

Important Development Relative to Private Placements in Quebec: Availability of the Accredited Investor Exemption for Quebec Investors

By Michel Servant and Josianne Beaudry

Accredited Investor Exemption

In a notice published in the April 23, 2004 bulletin of the *Agence nationale d'encadrement du secteur financier*, also known as the *Autorité des marchés financiers* (the "Autorité"), the securities regulatory authority in Quebec, the staff of the Autorité confirmed that it will grant discretionary exemptions from the registration and prospectus requirements of the *Securities Act* (Quebec) (the "Act") on a case-by-case basis to issuers in Quebec who make an application to this effect in connection with any private placement to be made to persons who would qualify as "accredited investors" under paragraphs a) through t) of the definition provided in Multilateral Instrument 45-103 entitled "Capital Raising Exemptions" ("MI 45-103"). Such exemption must, however, be obtained prior to the completion of the placement.

Under the definition provided in MI 45-103, an accredited investor includes certain financial institutions, government regulated pension funds, government agencies, individuals who (either jointly or with a spouse) own financial assets with an aggregate realizable value (before taxes but net of any related liabilities) exceeding \$1,000,000, individuals whose net income before taxes exceeded \$200,000 or whose net income before taxes together with his/her spouse exceeded \$300,000 in each of the past two years and who have reasonable expectation of exceeding such income level in the current year, registered advisors and dealers, an entity (other than a mutual fund or non-redeemable investment fund) with net assets of at least \$5,000,000 as of the date of its most recent financial statements and mutual funds or non-redeemable investment funds that distribute securities under a prospectus for which a receipt has been issued. Please note, however, that the foregoing is only a summary of the definition of accredited investor as provided in MI 45-103; please refer to the actual legal text for the complete definition.

Consequently, the usual prospectus exemption in Quebec requiring investors to purchase a minimum of \$150,000 of securities, will no longer be the only one available for a placement with Quebec investors who are not "sophisticated purchasers" within the meaning of sections 43, 44 and 45 of the Act¹ provided that an exemption application is filed with the Autorité prior to the completion of the placement and that such investors qualify as "accredited investors" under MI 45-103. From now on, investors qualifying as "accredited investors" will be able to acquire securities by way of a private placement without any consideration as to the amount invested.

Hold Period

Finally, given the modifications to Multilateral Instrument 45-102 - Resale of Securities in force since March 30, 2004 that harmonize the hold period in all provinces (except Quebec) for securities acquired in connection with most private placements at four months, l'Autorité has published two general exemptions² by which it will allow an investor residing in Quebec to benefit from the shortened hold period of four months instead of the hold periods of 6 or 12 months, as the case may be, provided in the Act subject to the following conditions being met:

- the issuer of the securities is a reporting issuer in Quebec;
- the issuer has been a reporting issuer in Quebec for at least four months immediately preceding the trade;

¹ This definition is much more restrictive than that of an accredited investor, including generally only "institutional investors" and is generally not accessible to individuals.

² Please see the Bulletin of April 2, 2004, vol.1 n°09; decision n°2004-PDG-0021 and n°2004-PDG-0022.



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- the purchaser and the subsequent purchasers have held the securities for at least four months³;
- no extraordinary commission or consideration is paid in respect of the trade;
- no effort is made to prepare the market or to create a demand for the securities that are subject of the trade;
- if the seller is an “insider” of the issuer, he has no reasonable grounds to believe that the issuer is in default of its obligations under the applicable securities legislation.

In the event that the issuer files an application exemption with the Autorité in order to complete a private placement with accredited investors, we understand that the Autorité will impose a hold period of four months provided that the foregoing conditions are met.

Conclusion

The availability of the accredited investor exemption to Quebec investors will harmonize the Quebec regime with the other Canadian provinces and will increase the flexibility of the Quebec regime allowing investors qualifying as accredited investors to acquire securities by way of private placement without any consideration as to the amount invested.

If you would like to discuss these new developments, please contact Michel Servant at (514) 877-2915 or at mservant@lavery.qc.ca, or Josianne Beaudry at (514) 877-3055 or at jbeaudry@lavery.qc.ca.

³ This condition is not applicable to securities acquired under an exemption provided in sections 50 or 52, i.e. in connection with an exchange of securities in the context of a consolidation or reorganization or in a distribution of securities notably to holders of subscription rights, by way of stock dividend, to shareholders through subscription plans or to its employees and senior executives.

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