

# 2003 BCSECCOM 513

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications – prospectus and registration relief for trades of options and shares in connection with an employee stock option plan - issuer bid relief in connection with acquisition of Awards under stock option plan – issuer with de minimus Canadian presence

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 48, 76 and 114

## **IN THE MATTER OF THE SECURITIES LEGISLATION OF ONTARIO, BRITISH COLUMBIA AND ALBERTA**

## **AND IN THE MATTER OF THE MUTUAL RELIANCE REVIEW SYSTEM FOR EXEMPTIVE RELIEF APPLICATIONS**

## **AND IN THE MATTER OF ADC TELECOMMUNICATIONS, INC.**

## **MRRS DECISION DOCUMENT**

WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in each of Ontario, British Columbia and Alberta (the “Jurisdictions”) has received an application from ADC Telecommunications, Inc. (“ADC” or the “Company”) for a decision pursuant to the securities legislation of the Jurisdictions (the “Legislation”) that:

- (i) the requirements contained in the Legislation to be registered to trade in a security (the “Registration Requirements”) and the requirement to file a prospectus and obtain a receipt (the “Prospectus Requirements”) (the Registration Requirement and the Prospectus Requirement are, collectively, the “Registration and Prospectus Requirements”) will not apply to certain trades in securities of ADC made in connection with ADC’s Global Stock Incentive Plan (the “Plan”);
- (ii) the Registration and Prospectus Requirements will not apply to first trades of shares of common stock acquired under the Plan executed on an exchange or market outside of Canada; and
- (iii) the requirements contained in the Legislation relating to the delivery of an offer and issuer bid circular and any notices of change or variation thereto, minimum deposit periods and withdrawal rights, taking up and paying for securities tendered to an issuer bid, disclosure, restrictions upon purchases of

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securities, bid financing, identical consideration and collateral benefits together with the requirement to file a reporting form within 10 days of an exempt issuer bid and pay a related fee (the “Issuer Bid Requirements”) will not apply to certain acquisitions by the Company of Awards (as defined below), including Shares (as defined below), and New Options (as defined below) pursuant to the Plan in each of the Jurisdictions;

AND WHEREAS pursuant to the Mutual Reliance Review System for Exemptive Relief Applications (the “System”), the Ontario Securities Commission is the principal regulator for this application;

AND WHEREAS unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 Definitions.

AND WHEREAS ADC has represented to the Decision Makers as follows:

1. ADC is presently a corporation in good standing incorporated under the laws of Minnesota.
2. ADC and affiliates of ADC (the “ADC Affiliates”) (ADC and the ADC Affiliates are, collectively, the “ADC Companies”) supply equipment, software and services for telecommunications, cable television, broadcast, wireless, and enterprise networks.
3. ADC is registered with the U.S. Securities and Exchange Commission (the “SEC”) in the U.S. under the U.S. Securities Exchange Act of 1934 (the “Exchange Act”) and is not exempt from the reporting requirements of the Exchange Act pursuant to Rule 12G 3-2.
4. The Company is not a reporting issuer in any of the Jurisdictions and has no present intention of becoming a reporting issuer in any of the Jurisdictions.
5. The authorized share capital of ADC consists of: 1,200,000,000 shares of common stock (“Shares”) and 10,000,000 shares of preferred stock (“Preferred Shares”). As of March 10, 2003, there were 801,929,103 Shares, and no Preferred Shares issued and outstanding.
6. The Shares are quoted on the Nasdaq National Market System (the “NASDAQ”).
7. ADC intends to use the services of one or more agents/brokers in connection with the Plan (each an “Agent”). UBS PaineWebber has been appointed as

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Agent under the Plan. UBS PaineWebber is not registered to conduct retail trades in securities in the Jurisdictions. UBS PaineWebber is registered under applicable U.S. securities or banking legislation and any other Agent appointed to take on a broker type role in connection with the Plan, in addition to or in replacement of UBS PaineWebber will be a registrant in the Jurisdictions or a corporation registered under applicable U.S. securities or banking legislation and will be authorized by ADC to provide services as an Agent under the Plan.

