

# ALBERTA SECURITIES COMMISSION

## DETERMINATION *Business Corporations Act (Alberta)*

Citation: Re Canacol Energy Ltd., 2021 ABASC 170

Date: 20211108

### Canacol Energy Ltd.

#### Background

1. Canacol Energy Ltd. (**Canacol**) has applied to the Alberta Securities Commission (the **Commission**) for a determination under subsection 3(3) of the *Business Corporations Act* (Alberta) (the **ABCA**) that the senior notes due 2028 proposed to be distributed by Canacol (the **Senior Notes**) are not part of a distribution to the public under the ABCA.

#### Interpretation

2. Terms defined in National Instrument 14-101 *Definitions* have the same meaning if used in this determination, unless otherwise defined.

#### Representations

3. This determination is based on the following representations by Canacol to the Commission:
  - (a) Canacol is a corporation incorporated under the ABCA, is a reporting issuer or the equivalent under the securities legislation in each of the provinces of Canada, other than Québec, and is not in default of securities laws.
  - (b) Canacol's head office is located in Calgary, Alberta.
  - (c) The Senior Notes will be distributed primarily in the United States.
  - (d) The Senior Notes will be issued and sold pursuant to exemptions from the registration requirements of the 1933 Act to one or more of Credit Suisse Securities (USA) LLC, Citigroup Global Markets Inc. and certain other specified persons (collectively, the **Initial Purchasers**).
  - (e) The Initial Purchasers will resell the Senior Notes to investors in transactions pursuant to Rule 144A under the 1933 Act and Regulation S under the 1933 Act or in transactions otherwise exempt from or not subject to the registration requirements of the 1933 Act.
  - (f) A portion of the Senior Notes may be distributed in one or more of the provinces of Canada to purchasers who are "accredited investors," as defined in National Instrument 45-106 *Prospectus Exemptions* (**NI 45-106**) or Section 73.3 of the *Securities Act* (Ontario) (the "**OSA**"), as applicable, pursuant to an exemption from the prospectus requirements contained in NI 45-106 or the OSA, as applicable.

- (g) The Senior Notes may also be distributed in other jurisdictions, pursuant to available exemptions; Canacol will comply with relevant local laws in these jurisdictions, as applicable.
- (h) The Senior Notes will not be listed on any stock exchange in Canada or the United States.
- (i) An application has been made to the Singapore Exchange Securities Trading Limited (the **SGX ST**) for the listing and quotation of the notes on the SGX ST. Upon approval of listing on the SGX ST, the Senior Notes will remain subject to applicable private placement transfer restrictions.
- (j) An offering document (**Offering Document**) will be provided by the Initial Purchasers to purchasers of Senior Notes.
- (k) The Offering Document will contain disclosure substantially similar to that contained in a prospectus subject to the 1933 Act, and could therefore be construed as a document similar to those referenced in subsection 3(2)(a) of the ABCA. The Offering Document is required to be filed in certain jurisdictions in Canada if a distribution of the Senior Notes is made in any such jurisdictions.
- (l) Accordingly, the Senior Notes could be considered part of a "distribution to the public" by Canacol of "debt obligations", as those terms are defined in the ABCA.
- (m) As a result, section 83 of the ABCA would require the appointment under the Indenture of at least one trustee registered under the *Loan and Trust Corporations Act* (Alberta) (the **LTCA**).
- (n) Canacol, certain of its subsidiaries and Citibank, N.A. (**Citibank**), a trustee resident in the United States, will enter into an indenture for the Senior Notes (the **Indenture**) which will be governed by, and construed in accordance with, the laws of the State of New York.
- (o) Citibank will be appointed the trustee (the **Trustee**) under the Indenture. Citibank is a national banking association, organized and existing under the laws of the United States, authorized to exercise corporate trust powers and supervised by the Comptroller of Currency.
- (p) The Indenture will be in substantially the form of an indenture that would be required under the *Trust Indenture Act of 1939* (United States) if the Senior Notes were subject to registration under the 1933 Act.
- (q) The Trustee is not registered under the LTCA; however, the Indenture will require that at all times the Trustee: (i) is a corporation organized under the laws of the United States or any state thereof; (ii) is authorized under such laws to exercise corporate trustee powers; (iii) is subject to supervision or examination by the United States federal and state authorities; and (iv) together with its affiliates, has a combined capital and surplus of at least US\$100 million.

- (r) Although the terms of the Indenture will not comply with all of the provisions of Part 7 of the ABCA, the terms will be substantially in compliance with subsections 82(1) and 82(2) [conflict of interest], section 88 [evidence of compliance] and section 89 [notice of default] of the ABCA.
- (s) The Indenture does not contain the same standard of care as is found in section 90 of the ABCA but does provide that if an event of default has occurred and is continuing, the Trustee shall use the same degree of care and skill in its exercise as a prudent person would exercise or use under the circumstances in the conduct of such person's own affairs.
- (t) Holders of Senior Notes will not derive any additional material benefit from having the Indenture be subject to the ABCA and the LTCA.

**Decision**

4. The Commission, being satisfied that granting this determination would not prejudice any security holder of Canacol, determines in accordance with subsection 3(3) of the ABCA that the Senior Notes are not part of a distribution to the public pursuant to the ABCA.

*“original signed by”*

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Timothy Robson  
Manager, Legal  
Corporate Finance  
Alberta Securities Commission