

Headnote

National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – relief granted permitting issuer to send-proxy-related materials to registered securityholders and beneficial owners using a delivery method permitted under U.S. federal securities law – issuer will send proxy-related materials in compliance with Rule 14a-16 under the *Securities Exchange Act of 1934* of the United States of America and will provide additional information relating to meetings and delivery and voting processes.

Applicable Legislative Provisions

National Instrument 51-102 *Continuous Disclosure Obligations*, ss. 9.1, 9.1.5 and 13.1.

National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer*, ss. 2.7, 9.1.1 and 9.2

Citation: Re Encana Corporation, 2019 ABASC 26

Date: 20190205

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
Encana Corporation (the **Filer**)

Decision

Background

The securities regulatory authority or regulator in each of the Jurisdictions (the **Decision Maker**) has received an application (the **Application**) from the Filer for a decision under the securities legislation of the Jurisdictions (the **Legislation**) for relief permitting the Filer to send proxy-related materials to registered holders of securities (**Registered Holders**) and beneficial owners of securities (**Beneficial Holders**) entitled to vote at any meeting of securityholders of the Filer using a delivery method permitted under U.S. federal securities law (the **Requested 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 this Application;

- (b) the Filer has 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, New Brunswick, Prince Edward Island, Nova Scotia, Newfoundland and Labrador, Yukon, Northwest Territories, and Nunavut; 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*, MI 11-102, National Instrument 51-102 *Continuous Disclosure Obligations* (**NI 51-102**) and National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* (**NI 54-101**) have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer is incorporated under the *Canada Business Corporations Act* and its executive and registered offices are located in Calgary, Alberta.
2. The Filer is a reporting issuer in all provinces and territories in Canada and is not in default of securities legislation in any jurisdiction of Canada.
3. The Filer had outstanding approximately 952,478,421 common shares (**Common Shares**) as of the close of business on September 30, 2018.
4. The Common Shares are listed on both the Toronto Stock Exchange and the New York Stock Exchange (**NYSE**).
5. The Filer is an "SEC issuer" as defined in NI 51-102.
6. The Filer has determined that it currently does not qualify as a "foreign private issuer" under Rule 3b-4 of the 1934 Act and, accordingly, is required to comply with applicable U.S. federal securities law in all respects, including the U.S. proxy solicitation rules applicable to U.S. domestic registrants.
7. In accordance with section 9.1.5 of NI 51-102, a reporting issuer that is an SEC issuer can send proxy-related materials to registered holders under section 9.1 of NI 51-102 using a delivery method permitted under U.S. federal securities law, if both of the following apply:
 - (a) the SEC issuer is subject to, and complies with, Rule 14a-16 under the 1934 Act (the **U.S. Notice-and-Access Rules**);
 - (b) residents of Canada do not own, directly or indirectly, outstanding voting securities carrying more than 50% of the votes for the election of directors, and none of the following apply:

- (i) the majority of the executive officers or directors of the issuer are residents of Canada;
- (ii) more than 50% of the consolidated assets of the issuer are located in Canada;
- (iii) the business of the issuer is administered principally in Canada

(the **Automatic Registered Holder Exemption**).

8. In accordance with section 9.1.1(1) of NI 54-101, despite section 2.7 of NI 54-101, a reporting issuer that is an SEC issuer can send proxy-related materials to beneficial owners using a delivery method permitted under U.S. federal securities law, if all of the following apply:
- (a) the SEC issuer is subject to, and complies with the U.S. Notice-and-Access Rules;
 - (b) the SEC issuer has arranged with each intermediary through whom the beneficial owner holds its interest in the reporting issuer's securities to have each intermediary send the proxy-related materials to the beneficial owner by implementing the procedures under Rule 14b-1 or Rule 14b-2 under the 1934 Act that relate to the procedures in the U.S. Notice-and-Access Rules;
 - (c) residents of Canada do not own, directly or indirectly, outstanding voting securities of the issuer carrying more than 50% of the votes for the election of directors, and none of the following apply:
 - (i) the majority of the executive officers or directors of the issuer are residents of Canada;
 - (ii) more than 50% of the consolidated assets of the issuer are located in Canada;
 - (iii) the business of the issuer is administered principally in Canada

(the **Automatic Beneficial Holder Exemption** and, together with the Automatic Registered Holder Exemption, the **Automatic Exemptions**).