8. The role of the Agent may include: (a) disseminating information and materials to Participants in connection with the Plan; (b) assisting with the administration of and general record keeping for the Plan; (c) holding Shares on behalf of Participants, Former Participants and Permitted Transferees in brokerage accounts; (d) facilitating Award and New Option (as defined below) exercises (including cashless exercises) under the Plan; (e) facilitating the payment of withholding taxes, if any, by cash or the tendering or withholding of Shares; (f) facilitating the reacquisition of Awards and New Options under the terms of the Plan; and (g) facilitating the resale of Shares issued in connection with the Plan.
9. The purposes of the Plan are to: (a) aid in maintaining and developing key employees capable of assuring the future success of the Company, and to offer such personnel incentives to put forth maximum efforts for the success of the Company's business; (b) enhance the Company's ability to attract and retain the services of experienced and knowledgeable outside directors; and (c) afford such key employees and outside directors an opportunity to acquire a proprietary interest in the Company, thereby aligning their interests with the interests of the Company's shareholders.
10. Subject to adjustments as provided for in the Plan and an increase made in accordance with U.S. law, the maximum number of Shares which shall be made available for issuance under the Plan is 149,308,431.
11. The Plan permits grants of: (a) options on Shares ("Options"); stock appreciation rights ("SARs"), restricted shares ("Restricted Stock"), restricted stock units ("Restricted Stock Units"), performance awards ("Performance Awards") and dividend equivalents ("Dividend Equivalents"); (Shares, Options, SARs, Restricted Stock, Restricted Stock Units, Performance Awards and Dividend Equivalents are, collectively, "Awards") to key employees and outside directors of the ADC Companies ("Participants"), provided that Restricted Stock Units and Dividend Equivalents can be granted to outside directors of the ADC Companies only.

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12. Employees of the ADC Companies eligible to participate in the Plan will not be induced to purchase Shares or to exercise Awards or New Options by expectation of employment or continued employment.
13. As of May 28, 2003, there were 442 persons in Canada eligible to receive Awards under or participate in the Plan: 4 persons resident in British Columbia, 233 persons resident in Alberta, 196 persons resident in Ontario and 9 persons resident in Quebec.
14. All necessary securities filings have been made in the U.S. in order to offer the Plan to Participants resident in the U.S.
15. A prospectus prepared according to U.S. securities laws describing the terms and conditions of the Plan will be delivered to each Participant who receives an Award under the Plan. The annual reports, proxy materials and other materials ADC provides to its U.S. shareholders will be provided or made available upon request to Participants resident in the Jurisdictions who acquire and retain Shares under the Plan at substantially the same time and in substantially the same manner as such documents would be provided to U.S. shareholders. All such documents may be delivered electronically to Participants.
16. The Plan is administered by a committee appointed by the board of directors of ADC (the "Committee").
17. Generally, in order to exercise an Option under the Plan, an optionee must submit a written notice of exercise to ADC or to the Agent identifying the Option, the number of Shares being purchased and the method of payment.
18. Among other payment methods, the Plan provides that payment for Shares acquired pursuant to the Plan may be made: (a) in cash; (b) by the surrender of Shares owned by the Participant to the Company for cancellation ("Stock-Swap Exercises") or to the Agent for resale; (c) in the case of Option exercise, by the retention of a number of Shares by the Company from the total number of Shares into which the Option is exercised; or (d) by a combination of the foregoing.
19. Options will vest and will be exercisable as specified in the Option agreement as determined by the Committee. The Option exercise price for each Share purchased under any Option will be determined by the Committee; *provided, however*, that such exercise price shall not be less than the average of the high and low daily trading prices (rounded down to the nearest whole cent) of a Share as reported on the NASDAQ, if the Shares are then quoted on the

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NASDAQ or (ii) the average of the high and low daily trading prices (rounded down to the nearest whole cent) of a Share on a national securities exchange, if the shares are then being traded on a national securities exchange on the date of grant of such Option.

20. The term of each Option will be fixed by the Committee provided however that the term shall be no more than ten (10) years from the date of the grant.
21. ADC proposes to offer Participants, who are employees, the opportunity to participate in an Option exchange program (such program being the "Option Exchange") in which such Participants are offered to exchange existing "underwater" Options for replacement options ("New Options") granted at least six months and one day after the existing Options are cancelled (such cancellations being "Option Exchange Cancellations"). If Participants elect to participate, their existing Options will be exchanged for a lesser number of New Options. The "exchange ratio" from existing Options to New Options will vary, depending on the exercise price of the existing Options.
22. Subject to the following exception, if a Participant in the Option Exchange is no longer an employee of the ADC Companies on the date the New Options are granted (such date is the "New Option Grant Date"), such Participant will not receive a New Option (nor any compensation in lieu of a New Option). If the Participant dies or is terminated involuntarily, for any reason other than termination for cause, during the six month and one day period between the time when existing Options granted under the Plan are cancelled and the New Option Grant Date, then such Participant will receive the New Option covering 20% of the number of optioned Shares that he or she would have received if the Participant were an employee on the New Option Grant Date as a New Option grant.
23. In addition, Options may be replaced or exchanged for re-pricing and other purposes in accordance with the terms of the Plan (such Option replacements and exchanges and the Option Exchange Cancellations are, collectively, "Option Cancellations").
24. ADC shall have the right to deduct applicable taxes from any payment under the Plan by withholding, at the time of delivery or vesting of cash or Shares under the Plan, an appropriate amount of cash or Shares ("Share Withholding Exercises") or a combination thereof for a payment of taxes required by law or to take such other action as may be necessary in the opinion of ADC or the Committee to satisfy all obligations for the withholding of such taxes.

