

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

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.

National Instrument 44-102 *Shelf Distributions*, s. 11.1 – exemption from shelf distribution limit requirements – An issuer wants relief from the requirement to limit the amount of equity securities distributed by way of at-the-market distributions to less than 10% of the aggregate market value of the issuer's outstanding equity securities of the same class as the class of securities distributed - the issuer is conducting an at-the-market distribution using the shelf procedures in Part 9 of National Instrument 44-102 *Shelf Distributions* in effect prior to August 31, 2020, and on the conditions specified in the order; the issuer has provided additional facts to the regulator demonstrating that filing a new prospectus supplement to increase the limit of equity securities permitted to be distributed by way of at-the-market distributions would create significant practical and financial impediments to completing their offering.

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

Applicable Legislative Provisions

Securities Act, ss. 11, 84 and 169

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

July 24, 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
Perk Labs Inc.
(the Issuer)

and

Echelon Wealth Partners Inc.
(the Agent, and together with the Issuer, the Filers)

Decision

Background

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

- (a) 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 Delivery Requirement) does not apply to the Agent or any other registered investment dealer acting as selling agent for the Agent (each, a Selling Agent) in connection with any-at-the market distributions (ATM Distributions) of common shares of the Issuer (as defined below) within the meaning of

National Instrument 44-102 *Shelf Distributions* (NI 44-102) made by the Issuer pursuant to an equity distribution agreement (the Equity Distribution Agreement) to be entered into between the Issuer and the Agent;

- (b) the requirement under section 9.1 of NI 44-102, that limits the number of Common Shares that the Issuer may issue and sell pursuant to any ATM Distributions to an amount not to exceed 10% of the aggregate market value of the then outstanding Common Shares calculated in accordance with section 9.2 of NI 44-102 (the 10% Aggregate Cap) does not apply to the Issuer in connection with any ATM Distributions; and
- (c) the requirements (collectively, the Form Requirements) to include the following in a prospectus supplement or any amendment thereto does not apply to the Prospectus Supplement (as defined below) or any amendment thereto:
 - (i) a forward-looking issuer certificate specified in section 2.1 or 2.4, as applicable, of Appendix A to NI 44-102;
 - (ii) a forward-looking underwriter certificate specified in section 2.2 or 2.4, as applicable, of Appendix A to NI 44-102; and
 - (iii) a statement in a prospectus respecting purchasers' statutory rights of withdrawal and remedies of rescission or damages in substantially the form prescribed in Item 20 of Form 44-101F1 *Short Form Prospectus*.

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 made public until the earliest of (i) the date on which the Issuer and the Agent enter into an Equity Distribution Agreement, (ii) the date on which the Issuer and Agent advises 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 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 Filers have provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in each of the provinces and territories of Canada; and
- (c) this 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 herein.

Representations

- ¶ 3 This decision is based on the following facts represented by the Filers:

Perk Labs Inc.

1. the Issuer is incorporated under the Business Corporations Act (British Columbia); the head office of the Issuer is located in Vancouver, British Columbia;
2. the Issuer is a reporting issuer under the securities legislation of British Columbia, Alberta and Ontario and is not in default of securities legislation in any jurisdiction of Canada; upon a receipt being issued for the Shelf Prospectus (as defined below), the Issuer will be a reporting issuer in all of the provinces and territories of Canada;
3. the Issuer's common shares (Common Shares) are listed on the Canadian Securities Exchange (CSE), quoted on the OTCQB Market and listed on the Frankfurt Stock Exchange;

Echelon Wealth Partners Inc.

4. the Agent is a wealth management and capital markets firm having an address at 1 Adelaide Street East, Suite 2100, Toronto, Ontario M5C 2V9;
5. the Agent is registered as a dealer in the category of investment dealer under the securities legislation of each of the provinces and territories of Canada and a member of the Investment Industry Regulatory Organization of Canada;
6. the Agent is not in default of securities legislation in such jurisdictions;

