

Canadian Resale Rules

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Canadian provincial securities laws apply anytime a company issuing securities is located in Canada or the individual receiving or selling securities is located in Canada.



If you purchased securities of a company in a private placement those securities will have one or two restrictive legends on the back or front of the share certificate you received; a Canadian legend and sometimes a US legend. Regardless of what legend appears on the share certificate you must comply with Canadian secondary trading otherwise known as resale rules if you or the issuing company resides in Canada.

What are the Canadian resale rules and what do you need to do to resell those private placement securities you purchased? The answer to that question depends on what type of issuer you purchased these securities from. There are essentially five different categories of issuers in Canada:

1. [Canadian reporting issuers](#);
2. [Canadian non-reporting issuers](#);
3. [Foreign traded non-reporting issuers](#);
4. [US registered issuers but a non-reporting in Canada](#); and
5. [US OTC traded British Columbia reporting issuer](#).

This article will briefly discuss the resale rules set out by the Canadian securities regulators for each category of issuer after first providing a brief over-view of the regulatory framework.

Legal Framework

Securities issued in a private placement transaction are required to be stamped with a legend describing the restrictions on resale. This legend makes it clear to everyone who comes into contact with that share certificate that the underlying securities may not be sold or transferred unless the terms of the restrictive legend have been met or the sale or transfer is made pursuant to an available exemption from the registration and prospectus requirements of all applicable securities laws.

[National Instrument 45-102 - Resale of Securities](#) ("NI 45-102") has been adopted by all of the provinces and territories in Canada. In general, NI 45-102 imposes an indefinite hold period on stock issued by non-reporting issuers and a restricted period of four months on stock issued by reporting issuers in a private placement unless a resale exemption may be relied upon to sell these securities. A "**reporting issuer**" is an entity that has filed a registration statement or a prospectus with at least one provincial securities regulator and who as a result files continuous disclosure documents with that regulator. The securities of such entities may or may not be listed for trading on a recognized exchange. NI 45-102 also provides a resale exemption for foreign non-reporting issuers.

The British Columbia Securities Commission provides two additional resale exemptions for securities traded in the United States. The first resale exemption is available to trade securities of United States registered issuers who are non-reporting in Canada under [BC Instrument 72-502 Trades in Securities of U.S. Registered Issuers](#). The second resale exemption applies to all issuers who trade on the US over the counter market ("**OTC**") and are deemed to be reporting issuers in British Columbia as set out in [BC Instrument 51-509 Issuers Quoted in the U.S. Over-the-Counter Markets](#).

Resale Rules

1) **Canadian Reporting Issuers.** The standard restrictive legend on share certificates of Canadian reporting issuers is as follows:

"UNLESS PERMITTED UNDER SECURITIES LEGISLATION, THE HOLDER OF THIS SECURITY MUST NOT TRADE THE SECURITY BEFORE [INSERT DATE THAT IS 4 MONTHS AND A DAY AFTER THE DISTRIBUTION DATE]."

The requirement that must be met to remove this restrictive legend varies depending on who the shareholder is in relation to the issuer.

Non-Control Distributions (s. 2.5). Securities of a Canadian reporting issuer acquired in a private placement transaction are subject to a restricted period. The restricted period is composed of two parts. The issuer must have been a reporting issuer in at least one jurisdiction in Canada for four months or more immediately preceding the trade and at least four months must have elapsed from the securities' distribution date. Other requirements include:

1. that the trade is not a "control distribution;"
2. that no unusual effort has been made to prepare the market for the trade;
3. that no extraordinary commission is paid to a person or company in respect of the trade; and
4. if the seller is an insider or officer of the issuer, the selling security holder has no reasonable grounds to believe that the issuer is in default of securities legislation.

Shareholders may remove the legend from the securities certificate once the four month restricted period has elapsed. To do so the share certificate must be returned to the issuer's transfer agent along with a letter of instruction. The letter of instruction should include the legend removal instructions, the shareholder's social insurance number or social security number, and the name of the transferee. The original share certificate(s) should be enclosed along with an irrevocable power of attorney that has been medallion guaranteed. The exact documents requested can vary among transfer agents. A legal opinion letter is not required.