9. The Filer is unable to rely on the Automatic Exemptions because a majority of the Filer's executive officers are residents of Canada and the business of the Filer is administered principally in Canada.
10. Three of the Filer's seven executive officers are residents of the U.S., including the President and Chief Executive Officer.
11. Six of the Filer's ten directors are residents of the U.S.

12. The Filer has a corporate office in Denver, Colorado, U.S., where three of the Filer's seven executive officers, including the Chief Executive Officer of the Filer, and over 45% of the Filer's employees are located. This office is primarily responsible for the U.S. operations of the Filer, which accounted for over 60% of the Filer's revenue from operations for the nine months ended September 30, 2018.
13. In addition:
 - (a) as of June 30, 2018, the majority of the shareholders of Common Shares were not residents of Canada;
 - (b) the majority of the Filer's consolidated assets, including property and equipment and intangible assets subject to amortization, are located outside of Canada; and
 - (c) the majority of the trading volume of the Common Shares occurs on the NYSE.
14. NI 51-102 requires the Filer to deliver proxy-related materials to Registered Holders and NI 54-101 requires the Filer to deliver proxy-related materials to Beneficial Holders that have requested materials for the meetings of the Filer.
15. For any meeting of securityholders of the Filer for which the Filer elects to deliver proxy-related materials by using notice-and-access (each, a **Notice-and-Access Meeting**), the Filer will send proxy-related materials to holders of voting securities in compliance with the U.S. Notice-and-Access Rules.
16. The U.S. Notice-and-Access Rules allow the Filer to furnish proxy-related materials by:
 - (a) sending registered securityholders entitled to vote at a Notice-and-Access Meeting a notice of internet availability of proxy-related materials (the **Notice**) 40 calendar days or more prior to the date of the applicable Notice-and-Access Meeting and sending the record holder, broker or respondent bank the Notice in sufficient time for the record holder, broker or respondent bank to prepare, print and send the Notice to beneficial securityholders entitled to vote at the applicable Notice-and-Access Meeting at least 40 calendar days before the date of such Notice-and-Access Meeting; and
 - (b) making all proxy-related materials identified in the Notice, including the management proxy circular, publicly accessible, free of charge, at a website address specified in the Notice. The Notice will comply with the requirements of the U.S. Notice-and-Access Rules and include instructions regarding how a securityholder entitled to vote at the applicable Notice-and-Access Meeting may request a paper or email copy of the proxy-related materials at no charge. The U.S. Notice-and-Access Rules permit the Filer and, in turn, the record holder, broker or respondent bank, to send only the Notice to beneficial securityholders, provided that all applicable requirements of the U.S. Notice-and-Access Rules have been satisfied.
17. In lieu of delivering to each Registered Holder the proxy-related materials required under NI 51-102, for each Notice-and-Access Meeting the Filer will deliver by mail or email (if permitted by applicable law) the Notice to each Registered Holder.

