

Headnote

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – relief from prospectus requirements in connection with the issuance, from time to time, of membership and investment shares to members of a Ontario incorporated cooperative – the cooperative could not rely on the prospectus exemption in ASC Rule 45-511 *Local Prospectus Exemptions and Related Requirements*.

Applicable Legislative Provisions

Securities Act, R.S.A. 2000, c.S-4, sections 110 and 144

Citation: Re Consolidated Dealers Co-Operative Inc., 2020 ABASC 147 Date: 20200904

In the Matter of
the Securities Legislation of
Alberta (the **Jurisdiction**)

and

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

and

In the Matter of
Consolidated Dealers Co-Operative Inc. (the **Filer**)

Decision

Background

The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction (the **Legislation**) that the prospectus requirement contained in the Legislation (the **Prospectus Requirement**) shall not apply to the issuance, from time to time, of membership shares of the Filer (**Membership Shares**) and Class A preference shares of the Filer (**Class A Preference Shares**), to Prospective Members (as defined below) or to the first trade of such shares by a member of the Filer (**Member**) to the Filer or a Prospective Member (the **Exemption Sought**).

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

- (a) the Alberta Securities Commission is the principal regulator for this application;
and
- (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, Quebec, Nova Scotia, New Brunswick, Prince

Edward Island, Newfoundland and Labrador, Yukon, Northwest Territories, and Nunavut.

Interpretation

Terms defined in National Instrument 14-101 *Definitions*, MI 11-102 or the *Co-operative Corporations Act*, R.S.O. 1990, c. C. 35 (the **CCA**) have the same meanings 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 CCA.
2. The Filer's head office is in Woodbridge, Ontario.
3. The Filer was created to be a single-source purchasing solution for new car and truck dealers in Canada, which are provided with the opportunity to take advantage of a central buying group capitalizing on its bulk purchase power to obtain attractive prices, rebates and commissions on automotive accessories, materials and supplies.
4. The authorized capital of the Filer consists of one hundred million (100,000,000) Membership Shares with a par value of \$1.00 each, five hundred thousand (500,000) Class A Preference Shares with a par value of \$100 each and five hundred thousand (500,000) Class B preference shares with a par value of \$100 each (the **Class B Preference Shares**).
5. The Membership Shares have voting rights, dividend rights and entitle the holders of such shares to a right to share in the distribution of assets of the Filer upon its dissolution.
6. The Class A Preference Shares have the right to vote at meetings of holders of Class A Preference Shares, are non-dividend bearing and are redeemable. In the event of liquidation, dissolution or winding-up of the Filer, the holders of the Class A Preference Shares shall have preference over the holders of Membership Shares and Class B Preference Shares.
7. The Class B Preference Shares have the right to vote at meetings of holders of Class B Preference Shares, priority dividend rights and are redeemable. In the event of liquidation, dissolution or winding-up of the Filer, the holders of the Class B Preference Shares shall have preference over the holders of Membership Shares.
8. The Class A Preference Shares and Class B Preference Shares are considered investment shares as that term is defined under the *Cooperatives Act*, R.S.A. 2001, c.C. 28.1.
9. The Filer will not issue any Class B Preference Shares in reliance upon the Exemption Sought.

10. The Filer is not, and has no present intention of becoming, a reporting issuer in any of the provinces or territories of Canada.
11. There is no market for the Membership Shares or the Class A Preference Shares and the Membership Shares and the Class A Preference Shares are not traded on any marketplace as defined in National Instrument 21-101 *Marketplace Operation*. The Filer has no present intention of listing the Membership Shares or the Class A Preference Shares on any stock exchange or market.
12. To be eligible for membership in the Filer, each person or company must: (i) be actively engaged in the business of new car and truck sales and servicing in Canada; (ii) have been a non-Member associate (**Associate**) of the Filer for a period of at least one year; (iii) have submitted a fully executed a share subscription agreement (**Membership Subscription Agreement**) subscribing for 500 Membership Shares at \$1.00 per share and 95 Class A Preference Shares at \$100 per share (the **Requisite Number of Shares**) in the form provided by the Filer; and (iv) meet minimum financial and creditworthiness criteria as determined by the board of directors (the **Board**) from time to time (collectively, the **Eligibility Criteria**).
13. Only Associates which meet the Eligibility Criteria (**Prospective Members**) are permitted to subscribe for Membership Shares and Class A Preference Shares. Membership Shares and Class A Preference Shares are only sold together to Prospective Members to gain membership in the Filer. Once Prospective Members become Members they cannot subscribe for additional Membership Shares or Class A Preference Shares.
14. As set out in the articles of the Filer, the Membership Shares may only be transferred with the prior consent of the Board. The CCA restricts the transfer of Membership Shares to Members. The Class A Preference Shares may be issued, allotted and transferred only to Members.
15. In compliance with the applicable provisions of the CCA, the Filer will hold annual meetings of Members.
16. Each Prospective Member will be required to execute a Membership Subscription Agreement with the Filer in order to subscribe for the Requisite Number of Shares. The Prospective Member must then provide payment to the Filer in the amount of \$10,000 for the Requisite Number of Shares as well as the Prospective Member's proportionate share of the retained earnings of the Filer at the end of the previous fiscal year (**Retained Earnings Premium**).
17. Upon the Filer receiving an executed Membership Subscription Agreement, the requisite funds and approval by the Board of the admission of such Prospective Member, the Prospective Member will become a Member.