The four month reporting issuer requirement does not apply if an issuer becomes a reporting issuer after the distribution date by filing a prospectus in one of the provinces in Canada. The only restricted period is that four months have elapsed since the distribution date to the shareholder.

Control Distributions (s.2.8). A "control distribution" is defined in NI 45-102 as a trade in previously issued securities of an issuer from the holdings of a control person. A "control person" is defined as a person or combination of persons and/or companies acting together by virtue of an agreement who hold sufficient voting rights in an issuing company to materially affect the control of the company—otherwise defined as twenty percent of the voting rights in the absence of evidence to the contrary.

A control person must meet all the conditions that apply to non-control distributions. They must also sign and file on SEDAR a [*Form 45-102 Notice of Intention to Distribute Securities under Section 2.8 of NI 45-102 Resale of Securities*](#) ("**Advance Notice of Sale**") at least seven days before the first trade of the securities that are part of the distribution. The Advance Notice of Sale expires within 30 days of its filing date. A new Advance Notice of Sale cannot be filed until the expiry of the original Advance

Notice of Sale. A control person is required to file an insider report through SEDI within three days after the completion of any trade.

2) **Canadian Non-Reporting Issuers (s. 2.6).** Shareholders of restricted securities of Canadian non-reporting issuers have very limited circumstances under which they may sell their securities. The legend placed on the share certificates of Canadian non-reporting issuers is as follows:

"UNLESS PERMITTED UNDER SECURITIES LEGISLATION, THE HOLDER OF THIS SECURITY MUST NOT TRADE THE SECURITY BEFORE THE DATE THAT IS 4 MONTHS AND A DAY AFTER

THE LATER OF (I) [INSERT THE DISTRIBUTION DATE], AND (II) THE DATE THE ISSUER BECAME A REPORTING ISSUER IN ANY PROVINCE OR TERRITORY."

In practice, the securities of non-reporting issuers acquired in a private placement transaction are subject to an indefinite hold. The legend never comes off the share certificates of these securities unless the issuer becomes a reporting issuer in Canada. Once the issuer becomes a reporting issuer the requirements to remove the legend are identical to those required for shareholders of restricted securities issued by Canadian reporting issuers outlined above. The constating documents (articles, memorandum, bylaws or its shareholders agreement) of private issuers usually have restrictions on transfer of securities. Often these restrictions include getting approval from the board of directors of that issuer before any sale or transfer may be affected.

Shareholders of restricted securities of non-reporting issuers may rely on the prospectus and registration exemptions in *National Instrument 45-106 - Prospectus and Registration Exemptions* ("NI 45-106") to sell or transfer their holdings. The restrictive legend remains on the share certificate representing the transferred securities. For instance the private issuer exemption in section 2.4 of NI 45-106 is available to both issuers and non-issuers. It allows sales of securities of private issuers (as defined in NI 45-106) to:

1. a director, officer, employee, founder or control person of the issuer,
2. a director, officer or employee of an affiliate of the issuer,
3. a spouse, parent, grandparent, brother, sister, child or grandchild of a director, executive officer, founder or control person of the issuer,
4. a parent, grandparent, brother, sister, child or grandchild of the spouse of a director, executive officer, founder or control person of the issuer,
5. a close personal friend of a director, executive officer, founder or control person of the issuer,
6. a close business associate of a director, executive officer, founder or control person of the issuer,
7. a spouse, parent, grandparent, brother, sister, child or grandchild of the selling shareholder or of the selling shareholder's spouse,
8. a shareholder of the issuer,
9. an accredited investor,
10. a person of which a majority of the voting securities are beneficially owned by, or a majority of the directors are, persons described in paragraphs (a) to (i),
11. a trust or estate of which all of the beneficiaries or a majority of the trustees or executors are persons described in paragraphs (a) to (i), or
12. a person that is not the public.