18. In lieu of delivering to each Beneficial Holder the proxy-related materials required under NI 54-101, for each Notice-and-Access Meeting the Filer will deliver to Broadridge Financial Solutions, Inc., its affiliates, successor or an equivalent provider of proxy services (collectively, **Broadridge**) the Notice for delivery to each Beneficial Holder. Broadridge will deliver the English-only Notice to each Beneficial Holder by postage-paid mail or email (if permitted by applicable law). Broadridge will act as the Filer's agent for such purposes and the Filer will pay all of the expenses involved in printing and delivering the Notice to all Beneficial Holders.
19. The Notice sent by the Filer to securityholders entitled to vote at a Notice-and-Access Meeting will include the following information:
 - (a) the date, time and location of such Notice-and-Access Meeting as well as information on how to obtain directions to be able to attend such Notice-and-Access Meeting and vote in person or to designate another person to attend, vote and act on the securityholder's behalf;
 - (b) a clear and impartial description of each matter to be voted on at such Notice-and-Access Meeting, including the recommendations of the board of directors of the Filer regarding those matters;
 - (c) an indication that the Notice is not a form for voting and presents only an overview of the more complete proxy-related materials;
 - (d) a plain language explanation of the U.S. Notice-and-Access Rules, including that the proxy-related materials for such Notice-and-Access Meeting have been made available online and that securityholders may request a physical copy at no charge;
 - (e) an explanation of how to obtain a physical copy of the proxy-related materials for such Notice-and-Access Meeting;
 - (f) the website addresses for SEDAR, the Filer's website and any other third party hosting websites where the proxy-related materials are posted;
 - (g) a reminder to review the management proxy circular for such Notice-and-Access Meeting before voting;
 - (h) an explanation of the methods available for securityholders to vote at such Notice-and-Access Meeting; and
 - (i) the date by which a validly completed form of proxy or voting instruction form must be deposited in order for the securities represented by such form of proxy or voting instruction form to be voted at such Notice-and-Access Meeting, or any adjournment thereof.
20. Registered Holders and Beneficial Holders requesting the proxy-related materials will receive the same materials required to be sent to securityholders under the U.S. Notice-and-Access Rules.

21. A Beneficial Holder who wants to attend a Notice-and-Access Meeting in person will be required to obtain a proxy from his, her or its applicable intermediary.
22. For each Notice-and-Access Meeting, Broadridge will notify all Canadian intermediaries on whose behalf it acts as agent under NI 54-101 to advise them of the Filer's reliance on the U.S. Notice-and-Access Rules and this decision for communicating with Beneficial Holders.
23. For each Notice-and-Access Meeting, the Filer will retain Broadridge to respond to requests for proxy-related materials from Beneficial Holders and will retain AST Trust Company (Canada), its affiliates, successor or an equivalent provider of transfer agent or proxy services (collectively, **AST** and, together with Broadridge, the **Agents**) to respond to requests for proxy-related materials from Registered Holders. The Notice from the Filer will direct such Registered Holders and Beneficial Holders to contact the Agents, as applicable, at a specified toll-free telephone number, by email or via the internet to request a printed copy of the proxy-related materials for the applicable Notice-and-Access Meeting. The Agents will give notice to the Filer of the receipt of requests for printed copies, and the Filer will provide English-only materials to the Agents in compliance with the requirements of the U.S. Notice-and-Access Rules.
24. The Filer will not receive any information from the Agents about the Registered Holders and Beneficial Holders that contact the Agents in respect of a Notice-and-Access Meeting, other than the aggregate number of proxy-related material packages requested by Registered Holders and Beneficial Holders, and the Filer will reimburse the Agents for the costs of delivering such packages. The Agents will not use any email address obtained from a Registered Holder or a Beneficial Holder solely for the purpose of requesting a copy of proxy-related materials for any purpose other than to send a copy of those materials to that holder.
25. The Filer has consulted with the Agents in developing the mailing and voting procedures described in this decision for Registered Holders and Beneficial Holders.

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 the Requested Relief is granted provided that, in respect of a Notice-and-Access Meeting, at the time the Filer sends the notification of meeting and record dates for such meeting in accordance with section 2.2 of NI 54-101, the Filer meets all of the requirements of the Automatic Exemptions other than those set out in:

- (a) sections 9.1.5(b)(i) and (iii) of NI 51-102, in the case of the Automatic Registered Holder Exemption; and
- (b) sections 9.1.1(1)(c)(i) and (iii) of NI 54-101, in the case of the Automatic Beneficial Holder Exemption.

For the Commission:

“original signed by”

Tom Cotter
Vice-Chair

“original signed by”

Kari Horn
Vice-Chair