Proposed ATM Distributions

7. subject to mutual agreement on terms and conditions, the Filers propose to enter into an Equity Distribution Agreement providing for the sale from time to time by the Issuer through the Agent, as agent, of Common Shares pursuant to an ATM Distribution under the applicable shelf procedures prescribed by Part 9 of NI 44-102;
8. prior to making any ATM Distributions, the Issuer will have filed, in each of the provinces and territories of Canada:
 - (a) a shelf prospectus (the Shelf Prospectus) providing for the distribution from time to time of securities of the Issuer, including Common Shares, debt securities, warrants, subscription receipts and units comprised of the foregoing which will constitute an "unallocated shelf" within the meaning of Part 3 of NI 44-102; and

- (b) a prospectus supplement (Prospectus Supplement together with the Shelf Prospectus, the Prospectus) to qualify the sale of Common Shares under the applicable Equity Distribution Agreement; each Prospectus Supplement will describe the applicable Equity Distribution Agreement and otherwise supplement the disclosure in the Shelf Prospectus in respect of a distribution of Common Shares;
9. upon entering into an Equity Distribution Agreement, the Issuer will immediately:
 - (a) issue and file a news release to announce the applicable Equity Distribution Agreement indicating that the Shelf Prospectus and the Prospectus Supplement have been or will be filed on SEDAR, and specify where and how purchasers may obtain copies; and
 - (b) file the Equity Distribution Agreement on SEDAR;
 10. the Issuer will sell Common Shares in Canada through methods constituting ATM Distributions, including sales made on the CSE or any other Canadian “marketplace” (within the meaning of National Instrument 21-101 *Marketplace Operation*) on which the Common Shares are listed or quoted or otherwise traded (a Marketplace), through the Agent, as agent, directly or through a Selling Agent;
 11. the Agent will act as the sole agent on behalf of the Issuer in connection with the sale of Common Shares on a Marketplace pursuant to the respective Equity Distribution Agreement, directly by the Agent 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 Agent will sign an agent’s certificate in the applicable Prospectus Supplement filed on SEDAR;
 12. the Agent will effect ATM Distributions on the CSE or a Marketplace, either itself or through a Selling Agent; if sales are effected through a Selling Agent, the Selling Agent will be paid a customary seller’s commission for effecting the trades; a purchaser’s rights and remedies under the Legislation against the Agent, as agent for an ATM Distribution, will not be affected by a decision to effect the sale directly or through a Selling Agent;
 13. each 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 Agent that the Prospectus contains full, true and plain disclosure of all material facts relating to the Issuer and the Common Shares being distributed; the Issuer will 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;
 14. 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 such term is 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 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 such term is defined in the Legislation);

15. if after the Issuer delivers a sell notice to the Agent directing the Agent to sell Common Shares on the Issuer’s behalf pursuant to the Equity Distribution Agreement (a Sell Notice), the sale of the 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 had disseminated and filed a Designated News Release, in the case of a material fact, or filed a material change report or amended the Prospectus, in the case of a material change, or (ii) circumstances have changed so that the sales would no longer constitute a material fact or material change;
16. 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) sales under earlier Sell Notices, (iii) the percentage of outstanding Common Shares represented by the number of Common Shares proposed to be sold pursuant to the Sell Notice, (iv) trading volume and volatility of the Common Shares, (v) recent developments in the business, affairs and capital structure of the Issuer, and (vi) prevailing market conditions generally;
17. it is in the interest of the Issuer and the Agent to minimize the market impact of sales under an ATM Distribution; therefore, the Agent will monitor closely the market’s reaction to trades made on Marketplaces pursuant to an ATM Distribution in order to evaluate the likely market impact of future trades; the Agent has experience and expertise in managing sell orders to limit downward pressure on trading prices; if the Agent 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, the Agent will recommend against effecting the trade at that time;

Disclosure of Shares Sold

18. within seven calendar days after the end of each calendar month during which the Issuer conducts an ATM Distribution, the Issuer will disclose in a report filed on SEDAR the number and average price of Common Shares sold pursuant to ATM Distributions under the Prospectus, as well as total gross proceeds, commission and net proceeds for such sales; furthermore, for each financial period in which the Issuer conducts an ATM Distribution, it will disclose in its annual and interim financial statements and management discussion and analysis filed on SEDAR the number and average selling price of the Common Shares distributed pursuant to ATM Distributions, and the commission and gross and net proceeds for such sales;