Shareholders of restricted securities of non-reporting issuers, who may or may not be a private issuer, may also rely on the: (a) accredited investor exemption; (b) minimum investment amount of \$150,000 exemption; (d) family, friends and business associates; (e) current or former employees, executive officers, directors, or consultants of non-reporting issuer exemption; or (f) isolated trade exemption contained in NI 45-106. Shareholders should check with legal counsel to confirm whether they will need to file a [Form 45-106 Report of Exempt Distribution](#) if relying on an exemption from NI 45-106.

(Note: The exemptions set out in NI 45-106 are not available to US OTC traded British Columbia reporting issuers. See below for more details.)

Canadian non-reporting issuers are usually self-transferring, meaning the issuer usually acts as its own transfer agent. Shareholders interested in transferring their securities should contact the registered office of the issuer to obtain instructions on what they need to do in order to transfer their shares. As mentioned above, all transfers may be subject to approval of the board of directors of the issuer or be otherwise limited.

3) Foreign Traded Non-Reporting Issuers (2.14). NI-45-102 provides restricted securities of issuers who are non-reporting issuers in Canada but are traded on an exchange or market outside of Canada with their own resale exemption. The share certificates of these securities will have the same legend as placed on the securities of all Canadian non-reporting issuers. They

may also have a restrictive legend the foreign jurisdiction in which the securities are traded requires. To remove the Canadian legend and sell these shareholders must confirm:

1. the issuer was a non-reporting issuer in Canada on the original distribution date of the securities to the shareholder;
2. the issuer will not be a reporting issuer on the date of the trade;
3. as of the original distribution date, Canadians did not own directly or indirectly more than 10 percent of the outstanding securities of the class or series; and
4. as of the original distribution date, Canadians did not represent more than 10 percent of the total number of owners of the securities of the class or series.

The trade is required to be made through an exchange or market outside of Canada, or to a person or company outside of Canada.

Transfer agents in Canada will require a letter of instruction providing the legend removal instructions, the shareholder's social insurance number or social security number, and the name of the transferee. The original share certificate(s) and an irrevocable power of attorney that has been medallion guaranteed should be enclosed with the letter. A legal opinion letter from the issuer's securities counsel is almost always required. The exact documents requested can vary among transfer agents.

Shareholders should keep in mind that they will also need to comply with the securities laws and regulations of the jurisdiction in which the securities are traded and the exchange on which they are traded.

4) US Reporting Issuers Non-Reporting in Canada (BC Only). In addition to being able to rely on the foreign traded non-reporting issuer exemption provided in NI 45-102, BC residents have a resale exemption available if the securities of the issuer are registered under *the Securities Act of 1934* in the United States. The share certificates of these securities have the standard Canadian non-reporting issuer restrictive legend and either a US Regulation S restrictive legend:

"THE SECURITIES REPRESENTED BY THIS CERTIFICATE HAVE BEEN OFFERED AND SOLD IN AN OFFSHORE TRANSACTION IN RELIANCE UPON REGULATION S AS PROMULGATED BY THE SECURITIES AND EXCHANGE COMMISSION UNDER THE SECURITIES ACT OF 1933 ("REGULATION S"), ACCORDINGLY THE COMMON SHARES REPRESENTED BY THIS CERTIFICATE HAVE NOT BEEN REGISTERED UNDER THE 1933 ACT AND MAY NOT BE OFFERED FOR SALE, SOLD OR OTHERWISE TRANSFERRED IN THE UNITED STATES OR TO A U.S. PERSON, AS DEFINED IN REGULATION S, OR TO A PERSON IN THE UNITED STATES EXCEPT PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT UNDER THE 1933 ACT, OR PURSUANT TO AN EXEMPTION FROM REGISTRATION UNDER THE 1933 ACT, THE AVAILABILITY OF WHICH IS TO BE ESTABLISHED TO THE SATISFACTION OF THE ISSUER."

or a standard US legend:

"NONE OF THE SECURITIES REPRESENTED HEREBY HAVE BEEN REGISTERED UNDER THE UNITED STATES SECURITIES ACT OF 1933, AS AMENDED (THE "1933 ACT"), OR ANY U.S. STATE SECURITIES LAWS, AND, UNLESS SO REGISTERED, NONE MAY BE OFFERED OR SOLD EXCEPT PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT UNDER THE 1933 ACT OR PURSUANT TO AN EXEMPTION FROM, OR IN A TRANSACTION NOT SUBJECT TO, THE REGISTRATION REQUIREMENTS OF THE 1933 ACT AND IN EACH CASE ONLY IN ACCORDANCE WITH APPLICABLE STATE SECURITIES LAWS."

