

Headnote

Process for Exemptive Relief Applications in Multiple Jurisdictions - Issuer to enter into equity distribution agreement with underwriters to distribute common shares through the facilities of the TSX - Issuer granted exemption from the prospectus delivery requirement and prospectus forms requirements, subject to conditions.

Applicable Alberta Statutory Provisions

Sections 213 and 221 of the *Securities Act* (Alberta)

Citation: NAL Oil & Gas Trust and Canaccord Capital Corporation, Re, 2009

ABASC606

Date: 20091204

In the Matter of
the Securities Legislation of
Alberta and Ontario
(the **Jurisdictions**)

and

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

and

In the Matter of
NAL Oil & Gas Trust (the **Issuer**) and Canaccord Capital Corporation
(the **Agent** and together with the Issuer, the **Filers**)

Decision

Background

The securities regulatory authority or regulator in each of the Jurisdictions (**Decision Maker**) has received an application (the **Application**):

- (a) from the Agent for a decision under the securities legislation in each Jurisdiction (the **Legislation**) 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 supplements and any amendment to the prospectus (the **Prospectus Delivery Requirement**) does not apply to the Agent or any other Toronto Stock Exchange (the **TSX**) participating organization acting as selling agent for the Agent (such other TSX participating organization, a **Selling Agent**) in connection with an arrangement providing for at-the-market distributions (collectively, the **ATM Distribution**), as defined in National Instrument 44-102 *Shelf Distributions* (**NI**

44-102), made by the Issuer pursuant to the Equity Distribution Agreement (as defined below);

- (b) from the Issuer for a decision under the Legislation that the requirement to include in a prospectus supplement:
 - (i) a certificate of the Issuer in the form specified in section 2.1 of Appendix A to NI 44-102; and
 - (ii) the statement respecting purchasers' statutory rights of withdrawal and remedies of rescission or damages in substantially the form prescribed by item 20 of Form 44-101F1

(the **Prospectus Form Requirements**) do not apply to a prospectus filed in connection with the ATM Distribution; and

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

- (a) the Alberta Securities Commission (the **Commission**) is the principal regulator for the 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 British Columbia, Saskatchewan, Manitoba, Québec, Nova Scotia, New Brunswick, 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

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning in this decision, unless they are otherwise defined in this decision.

Representations

The decision is based on the following facts represented by the Filers:

The Issuer

1. The Issuer is an unincorporated open-end oil and gas royalty trust formed under the laws of Alberta. The head office of the Issuer is located in Calgary, Alberta.
2. The Issuer is a reporting issuer or the equivalent under the Legislation and is in compliance in all material respects with the applicable requirements of the Legislation.
3. The trust units (the **Units**) of the Issuer are listed on the TSX.

4. The Issuer has previously filed and received a receipt under the Legislation for a short form base shelf prospectus dated May 15, 2009 providing for the distribution from time to time of Units, debt securities, warrants and subscription receipts in an aggregate initial offering amount of up to \$600,000,000 (the **Shelf Prospectus**). The Shelf Prospectus constitutes an “unallocated shelf” within the meaning of Part 3 of NI 44-102.

The Agent

5. The head office of the Agent is located in Vancouver, British Columbia. The Agent is registered as an investment dealer under the Legislation.

Proposed ATM Distribution

6. Subject to mutual agreement on terms and conditions, the Issuer is proposing to enter into an equity distribution agreement (the **Equity Distribution Agreement**) with the Agent relating to the ATM Distribution pursuant to the shelf procedures prescribed by Part 9 of NI 44-102.
7. Prior to distributing Units under the ATM Distribution, the Issuer will have filed in the Jurisdictions in connection with the ATM Distribution, a prospectus supplement describing the terms of the Equity Distribution Agreement (the **Prospectus Supplement**).
8. The Issuer will issue a news release regarding entering into the Equity Distribution Agreement and will file it on SEDAR. The news release will indicate that the Shelf Prospectus and Prospectus Supplement have been filed on SEDAR and specify where and how purchasers may obtain copies. A copy of the news release will also be posted on the Issuer’s website.
9. Under the proposed Equity Distribution Agreement, the Issuer may issue and sell Units pursuant to any distribution thereunder in an amount not to exceed 10% of the aggregate market value of the outstanding Units calculated in accordance with section 9.2 of NI 44-102.
10. The Agent will, in turn, sell Units in Canada through methods constituting "at-the-market distributions" within the meaning of NI 44-102, including sales made on the TSX through the Agent, directly or through a Selling Agent.
11. The Agent will act as the sole underwriter on behalf of the Issuer in connection with the sale of the Units on the TSX and will be the only person or company paid an underwriting fee or commission by the Issuer in connection with such sales. The Agent will sign an underwriters’ certificate in the Prospectus Supplement filed on SEDAR. The Agent will effect sales on the TSX either itself or through a Selling Agent. If the sales are effected through a Selling Agent, the Selling Agent will be paid a seller’s commission for effecting the trades on the Agent’s behalf. A purchaser’s rights and remedies under

the Legislation against the Agent as underwriter of the ATM Distribution through the TSX will not be affected by a decision to effect the sale directly or through a Selling Agent.

