales under prior Sell Notices, (v) recent developments in the business, affairs and capital structure of the Issuer, and (vi) prevailing market conditions generally;
20. it is in the interest of the Issuer and the Agents to minimize the market impact of sales under an ATM Distribution; therefore, the Agents will monitor closely the market's reaction to trades made pursuant to the ATM Distribution in order to evaluate the likely market impact of future trades; the Agents have experience and expertise in managing sell orders to limit downward pressure on trading prices; if any of the Agents has concerns as to whether a particular sell order placed by the Issuer may have a significant effect on the market price of the Common Shares, that Agent will recommend against effecting the trade at that time;

Disclosure of Sales Monthly and in Annual and Interim Report

21. within seven calendar days after the end of any calendar month during which the Issuer conducts an ATM Distribution, it will file on SEDAR and make publicly available as a notice of proceeds, a report disclosing in respect of such ATM Distribution, the number and average price of Common Shares distributed, gross proceeds, commissions and net proceeds; for each financial period in which the Issuer conducts an ATM Distribution, it will disclose in each of its filed interim financial statements, annual financial statements and management discussion and analysis, for the interim period or year, as applicable, following the distribution the number and average price of the Common Shares distributed under the Prospectus and the aggregate gross and aggregate net proceeds raised and the aggregate commissions paid or payable, under the Prospectus during such annual or interim period, as applicable;

Prospectus Delivery Requirement

22. pursuant to the Prospectus Delivery Requirement, a dealer effecting a trade of securities offered under a prospectus is required to deliver a copy of the prospectus (including the applicable prospectus supplement(s) in the case of a base shelf prospectus) to the purchaser within prescribed time limits;

23. delivery of a prospectus is not practicable in the circumstances of an ATM Distribution as neither the Agents nor any Selling Agent, as applicable, effecting the trade will know the identity of the purchasers;
24. the Prospectus (together with all documents incorporated by reference therein) will be filed and readily available electronically via SEDAR to all purchasers under ATM Distributions; as stated in section 11 above, the Issuer will issue a news release that specifies where and how copies of the Prospectus can be obtained;
25. the liability of an issuer or an underwriter (or others) for a misrepresentation in a prospectus pursuant to the civil liability provisions of the Legislation will not be affected by the grant of an exemption from the Prospectus Delivery Requirement, as purchasers of securities offered under a prospectus during the period of distribution have a right of action for damages or rescission without regard to whether the purchaser relied on the misrepresentation or in fact received a copy of the prospectus;

Withdrawal Right and Right of Action for Non-Delivery

26. pursuant to the Legislation, an agreement to purchase securities in respect of a distribution to which the prospectus requirement applies is not binding on the purchaser if a dealer receives, not later than midnight on the second day exclusive of Saturdays, Sundays and holidays, after receipt by the purchaser of the latest prospectus or any amendment to the prospectus, a notice in writing that the purchaser does not intend to be bound by the agreement of purchase (the Withdrawal Right);
27. pursuant to the Legislation, a purchaser of securities to whom a prospectus was required to be sent or delivered in compliance with the Prospectus Delivery Requirement, but was not so sent or delivered, has a right of action for rescission or damages against a dealer who did not comply with the Prospectus Delivery Requirement (the Right of Action for Non-Delivery);
28. neither the Withdrawal Right nor the Right of Action for Non-Delivery is workable in the context of an ATM Distribution because of the impracticability of delivering the Prospectus to a purchaser of Common Shares thereunder;

Prospectus Form Requirements

29. to reflect the fact that an ATM Distribution is a continuous distribution, the Prospectus Supplement and any amendment thereto will include the following issuer certificate (with appropriate modifications in respect of the filing of an amendment prescribed by section 2.4 of Appendix A to NI 44-102), such issuer certificate to supersede and replace any issuer certificate included in the Shelf Prospectus solely with regard to the ATM Distribution:

The short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and the supplement as required by the securities legislation of each of the provinces of Canada.

30. to reflect the fact that an ATM Distribution is a continuous distribution, the Prospectus Supplement and any amendment thereto will include the following underwriter certificate (with appropriate modifications in respect of the filing of an amendment prescribed by section 2.4 of Appendix A to NI 44-102):

To the best of our knowledge, information and belief, the short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and the supplement as required by the securities legislation of each of the provinces of Canada.

31. a different statement of purchasers' rights than that required by the Legislation is necessary in order to allow the Prospectus to accurately reflect the relief granted from the Prospectus Delivery Requirement. Accordingly, the Prospectus Supplement will state the following, with the date reference completed:

Securities legislation in some provinces of Canada provides purchasers of securities with the right to withdraw from an agreement to purchase securities and with remedies for rescission or, in some jurisdictions, revisions of the price, or damages if the prospectus, prospectus supplement, and any amendment relating to securities purchased by a purchaser are not sent or delivered to the purchaser. However, purchasers of Common Shares distributed under an at-the-market distribution by Eldorado Gold Corporation do not have the right to withdraw from an agreement to purchase the Common Shares and do not have remedies of rescission or, in some jurisdictions, revisions of the price, or damages for non-delivery of the prospectus, prospectus supplement, and any amendment relating to Common Shares purchased by such purchaser because the prospectus, prospectus supplement, and any amendment relating to the Common Shares purchased by such purchaser will not be sent or delivered, as permitted under a decision document dated ●, 2020 and granted pursuant to National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions or as permitted under Part 9 of National Instrument 44-102 Shelf Distributions, if applicable.

Securities legislation in some provinces of Canada further provides purchasers with remedies for rescission or, in some jurisdictions, revisions of the price or damages if the prospectus, prospectus supplement, and any amendment relating to securities purchased by a purchaser contains a misrepresentation. Those remedies must be exercised by the purchaser within the time limit prescribed by securities legislation. Any remedies under securities legislation that a purchaser of Common Shares distributed under an at-the-market distribution by Eldorado Gold Corporation may have against Eldorado Gold Corporation or its agents for rescission or, in some jurisdictions, revisions of the price, or damages if the prospectus, prospectus supplement, and any amendment relating to securities

purchased by a purchaser contain a misrepresentation will remain unaffected by the non-delivery of the prospectus referred to above.

A purchaser should refer to applicable securities legislation for the particulars of these rights and should consult a legal adviser.

32. the Prospectus Supplement will disclose that, in respect of ATM Distributions under the Prospectus Supplement, the statement prescribed in section 31 above supersedes and replaces the statement of purchasers' rights contained in the Shelf Prospectus; and

Confidentiality

33. the Issuer has not yet publicly announced its intention to enter into the Equity Distribution Agreement; premature disclosure of this intention may have an adverse effect on the Issuer.

Decision

- ¶ 4 Each of the Decision Makers is satisfied that this 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:

- (a) the Issuer makes the disclosure described in sections 21, 29, 30, 31, and 32;
- (b) the Issuer complies with the representations in sections 2, 10, 11, 12, 13, 16, 17, 18 and 19;
and
- (c) the Agents comply with the representations in sections 5, 6, 7, 12, 13, 14, 15, and 20.

This decision will terminate the earlier of (a) upon the amendments to NI 44-102 set out in the CSA Notice of Amendments to National Instrument 44-102 Shelf Distributions and Change to Companion Policy 44-102CP Shelf Distributions relating to At-the-Market Distributions published by the Canadian Securities Administrators on June 4, 2020 becoming effective; and (b) 25 months from the date of the receipt for the Shelf Prospectus.

The further decision of the Decision Makers is that the Confidentiality Relief is granted.

John Hinze
Director, Corporate Finance
British Columbia Securities Commission