

Headnote

Process for Exemptive Relief Applications in Multiple Jurisdictions – Issuer to enter into equity distribution agreements with underwriters to distribute common shares through the facilities of the TSX, the NYSE or other marketplace– such distribution an “at-the-market” distribution under NI 44-102– Issuer granted exemption from the prospectus delivery requirement and certain other requirements, subject to conditions. Decision and application also held in confidence by decision makers, until the earlier of the entering into of an equity distribution agreement, waiver of confidentiality or 90 days from the date of the decision.

Applicable Legislative Provisions

Sections 129, 213 and 221(5) of the *Securities Act* (Alberta)

Item 20 of Form 44-101 *Short Form Prospectus* and section 8.1 of National Instrument 44-101 *Short Form Prospectus Distributions*

Paragraphs 5.5 2. and 3., section 2.2 of Part 2 of Appendix A and section 11.1 of National Instrument 44-102 *Shelf Distributions*

Citation: Re TransCanada Corporation, 2017 ABASC 113

Date: 20170623

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

and

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

and

In the Matter of
TransCanada Corporation
(the **Issuer**),

TD Securities Inc., BMO Nesbitt Burns Inc. and J.P. Morgan Securities Canada Inc.
(the **Canadian Agents**)

and

TD Securities (USA) LLC, BMO Capital Markets Corp. and J.P. Morgan Securities LLC
(the **US Agents** and together with the Canadian Agents, the **Agents**, and the Agents together
with the Issuer, the **Filers**)

Decision

Background

The securities regulatory authority or regulator in each of the Jurisdictions (the **Decision Maker**) has received an application (the **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 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 (each a **Selling Agent**) in connection with any at-the-market distribution (**ATM Distribution**) of common shares (**Common Shares**) of the Issuer in Canada or the United States (**US**) pursuant to the Prospectus (as defined below) and to one or more substantially identical equity distribution agreements (each an **Equity Distribution Agreement**) to be entered into between the Filers;
- (b) that the requirement to include a forward-looking underwriter certificate in the form specified by section 2.2 of Appendix A to National Instrument 44-102 *Shelf Distributions* (**NI 44-102**) does not apply to the Prospectus Supplement (as defined below);
- (c) that the requirement to include a statement 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* (**44-101F1**) does not apply to the Base Shelf Prospectus (as defined below); and
- (d) that the requirement to include the statements specified by items 2 and 3 of section 5.5 of NI 44-102 does not apply to the Base Shelf Prospectus.

The Decision Makers have also received a request from the Filers for a decision that the Application and this decision (together, the **Confidential Material**) be held in confidence and not be made public until the earliest of (i) the date on which the Filers enter into an Equity Distribution Agreement, (ii) the date on which any of 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 (the **Confidentiality Relief**).

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

- (a) the Alberta Securities Commission is the principal regulator for the Application;
- (b) the Filers have provided notice that subsection 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, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, the Northwest Territories, Nunavut and the Yukon Territory; 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

Terms defined in National Instrument 14-101 *Definitions*, National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (SEDAR)*, MI 11-102 or NI 44-102 have the same meaning if used in this decision, unless otherwise defined herein.

Representations

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 in Calgary, Alberta.
2. The Issuer is a reporting issuer in each province and territory of Canada 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 1934 Act, and files its continuous disclosure documents with the SEC in the US.

The Agents

5. TD Securities Inc. is a corporation incorporated under the laws of the Province of Ontario with its head office in Toronto, Ontario.
6. BMO Nesbitt Burns Inc. is a corporation incorporated under the laws of Canada with its head office in Toronto, Ontario.

7. J.P. Morgan Securities Canada Inc. is a corporation incorporated under the laws of Canada with its head office in Toronto, Ontario.
8. Each of the Canadian Agents is registered as an investment dealer under the securities legislation in each province and territory of Canada, is a member of the Investment Industry Regulatory Organization of Canada, and is a participating organization of the TSX.
9. TD Securities (USA) LLC is a company formed under the laws of Delaware with its head office in New York, New York.
10. BMO Capital Markets Corp. is a corporation incorporated under the laws of Delaware with its head office in New York, New York.
11. J.P. Morgan Securities LLC is a company formed under the laws of Delaware with its head office in New York, New York.
12. Each of the US Agents is a broker-dealer registered with the SEC under the 1934 Act.
13. None of the Agents are in default of securities legislation in any jurisdiction of Canada.