Prospectus Delivery Requirement

19. pursuant to the Delivery Requirement, a dealer effecting a trade of Common Shares on behalf of the Issuer as part of an ATM Distribution 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;
20. the delivery of a prospectus is not practicable in the circumstances of an ATM Distribution because the Agent or Selling Agent, as applicable, effecting the trade will not know the purchaser's identity;
21. the Prospectus will be filed and readily available to all purchasers electronically via SEDAR; the Issuer will issue a news release that specifies where and how copies of the Prospectus can be obtained;
22. the liability of an issuer or an underwriter (and others) for 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 Delivery Requirement, because a purchaser of the securities offered by a prospectus during the period of distribution has a right of action for damages or rescission without regard as 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

23. 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 two business days 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);
24. pursuant to the Legislation, a purchaser of a security to whom a prospectus was required to be sent or delivered in compliance with the Delivery Requirement, but was not so sent or delivered, has a right of action for rescission or damages against the dealer who did not comply with the Delivery Requirement (the Right of Action for Non-Delivery);
25. 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

26. 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 44-101), such issuer certificate to supercede and replace the issuer certificate in the Base Shelf Prospectus solely with regard to ATM Distributions:

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

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

28. a different statement of purchasers' rights than that required by the Legislation is necessary so that the Prospectus will accurately reflect the relief granted from the Delivery Requirement; accordingly, the Issuer will include the following statement in the Prospectus Supplement, with the date reference completed:

Securities legislation in certain of the provinces and territories of Canada provides purchasers with the right to withdraw from an agreement to purchase securities and with remedies for rescission or, in some jurisdictions, revision of the price, or damages if the prospectus, prospectus supplements relating to securities purchased by a purchaser and any amendment are not delivered to the purchaser, provided that the remedies are exercised by the purchaser within the time limit prescribed by securities legislation. However, purchasers of Common Shares under an at-the-market distribution by the Issuer will not have the right to withdraw from an agreement to purchase the Common Shares and will not have remedies for rescission or, in some jurisdictions, revisions of the price, or damages for non-delivery of the prospectus, prospectus supplements relating to Common Shares purchased by a purchaser and any amendment will not be delivered as permitted under a decision dated ●, 2020 and granted pursuant to National Policy 11-203 - Process for Exemptive Relief Applications in Multiple Jurisdictions.

Securities legislation in certain of the provinces and territories of Canada also provides purchasers with remedies for rescission or, in some jurisdictions, revision of the price, or damages if the prospectus, prospectus supplements

relating to securities purchased by a purchaser and any amendment contain a misrepresentation, provided that the remedies are exercised by the purchaser within the time limit prescribed by securities legislation. Any remedies under securities legislation in the jurisdictions that a purchaser of Common Shares under an at-the-market distribution by the Issuer may have against the Issuer or the Agent for rescission or, in some jurisdictions, revisions of the price, or damages if the prospectus, prospectus supplements relating to the Common Shares purchased by a purchaser and any amendment contain a misrepresentation remain unaffected by the non-delivery of the prospectus and the decision referred to above.

Purchasers should refer to the applicable provisions of the securities legislation of the purchaser's province or territory and the decision referred to above for the particulars of their rights or consult with a legal advisor.

29. the modified disclosure of purchasers' rights set forth in paragraph 28 above will be explicitly presented in each Prospectus Supplement and, solely in regard to ATM Distributions contemplated by such Prospectus Supplement, supersede and replace the statement of purchasers' rights contained in the Shelf Prospectus;
30. the statements required by subsections 5.5(2) and (3) of NI 44-102 to be included in the Shelf Prospectus will be qualified by adding the following: “, except in cases where an exemption from such delivery requirements has been obtained”; and
31. 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 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 Relief Sought is granted, provided that:

- (a) the Issuer makes the disclosure described in paragraphs 18, 26, 27, 28, 29 and 30;
- (b) the Issuer complies with the representations in paragraphs 2, 7, 8, 9, 10, 13, 14, 15 and 16; and
- (c) the Agent complies with the representations in paragraphs 5, 6, 10, 11, 12 and 17.

This decision will terminate 25 months after the issuance of a receipt for filing the Shelf Prospectus under the Legislation.

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

John Hinze
Director, Corporate Finance
British Columbia Securities Commission