

**Headnote**

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

*Securities Act*, s. 84 – Circulation of Materials - 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.

*Securities Act*, s. 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. 84 and 169

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

April 3, 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  
Auxly Cannabis Group Inc.  
(the Issuer)

and

AltaCorp Capital Inc.  
(the Agent, together with the Issuer, the Filers)

Decision

**Background**

¶ 1 The securities regulatory authority or regulator in each of the Jurisdictions (the 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, 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 on behalf of the Agent as a selling agent (each, a Selling Agent) in connection with any at-the market distribution (each, an ATM Distribution), as defined in National Instrument 44-102 *Shelf Distributions* (NI 44-102) of common shares of the Issuer (the Shares) under an equity distribution agreement (the Equity Distribution Agreement) to be entered into by the Issuer and the Agent;
- (b) that the requirements (collectively, the Form Requirements) to include in a base shelf prospectus or any prospectus supplement thereto, as applicable:
  - (i) the statements specified in items 2 and 3 of section 5.5 of NI 44-102;
  - (ii) a forward-looking issuer certificate of the Issuer in the form specified in section 2.1 of Appendix A to NI 44-102;
  - (iii) a forward-looking underwriter certificate of the Agent in the form specified in section 2.2 of Appendix A to NI 44-102; and

- (iv) a statement respecting purchasers' statutory rights of withdrawal and remedies for rescission or damages in substantially the form prescribed in Item 20 of Form 44-101F1 *Short Form Prospectus*,

do not apply to a shelf prospectus of the Issuer providing for the distribution of securities of the issuer, including the Shares (the Shelf Prospectus), any applicable prospectus supplement (the Prospectus Supplement) or to any amendments thereto to be filed in respect of the sale of Shares under an ATM Distribution.

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 Filers enter into the Equity Distribution Agreement, (ii) the date on which either of the Filers advise the Decision Makers that there is no longer any need to hold the application and this decision in confidence, 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 this application;
- (b) the Filers have provided notice that section 4.7 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, Newfoundland and Labrador, Yukon, the Northwest Territories and Nunavut; 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 in this decision.

### **Representations**

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

#### *The Issuer*

1. the Issuer is a corporation currently existing under the *Business Corporations Act* (British Columbia); the head office of the Issuer is located in Vancouver, British Columbia;
2. the Shares are listed on the TSX Venture Exchange;

3. the Issuer is a reporting issuer or the equivalent under the securities legislation of each province of Canada other than Quebec, and it is contemplated that upon filing and being receipted for the Shelf Prospectus, the Issuer will be a reporting issuer in each province and territory of Canada;
4. the Issuer is not in default of securities legislation in any jurisdiction of Canada;

*The Agent*

5. the Agent is registered as an investment dealer under the securities legislation in each province or territory of Canada;
6. the Agent is not in default of securities legislation in any jurisdiction of Canada;

*Proposed ATM Distribution*

7. subject to mutual agreement on terms and conditions, the Issuer proposes to enter into the Equity Distribution Agreement with the Agent, providing for the sale from time to time by the Issuer through the Agent, as agent, of Shares under ATM Distributions under the base shelf prospectus procedures prescribed by Part 9 of NI 44-102;
8. before making any ATM Distributions, the Issuer will have filed the Shelf Prospectus (and will have received a final receipt for the Shelf Prospectus from the Decision Makers) and the Prospectus Supplement in each province and territory of Canada to qualify the sale of Shares under the Equity Distribution Agreement; the Prospectus Supplement will describe the terms of the ATM Distribution, including the terms of the Equity Distribution Agreement, and otherwise supplement the disclosure in the Shelf Prospectus;
9. if the Equity Distribution Agreement is entered into, the Issuer will promptly: (a) issue and file a news release announcing the Equity Distribution Agreement and indicating that the Shelf Prospectus and the Prospectus Supplement have been filed on SEDAR and specifying where and how purchasers of Shares under an ATM Distribution may obtain copies; and (b) file the Equity Distribution Agreement on SEDAR;
10. the Issuer will not, during the period that the final receipt for the Shelf Prospectus is effective, distribute by way of one or more ATM Distributions a total market value of Shares that exceeds 10% of the aggregate market value of the outstanding Shares calculated in accordance with section 9.2 of NI 44-102, as at the last trading day of the month before the month in which the first ATM Distribution is made;
11. the Issuer will conduct ATM Distributions only through the Agent, as agent, directly or through a Selling Agent, and only through the TSXV or any other "marketplace" (as defined in National Instrument 21-101 *Marketplace Operation*) in Canada (Marketplace);
12. the aggregate number of Shares sold on the TSXV or any other Marketplace under an ATM Distribution on any trading day will not exceed 25% of the trading volume of the Shares on the all Marketplaces on that day;