18. The Filer may, at the discretion of the Board, pay a commission of no more than 10% of the par value of the shares or \$1,000, to the individual that the manufacturer has approved to operate the dealership (**Principal**) of the Prospective Member that is purchasing such Membership Shares and Class A Preference Shares (the **Principal Commission**). A Prospective Member can purchase the Requisite Number of Shares by paying in full or by applying the rebates to which it is entitled against the subscription price over time. The Principal Commission is paid to the Principal only when the Requisite Number of Shares are paid for in full.
19. Each Prospective Member will receive:
 - (a) an offering statement which is prepared annually in compliance with the CCA, and received by the Financial Services Regulatory Authority of Ontario (**Offering Statement**), which provides similar disclosure to that required in a prospectus and is certified by the Chief Executive Officer and Chief Financial Officer of the Filer to contain full, true and plain disclosure of all material facts;
 - (b) an addendum to the Offering Statement advising of any differences in the material attributes of the securities being offered to holders in Ontario compared to holders outside of Ontario that are not described in the Offering Statement;
 - (c) the articles and by-laws of the Filer;
 - (d) a copy of the Membership Subscription Agreement (which includes a description of the Contractual Right of Action and Right of Withdrawal (each as defined below)) and forms part of the Offering Statement; and
 - (e) a copy of the Filer's most recent audited annual financial statements(collectively, the **Disclosure Documents**).
20. Each Prospective Member will also receive, and must sign, a risk acknowledgment form substantially similar to Form 45-106F4 *Risk Acknowledgement* (the **Risk Acknowledgement Form**).
21. Each Prospective Member will be provided with a contractual right of action against the Filer with respect to any misrepresentation contained in the Offering Statement provided to the Member upon entering into the Membership Subscription Agreement (the **Contractual Right of Action**). The Membership Subscription Agreement will also contain a description of the Contractual Right of Action and a statement that the Contractual Right of Action is in addition to any other right or remedy available at law to the Member.
22. Each Member or Prospective Member will be provided with the right to withdraw from their subscription commitment within two business days of signing the Membership Subscription Agreement (the **Right of Withdrawal**). The Membership Subscription Agreement will contain a description of the Right of Withdrawal.

23. Each Member will receive certificates representing the Membership Shares and Class A Preference Shares subscribed for. The certificates will state that the Membership Shares and Class A Preference Shares are subject to restrictions as contained in the Filer's articles and by-laws and the relevant Membership Subscription Agreement, including restrictions on transfers.
24. The Filer will provide Members with reports of any material change in the business of the Filer in a timely manner and will send Members outside of Ontario updated versions of the Offering Statement on an annual basis.
25. The Filer will send each Member a copy of its audited annual financial statements and auditor's report in accordance with section 140 of the CCA.
26. At each annual meeting of Members, the Filer will provide Members with a review of the operating results of the Filer and the opportunity to ask questions of management of the Filer.
27. No Prospective Member of the Filer is expected at the time it acquires the Requisite Number of Shares to be an "accredited investor", as defined in section 1.1 of National Instrument 45-106 *Prospectus Exemptions*.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted provided that:

- (a) the Filer is in compliance with the provisions of the CCA;
- (b) the only shares to be issued by the Filer in reliance on the Exemption Sought are Membership Shares and Class A Preference Shares;
- (c) the Filer is not a reporting issuer in any province or jurisdiction of Canada;
- (d) no securities of the Filer are listed on a securities exchange or other marketplace;
- (e) the Filer does not make any written or oral representations to Associates or Prospective Members regarding potential future profits from membership in the Filer;
- (f) solicitations for membership in the Filer are conducted solely by the Filer and there are no finder's fees or commissions paid in connection with the issuance of Membership Shares or Class A Preference Shares in reliance upon the Exemption Sought, other than the Principal Commission;

- (g) the Filer restricts the issuance of Membership Shares and Class A Preference Shares to Prospective Members;
- (h) prior to the initial trade of any Membership Shares or Class A Preference Shares to a Prospective Member, the Filer delivers to such Prospective Member a copy of:
 - (i) this Decision;
 - (ii) the Disclosure Documents containing all of the disclosure and documents specified in paragraph 19; and
 - (iii) the Risk Acknowledgement Form,
- (i) the Filer will provide ongoing disclosure specified in paragraphs 24 and 25 in accordance with the requirements of the CCA;
- (j) all share certificates issued in reliance of the Exemption Sought and which represent the Membership Shares and Class A Preference Shares bear a legend stating that the right to transfer the Membership Shares or Class A Preference Shares, as applicable is subject to restrictions contained in the articles and by-laws of the Filer and the Membership Subscription Agreement;
- (k) the exemptions contained in this Decision cease to be effective if any one of the provisions of the articles or the by-laws of the Filer or of the Membership Subscription Agreement relevant to the exemptions granted herein are amended in any material respect without prior written notice to, and consent by, the principal regulator; and
- (l) the first trade in any Membership Shares or Class A Preference Shares by a Member to a person or company other than the Filer or a Member is deemed to be a distribution subject to section 2.6 of National Instrument 45-102 *Resale of Securities*.

For the Commission:

“original signed by”

Tom Cotter
Vice-Chair

“original signed by”

Kari Horn
Vice-Chair