[BC Instrument 72-502 Distributions of Securities Outside of BC \("BCI 72-502"\)](#) allows the shareholders of restricted securities of a US reporting issuer to remove the Canadian legend and sell these securities when the following requirements have been met:

1. the seller's residential address or registered office is in British Columbia;
2. the seller has held the securities for a minimum of four months or six months if the seller is a control person;
3. the number of securities sold in the issuer by the seller over the preceding 12-month period does not exceed 5% of the issuer's outstanding securities in the class sold;

4. the sale is conducted through a registered investment dealer;
5. the dealer execute the trade through an exchange or market outside of Canada;
6. there has been no unusual effort made to prepare the market or create a demand for the securities.
7. the seller has not paid any extraordinary commission or other consideration for the trade; and
8. if the seller is an insider of the issuer, the seller reasonably believes that the company is not in default of the securities legislation (including U.S. federal and state securities legislation) that governs the issuer.

The four month hold period does not apply to securities that a seller acquired under a director or employee stock option.

Transfer agents in Canada will again require a letter of instruction providing the legend removal instructions, the shareholder's social insurance number or social security number, and the name of the transferee. The original share certificate(s) and an irrevocable power of attorney that has been medallion guaranteed should be enclosed with the letter. A legal opinion letter from the issuer's securities counsel will be required. The exact documents requested can vary among transfer agents. Legal counsel and the registered investment dealer will the standard documentation required to sell securities under Rule 144 in the United States. These documents include a seller's representation letter and a completed Form 144.

5) US OTC traded British Columbia reporting issuer (BC Only). *BC Instrument 51-509 Issuers Quoted in the U.S. Over-the-Counter Markets* ("BCI 51-509") came into effect in British Columbia September 15, 2008. The instrument was adopted by the British Columbia Securities Commission to address certain market abuses it identified as being conducted by certain issuers with British Columbia connections who were quoted on the US over the counter market. As a result all issuers who trade on the OTCBB or on the US PinkSheets with a British Columbia connection are deemed to be reporting issuers in British Columbia under BCI 51-509 ("**OTC Issuers**"). They are also denied the use of certain exemptions under NI 45-106 and NI 45-102 making it more difficult for issuers and shareholders of these companies to sell and trade securities of OTC Issuers.

Securities sold in private placements by OTC Issuers will have the standard private placement restrictive legends previously discussed and one of the following BCI 51-509 legends:

Pre-Ticker Symbol Legend:

"UNLESS OTHERWISE PERMITTED UNDER SECURITIES LEGISLATION, THE HOLDER OF THIS SECURITY MUST NOT TRADE THE SECURITY IN OR FROM BRITISH COLUMBIA UNLESS

- a. THE SECURITY HOLDER TRADES THE SECURITY THROUGH AN INVESTMENT DEALER REGISTERED IN BRITISH COLUMBIA FROM AN ACCOUNT AT THAT DEALER IN THE NAME OF THAT SECURITY HOLDER, AND
- b. THE DEALER EXECUTES THE TRADE THROUGH THE OTC BULLETIN BOARD OR PINK SHEETS."

Post Ticker Symbol Legend:

"UNLESS OTHERWISE PERMITTED UNDER SECURITIES LEGISLATION, THE HOLDER OF THESE SECURITIES MUST NOT TRADE THE SECURITIES IN OR FROM BRITISH COLUMBIA UNLESS THE CONDITIONS IN SECTION 12(2) OF BC INSTRUMENT 51-509 ISSUERS QUOTED IN THE U.S. OVER-THE-COUNTER MARKET ARE MET."