13. the Agent will act as the sole underwriter on behalf of the Issuer in connection with the sale of Shares on a Marketplace under the Equity Distribution Agreement, directly by the Agent or through one or more Selling Agents, and will be the only person or company paid an agency fee or commission by the Issuer in connection with such sales; the Agent will sign an underwriter's certificate in the Prospectus Supplement filed on SEDAR in the form set out in Section 29 below;
14. the Agent will effect ATM Distributions on a Marketplace either itself or through a Selling Agent; 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 Agent; a purchaser's rights and remedies under Canadian securities legislation against the Agent, as underwriters of an ATM Distribution, will not be affected by a decision to effect the sale directly or through a Selling Agent;
15. the Equity Distribution Agreement will require that, at the time of each sale of Shares under an ATM Distribution, the Issuer represents to the Agent that the Shelf Prospectus, as supplemented by the Prospectus Supplement, including the documents incorporated by reference in the Shelf Prospectus (which will include any news release that has been designated and filed as a Designated News Release as defined and outlined below) 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 the Shares being distributed; the Issuer would, therefore, be unable to proceed with sales under 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 Shares;
16. 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 Shelf 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);
17. if, after the Issuer delivers a notice to the Agent directing the Agent to sell Shares on the Issuer's behalf under the Equity Distribution Agreement (a Sell Notice), the sale of the Shares specified in the Sell Notice, taking into consideration prior sales under all previous ATM Distributions, 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 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;

18. in determining whether the sale of the 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 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 outstanding Shares that the number of Shares proposed to be sold under the Sell Notice represents, (iii) sales under prior Sell Notices, (iv) the trading volume and volatility of the Shares, (v) recent developments in the business, affairs and capital structure of the Issuer, and (vi) prevailing market conditions generally;
19. it is in the interest of both the Issuer and the Agent to minimize the market impact of sales under an ATM Distribution; the Agent will monitor closely the market's reaction to trades made under 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 Shares, the Agent will recommend against effecting the trade at that time;

#### *Disclosure of Shares Sold*

20. for each financial period in which the Issuer conducts an ATM Distribution, it will disclose in its annual and interim financial statements and related management discussion and analysis filed on SEDAR the number and average selling price of Shares distributed under the ATM Distribution in accordance with the Prospectus, and the commission and gross and net proceeds for such sales;

#### *Prospectus Delivery Requirement*

21. under the 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;
22. the delivery of a prospectus is not practicable in the circumstances of an ATM Distribution because neither the Agent nor any Selling Agent, as applicable, effecting the trade will know the identity of the purchasers;
23. the Shelf Prospectus and the Prospectus Supplement (together with all documents incorporated by reference therein) will be filed and readily available electronically via SEDAR to all purchasers under ATM Distribution; as stated in section 9 above, the Issuer will issue a news release that specifies where and how copies of the Shelf Prospectus and the Prospectus Supplement can be obtained;
24. the liability of an issuer or an agent (and others) for misrepresentation in a prospectus under the civil liability provisions of the Legislation will not be affected by the grant of an

exemption from the 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*

25. under 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);
26. under the Legislation, a purchaser of securities 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);
27. 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 Shares thereunder;

*Prospectus Form Requirements*

28. 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 contained 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 this supplement, as required by the securities legislation of each of the provinces and territories of Canada.*

29. 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 this supplement, as required by the securities legislation of each of the provinces and territories of Canada.*

30. 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 Delivery Requirement; accordingly, the Prospectus Supplement will state the following, 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 Shares under an at-the-market distribution by the Issuer will not have the right to withdraw from an agreement to purchase the Shares and will not have remedies of rescission or, in some jurisdictions, revision of the price or damages for non-delivery of the prospectus supplement, the accompanying prospectus and any amendment thereto relating to the Shares purchased by such purchaser because the prospectus supplement, the accompanying prospectus and any amendment thereto relating to the Shares purchased by the purchaser will not be delivered as permitted under a decision document dated •, 2020 and granted under 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 a purchaser with remedies for rescission or, in some jurisdictions, revision of the price or damages if the prospectus supplement, the accompanying prospectus and any amendment thereto relating to the securities purchased by a purchaser 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 Shares under an at-the-market distribution may have against the Issuer or the Agent for rescission or, in some jurisdictions, revision of the price, or damages if the prospectus supplement, the accompanying prospectus and any amendment thereto relating to the securities purchased by a purchaser contain a misrepresentation remain unaffected by the non-delivery of the prospectus and the decision document referred to above.*

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



31. the Prospectus Supplement will disclose that, in respect of ATM Distributions under the Prospectus Supplement, the statement prescribed in section 30 above supersedes and replaces the statement of purchasers' rights contained in the Shelf Prospectus;
32. the statements required by items 2 and 3 of section 5.5 of NI 44-102 to be included in the Shelf Prospectus will be qualified by including the additional words ", except in cases where an exemption from the prospectus delivery requirement has been obtained"; and
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 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 Exemption Sought is granted, provided that:

- (a) during the 60-day period ending not earlier than 10 days prior to the commencement of an ATM Distribution, the Shares have traded, in total, on one or more Marketplaces, as reported on a consolidated market display:
  - (i) an average of at least 100 times per trading day, and
  - (ii) with an average trading value of at least \$1,000,000 per trading day;
- (b) the Issuer does not, during the period that the final receipt for the Shelf Prospectus is effective, distribute by way of one or more ATM Distributions a total market value of Shares that exceeds 10% of the aggregate market value of Shares, such aggregate market value calculated in accordance with section 9.2 of NI 44-102 and as at the last trading day of the month before the month in which the first ATM Distribution is made;
- (c) the Issuer makes the disclosure described in sections 20, 28, 29, 30, 31 and 32;
- (d) the Issuer complies with the representations in sections 3, 4, 8, 9, 11, 12, 15, 16, 17 and 18; and
- (e) the Agent complies with the representations in sections 5, 6, 11, 12, 13, 14 and 19.

This decision will terminate 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