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25. No Award shall be assignable or transferable except to a designated beneficiary (under procedures established by ADC) or by the laws of descent and distribution in the case of the death of a Participant. Each Award or right under any Award shall be exercisable during the Participant's lifetime only by the Participant, by a transferee pursuant to the terms of the Plan, or if, permissible under applicable law, by the Participant's or such transferee's guardian or legal representative. Awards may not be pledged, alienated, attached or otherwise encumbered, and any purported pledge, alienation, attachment or encumbrance thereof shall be void and unenforceable against the ADC or any ADC Companies.
26. Following the termination of a Participant's relationship with the ADC Companies for reasons of disability, retirement, termination, change of control or any other reason (such Participants being "Former Participants"), and on the death of a Participant where Awards have been transferred by will or pursuant to a beneficiary designation or the laws of intestacy or otherwise as permitted under the Plan (such beneficiaries being "Permitted Transferees"), the Former Participants and Permitted Transferees will continue to have rights in respect of the Plan ("Post-Termination Rights").
27. Post-Termination Rights may include, among other things: (a) the right to exercise Awards for a period determined in accordance with the terms of the Plan and the Award; and (b) the right to exercise Awards and to sell Shares acquired under the Plan through the Agent.
28. Post-Termination Rights will only be effective where such rights accrued while the Participant had a relationship with the ADC Companies.
29. As there is no market for the Shares in Canada and none is expected to develop, it is expected that the resale by Participants, Former Participants and Permitted Transferees of the Shares acquired under the Plan will be effected through the NASDAQ.
30. As of May 27, 2003, Canadian shareholders did not own, directly or indirectly, more than 10% of the issued and outstanding Shares and did not represent in number more than 10% of the shareholders of ADC. If at any time during the currency of the Plan Canadian shareholders of ADC hold, in aggregate, greater than 10% of the total number of issued and outstanding Shares or if such shareholders constitute more than 10% of all shareholders of ADC, ADC will apply to the relevant Jurisdiction for an order with respect to further trades to and by Participants in that Jurisdiction in respect of the Shares acquired under the Plan.

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31. Pursuant to the Plan, the acquisition of Awards, including Shares, and New Options by the Company pursuant to Stock Swap Exercises, Share Withholding Exercises and Option Cancellations may constitute an “issuer bid”.
32. The issuer bid exemptions in the Legislation may not be available for such acquisitions by the Company.
33. The Legislation of all of the Jurisdictions does not contain exemptions from the Prospectus and Registration Requirements for all the intended trades in New Options and Shares acquired on the exercise of the New Options in connection with the Plan.
34. Where the Agents sell Shares on behalf of Former Participants and Permitted Transferees, the Agents, Former Participants and Permitted Transferees may not be able to rely upon the exemptions from the Prospectus and Registration Requirements contained in the Legislation of the Jurisdictions.

AND WHEREAS pursuant to the System, this Decision Document evidences the decision of each Decision Maker (collectively, the “Decision”);

AND WHEREAS each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the Decision has been met;

THE DECISION of the Decision Makers pursuant to the Legislation is that:

- (a) the Registration and Prospectus Requirements will not apply to any trade or distribution of Awards or New Options made in connection with the Plan, including trades or distributions involving ADC or its affiliates, the Agent, Former Participants or Permitted Transferees, provided that the first trade in Shares acquired on the exercise of Awards or New Options pursuant to this Decision will be deemed a distribution or primary distribution to the public under the Legislation unless the conditions in subsection 2.14(1) of Multilateral Instrument 45-102 “Resale of Securities” are satisfied;
- (b) the first trade by Former Participants or Permitted Transferees in Shares acquired pursuant to the exercise of Awards or New Options, including first trades effected through the Agent, will not be subject to the Prospectus and Registration Requirements, provided such first trade is executed through an exchange or a market or to a person or company outside of Canada; and

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- (c) the Issuer Bid Requirements will not apply to the acquisition by ADC of Awards or New Options from Participants, Former Participants or Permitted Transferees in connection with the Plan provided such acquisitions are made in accordance with the provisions of the Plan.

DATED this 22nd day of July, 2003.

Robert W. Davies

Harold P. Hands