Proposed ATM Distribution

14. Subject to mutual agreement on terms and conditions, the Filers propose to enter into Equity Distribution Agreements for the purpose of one or more ATM Distributions involving the periodic sale of Common Shares by the Issuer through the Agents, as agents, under the shelf prospectus procedures prescribed by Part 9 of NI 44-102.
15. Prior to making an ATM Distribution, the Issuer will have done all of the following:
 - (a) filed in each province and territory of Canada a short form base shelf prospectus providing for the distribution from time to time of Common Shares (the **Base Shelf Prospectus**);
 - (b) filed with the SEC a registration statement on Form F-10 under the multijurisdictional disclosure system providing for the distribution from time to time of Common Shares;
 - (c) filed in each province and territory of Canada a prospectus supplement describing the terms of the ATM Distribution, including the terms of the Equity Distribution Agreements and otherwise supplementing the disclosure in the Base Shelf Prospectus (the **Prospectus Supplement**, and together with the Base Shelf Prospectus as supplemented or amended and including any documents incorporated by reference therein (which shall include any Designated News Release as defined below), the **Prospectus**);

- (d) filed with the SEC a prospectus supplement in substantially the same form as the Prospectus Supplement.
16. The Issuer will include in the Base Shelf Prospectus a forward-looking certificate of the Issuer in the form prescribed by section 1.1 of Appendix A to NI 44-102.
 17. If an Equity Distribution Agreement is entered into, the Issuer will immediately do both of the following:
 - (a) issue and file a news release announcing the Equity Distribution Agreement and indicating that the Base Shelf Prospectus and the Prospectus Supplement have been filed on SEDAR and specifying where and how purchasers of Common Shares under an ATM Distribution may obtain copies of each;
 - (b) file the Equity Distribution Agreement on SEDAR.
 18. Under the proposed Equity Distribution Agreements the Issuer may conduct one or more ATM Distributions subject to the 10% limitation set out in subsection 9.1(1) of NI 44-102.
 19. The Issuer will not, during the period that the final receipt for the Base Shelf Prospectus is effective, distribute by way of one or more ATM Distributions a total market value of Common Shares that exceeds 10% of the aggregate market value of Common 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.
 20. The Issuer will conduct ATM Distributions only through one or more of the Agents (as agent) directly or via a Selling Agent, and only through (i) the TSX, (ii) the NYSE, or (iii) another marketplace as defined in National Instrument 21-101 *Marketplace Operation* upon which the Common Shares are listed, quoted or otherwise traded (each a **Marketplace**).
 21. The Canadian Agents will act as the sole agents of the Issuer in connection with an ATM Distribution directly or through one or more Selling Agents on the TSX or any other Marketplace in Canada (a **Canadian Marketplace**), and will be paid an agency fee or commission by the Issuer in connection with such sales. 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. The Canadian Agents will each sign an agent's certificate, in the form set out in paragraph 38 below, in the Prospectus Supplement.
 22. A purchaser's rights and remedies under applicable securities legislation against the Canadian Agents, as agents of an ATM Distribution through a Canadian Marketplace, will not be affected by a decision to effect the sale directly or through a Selling Agent.

23. The aggregate number of Common Shares sold on one or more Canadian Marketplaces pursuant to an ATM Distribution on any trading day will not exceed 25% of the trading volume of the Common Shares on all Canadian Marketplaces on that day.
24. The Equity Distribution Agreements will provide that, at the time of each ATM Distribution, the Issuer will represent to the Agents that the Prospectus contains full, true and plain disclosure of all material facts relating to the Issuer and 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.
25. 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 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 Base 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 such term is defined in the Legislation).
26. 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 an Equity Distribution Agreement (a **Sell Notice**), the sale of Common 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 has filed a Designated News Release or material change report, as applicable, or amended the Prospectus, or (ii) circumstances have changed such that a sale would no longer constitute a material fact or material change.
27. In determining whether the sale of the number 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:
 - (a) 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;
 - (b) the percentage of the outstanding Common Shares that the number of Common Shares proposed to be sold pursuant to the Sell Notice represents;
 - (c) sales under earlier Sell Notices;

- (d) trading volume and volatility of the Common Shares;
 - (e) recent developments in the business, operations or capital of the Issuer; and
 - (f) prevailing market conditions generally.
28. 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 closely monitor the market's reaction to trades made on any Marketplace pursuant to an 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 the Agents have 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 Agents will recommend against effecting the sell order at that time.