12. The number of Units sold on the TSX pursuant to the ATM Distribution on any trading day will not exceed 25% of the trading volume of the Units on the TSX on that day.
13. The Equity Distribution Agreement will provide that at the time of each sale of Units pursuant to the ATM Distribution, the Issuer will make a representation to the Agent that the prospectus contains full, true and plain disclosure of all material facts relating to the Issuer and Units being distributed. The Issuer would therefore be unable to proceed with sales pursuant to the ATM Distribution when it is in possession of undisclosed information that would constitute a material fact or a material change in respect of the Units.
14. If, after the Issuer delivers a “sell notice” to the Agent, the sale of Units specified in the notice, taking into consideration prior sales, would constitute a material fact or material change, the Issuer would have to suspend sales under the Equity Distribution Agreement until either: (i) it had filed a material change report or amended the prospectus; or (ii) circumstances had changed such that the sales would no longer constitute a material fact or material change.
15. In determining whether the sale of the number of Units specified in the 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 Units proposed to be sold; (ii) the percentage of the outstanding Units that number represents; (iii) trading volume and volatility of Units; (iv) recent developments in the business, affairs and capital structure of the Issuer; and (v) prevailing market conditions generally.
16. The Agent will monitor closely the market’s reaction to trades made under the ATM Distribution in order to evaluate the likely market impact of future trades. It is in the interest of both the Issuer and the Agent to minimize the market impact of sales under the ATM Distribution. The Agent has experience and expertise in managing sell orders to limit downward pressure on the market price. 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 Units, the Agent will recommend against effecting the trade at that time.
17. The underwriter’s certificate signed by the Agent included in the Prospectus Supplement will be in the form prescribed by section 2.2 of Appendix B to NI 44-102.

Prospectus Delivery Requirement

18. Pursuant to the Prospectus Delivery Requirement, a dealer effecting a trade of securities on the TSX on behalf of the Issuer as part of the ATM Distribution is required to deliver

a prospectus within prescribed time limits to all investors who purchase securities on the TSX.

19. The delivery of a prospectus is not practicable in the circumstances of the ATM Distribution as neither the Agent nor the Selling Agent effecting the trade will know the identity of the purchasers.
20. A purchaser is deemed to have relied upon a misrepresentation in a prospectus if it was a misrepresentation at the time of purchase, without regard to whether or not the purchaser received the prospectus.

Withdrawal Right

21. 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, notice in writing that the purchaser does not intend to be bound by the agreement of purchase (the **Withdrawal Right**).
22. The Withdrawal Right is not workable in the context of the ATM Distribution because the prospectus will not be delivered.

Right of Rescission or Damages for Non-Delivery

23. Pursuant to the Legislation, a purchaser of securities has a right for rescission or damages against a dealer for non-delivery of the prospectus (the **Right of Action for Non-Delivery**).
24. The Right of Action for Non-Delivery is not workable in the context of the ATM Distribution because the prospectus will not be delivered.

Disclosure of Securities Sold in ATM Distribution

25. For each month during which securities are distributed over the TSX by the Issuer pursuant to the prospectus filed in connection with the ATM Distribution, the Issuer will file on SEDAR, within seven calendar days after the end of the month with respect to sales during the prior month, a report disclosing the number and average price of Units distributed, gross proceeds, commission and net proceeds.
26. The Issuer will also disclose, in its annual and interim financial statements and MD&A filed on SEDAR, the number and average price of Units sold under the ATM Distribution, gross proceeds, commission and net proceeds.

Prospectus Form Requirements

27. Exemptive relief from the Prospectus Form Requirements for the Issuer's forward-looking certificate in the Prospectus Supplement is required to reflect the fact that no pricing supplement will be filed subsequent to the Prospectus Supplement. Accordingly, the Issuer will file the Prospectus Supplement with the following certificate in substitution for the certificate prescribed by the Prospectus Form Requirements:

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 under this prospectus, 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(s) as required by the securities legislation of *[insert jurisdictions in which qualified]*.

28. Exemptive relief from the Prospectus Form Requirements is required to reflect the relief from the Prospectus Delivery Requirement. Accordingly, the following text will be included in the Prospectus Supplement in substitution for the text prescribed by the Prospectus Form Requirements:

Securities legislation in certain of the jurisdictions 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 the securities legislation of the purchaser's jurisdiction. However, purchasers of Units under an at-the-market distribution of the Issuer will not have any right to withdraw from an agreement to purchase the Units and will not have remedies for rescission or, in some jurisdictions, revision of the price, or damages for non-delivery of the prospectus because the prospectus, any prospectus supplements relating to the Units purchased by the purchaser and any amendment will not be delivered as permitted under a decision dated November ●, 2009.

Securities legislation in certain of the jurisdictions 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 the securities legislation of the purchaser's jurisdiction. Any remedies under securities legislation that a purchaser of Units under an at-the-market distribution of the Issuer may have against the Issuer or the Agent for rescission or, in some jurisdictions, revision of the price, or damages if the prospectus, any prospectus supplements relating to the Units

purchased by the 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 jurisdiction and the decision referred to above for the particulars of their rights or consult with a legal adviser.

Decision

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:

- (a) the Prospectus Form Requirements do not apply to the prospectus of the Issuer filed in connection with the ATM Distribution provided that the disclosure described in paragraphs 25, 27 and 28 is made;
- (b) the Prospectus Delivery Requirement does not apply to the Agent or any Selling Agent and, as a result, the Withdrawal Right and the Right of Action for Non-Delivery will not apply to the ATM Distribution provided that the representations in paragraphs 8, 10, 11 and 12 are complied with; and
- (c) this decision will terminate 25 months after the issuance of the receipt for the Shelf Prospectus.

Furthermore, the decision of the principal regulator and the securities regulatory authority or regulator in Ontario is that the Application and this decision be kept confidential and not be made public until the earlier of: (i) the date on which the Issuer enters into the Equity Distribution Agreement with the Agent; (ii) the date the Filers advise the Decision Makers that there is no longer any need for the Confidential Material to remain confidential; and (iii) the date that is 90 days after the date of this decision.

“original signed by”

William S. Rice, QC
Alberta Securities Commission

“original signed by”

Glenda A. Campbell, QC
Alberta Securities Commission