Shareholders, who acquired securities of an OTC Issuer after September 15, 2008 and before the issuer's ticker-symbol date, may sell these securities in a private transaction using any available exemption under NI 45-106 or any other exemption available in British Columbia until the OTC Issuer's ticker-symbol date.

On or after the ticker symbol date, shareholders may only sell the securities of the OTC Issuer through a formal takeover bid or through a registered investment dealer. Other than the residency requirement, the conditions required to be met before a

shareholder may sell through an investment dealer are identical to those conditions required to sell securities of US reporting issuers who are non-reporting in Canada. The conditions are as follows:

1. the seller has held the securities for a minimum of four months or six months if the seller is a control person;
2. the number of securities sold in the issuer by the seller over the preceding 12-month period does not exceed 5% of the issuer's outstanding securities in the class sold;
3. the sale is conducted through a registered investment dealer;
4. the dealer execute the trade through the OTC Bulletin Board or the Pink Sheets;
5. there has been no unusual effort made to prepare the market or create a demand for the securities.
6. the seller has not paid any extraordinary commission or other consideration for the trade; and
7. if the seller is an insider of the OTC Issuer, the seller reasonably believes that the OTC Issuer is not in default of the securities legislation (including U.S. federal and state securities legislation) that governs the issuer.

The four month hold period does not apply to securities that a seller acquired under a director or employee stock option.

Shareholders of OTC Issuers are barred from using all of the prospectus and registration exemptions set out in NI 45-106 available to other reporting and non-reporting issuers in Canada such as the: (a) accredited investor exemption; (b) minimum investment amount of \$150,000 exemption; (d) family, friends and business associates; (e) current or former employees, executive officers, directors, or consultants of non-reporting issuer exemption; or (f) isolated trade exemption are not available to OTC Issuers. This restriction has been put in place to curb the ability of promoters of the OTC Issuer to sell the securities of the OTC Issuer in a shell vehicle transaction or to become involved in a pump & dump illegal activity.

Similarly, shareholders and OTC issuers are barred from relying on the take-over bid exemptions set out in sections 98(1)(c) ("private agreement exemption") and 98(1)(d) ("non-reporting issuer exemption") of the *British Columbia Securities Act*. These two exemptions allow for a quick change of control of an issuer in situations where either very few people are involved or the number of shareholders of a non-reporting issuer is less than 50. The first of these two exemptions is not available to an OTC Issuer for two years after their ticker symbol date. The second exemption is barred forever.

Transfer agents will request the exact same documents as required of US reporting issuers who are non-reporting in Canada. Shareholders should be aware that a number of investment dealers in British Columbia will no longer accept delivery of OTC Issuer securities or trade those securities. Shareholders are strongly advised to check with their broker before attempting to have any OTC Issuer securities transferred to a particular investment dealer.

Closing Comments

The purpose of this article is to get you familiar with the Canadian resale rules that may apply to you as a shareholder of restricted securities. Your broker and the transfer agent for the issuer whose securities you hold should be able to help you sort out the details as to how you may resell or transfer your restricted securities or how you may remove any restrictive legends stamped on the share certificates you hold. You may also want to consider contacting the issuer's legal counsel or your own legal counsel prior to conducting any trade or transfer of securities you acquired in a private placement transaction.

Links:

Check out the following links if you want to do further research on your own on Canadian Resale Rules.

NI 45-102	Resale of Securities
CP to NI 45-102	Resale of Securities
NI 45-106	Prospectus and Registration Exemptions
CP to NI 45-106	Prospectus and Registration Exemptions
CSA Staff Notice 45-305	Frequently asked questions regarding National Instrument 45-106 Prospectus and Registration Exemptions
BCP 45-601	Statutory and Discretionary Exemptions
BCI 51-509	Issuers Quoted in the U.S. Over-the-Counter Markets

CP to BCI 51-509
BCI 72-502

[Issuers Quoted in the U.S. Over-the-Counter Markets](#)
[Trades in Securities of U.S. Registered Issuers](#)

Notice: This article is provided as a guideline for planning purposes only. You are advised to contact legal counsel prior to undertaking any resale of securities. Laws change and there are subtle nuisances to the rules that may apply in your particular circumstance.



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