Disclosure of Common Shares Sold in ATM Distribution

29. The Issuer will disclose the number and average price of Common Shares sold pursuant to ATM Distributions, as well as gross proceeds, commissions and net proceeds, in its annual and interim financial statements and management discussion and analysis filed on SEDAR.

Prospectus Delivery Requirement

30. 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.
31. Delivery of a prospectus is not practicable in the circumstances of an ATM Distribution, because neither the Agents nor a Selling Agent effecting the trade will know the identity of the purchasers.
32. The Prospectus will be filed and readily available electronically via SEDAR to all purchasers under ATM Distributions. As stated in paragraph 17 above, the Issuer will issue a news release that specifies where and how copies of the Base Shelf Prospectus and the Prospectus Supplement may be obtained.
33. 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, because purchasers of securities offered by a prospectus during the period of distribution have a right of action for damages or rescission without regard to whether or not the purchaser relied on the misrepresentation or in fact received a copy of the prospectus.

Withdrawal Right and Right of Action for Non-Delivery

34. Pursuant to the Legislation, an agreement to purchase a security in respect of a distribution to which the prospectus requirement applies is not binding on the purchaser if the 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**).
35. Pursuant to the Legislation, a purchaser of a security to whom a prospectus was required to be, but was not in fact, sent or delivered in compliance with the Prospectus Delivery Requirement has a right of action for rescission or damages against the dealer who did not comply with the Prospectus Delivery Requirement (the **Right of Action for Non-Delivery**).
36. 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.

Modified Certificates and Statements

37. To reflect the fact that an ATM Distribution is a continuous distribution, the Prospectus Supplement will include the following issuer certificate:

The short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing, as of the date of a particular distribution of securities under the prospectus, will, as of that date, 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.

38. The Prospectus Supplement will include the following underwriter certificate:

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, as of the date of a particular distribution of securities under the prospectus, will, as of that date, 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.

39. A different statement of purchasers' rights than that required by the Legislation is necessary so that the Base Shelf Prospectus will accurately reflect the relief granted from the Prospectus Delivery Requirement. Accordingly, the Base Shelf Prospectus 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, revisions 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 of rescission or, in some jurisdictions, revisions of the price, or damages for non-delivery of the prospectus, because the prospectus, prospectus supplements relating to the Common Shares purchased by the purchaser and any amendment relating to Common Shares purchased by such purchaser will not be delivered as permitted under a decision dated •, 2017 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 further provides purchasers with remedies for rescission or, in some jurisdictions, revisions of the price or damages if the prospectus, prospectus supplements relating to securities purchased by a purchaser and any amendment contains a misrepresentation, provided that the remedies are exercised by the purchaser within the time limit prescribed by securities legislation. Any remedies under securities legislation that a purchaser of Common Shares under an at-the-market distribution by the Issuer may have against the Issuer or the Agents for rescission or, in some jurisdictions, revisions of the price, or damages if the prospectus, prospectus supplements relating to securities purchased by a purchaser and any amendment contain a misrepresentation remain unaffected by the non-delivery and the decision referred to above.

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

40. The statements required by items 2 and 3 of section 5.5 of NI 44-102 will be included in the Base Shelf Prospectus, but will be qualified by the additional words ", except in cases where an exemption from such delivery requirement has been obtained".

Decision

Each of the Decision Makers is satisfied that this decision satisfies 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:

- (a) at least one of the following is true:
 - (i) during a 60-day period ending not earlier than 10 days prior to the commencement of the ATM Distribution, the Common Shares have traded, in total, on one or more Marketplaces, as reported on a consolidated market display:
 - (A) an average of at least 100 times per trading day, and
 - (B) with an average trading value of at least \$1,000,000 per trading day;
 - (ii) at the commencement of the ATM Distribution, the Common Shares are subject to Regulation M under the 1934 Act and are an "actively-traded security" as defined thereunder;
- (b) the Issuer complies with the disclosure requirements set out in paragraphs 29 and 37 through 40 above; and
- (c) the Issuer and Agents respectively comply with the representations made in paragraphs 17, 19 through 21 and 23 through 28 above.

This decision will terminate 25 months from the date of the receipt for the Base Shelf Prospectus.

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

For the Alberta Securities Commission:

"original signed by"

Tom Cotter
Vice Chair

"original signed by"

Ian Beddis
Member