

## **2003 BCSECCOM 773**

### **Headnote**

Mutual Reliance Review System for Exemptive Relief Application - issuer adopted restricted share unit plan – plan involves trustee or broker distributing securities of issuer to employees, officers and directors – such shares acquired by trustee or broker on the secondary market – an exemption from registration requirement not available for such trades for technical reasons – decision to expire upon coming into force of amendments to Multilateral Instrument 45-105

### **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C.1996, c. 418, s. 48

Multilateral Instrument 45-105 *Trades to Employees, Senior Officers, Directors, and Consultants*

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

**AND**

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

**AND**

### **IN THE MATTER OF ATI TECHNOLOGIES INC.**

### **MRRS DECISION DOCUMENT**

WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in British Columbia and Ontario (the “Jurisdictions”) has received an application from ATI Technologies Inc. (the “Company”) for a decision pursuant to the securities legislation of the Jurisdictions (the “Legislation”) that the requirement contained in the Legislation to be registered to trade in a security (the “Registration Requirement”) shall not apply to certain trades in securities of the Company made in connection with the Company’s Restricted Share Unit Plan for Canadian Directors and Employees (the “Canadian Plan”) and the Company’s Restricted Share Plan for the U.S. Directors and Employees (the “U.S. Plan”, and collectively with the Canadian Plan, the “Plans”);

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;

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

1. The Company was incorporated under the laws of Ontario. The Company has been a reporting issuer in each of the jurisdictions of Canada which recognizes the reporting issuer concept since November 1993 and is not in default of its obligations as a reporting issuer thereunder. The Company has a current Annual Information Form for the purposes of National Instrument 44-101.
2. The Company is a foreign private issuer in the United States and is subject to the reporting requirements of the United States *Securities Exchange Act* of 1934 as they apply to foreign companies. The Company has filed its annual report on Form 40-F and other information required under applicable United States law with the United States Securities and Exchange Commission (“SEC”).
3. The Company’s authorized share capital consists of an unlimited number of common shares (“Shares”) and an unlimited number of non-voting preference shares. As of August 31, 2003, the Company’s issued share capital consisted of 241,742,113 Shares. No non-voting preference shares have been issued. The Shares are listed on the Toronto Stock Exchange and quoted on the NASDAQ.
4. The Plans form part of the incentive compensation package for employees of the Company in Canada and for employees of its subsidiaries in the United States (collectively, the “Employees”), certain officers of the Company in Canada and of its subsidiaries in the United States (“Officers” and together with the Employees, the “Participants”). The Board of the Directors of the Company approved the Plans subject to the approval of the applicable regulatory authorities on August 12, 2003. Participation in the Plans is voluntary and Participants will not be induced to participate in the Plans by expectation of employment or continued employment.
5. The Plans will be administered by the compensation committee of the board of directors of the Company.
6. The Employees are resident in the provinces of Ontario, British Columbia, Quebec and the United States. Certain of the Employees resident in the province of British Columbia may be eligible to receive awards through the U.S. Plan and certain Employees resident in the United States may be eligible to receive awards through the Canadian Plan. The Officers of the Company are residents of Ontario and British Columbia. Approximately 85% of

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Participants will be Employees, the remaining 15% of Participants will be Officers.

7. The Canadian Plan provides for awards by the Company to Participants in the Canadian Plan (the “Canadian Plan Participants”) of restricted share units (“RSU Awards”) which will vest over a three-year period. Restricted share units (“RSUs”) represent a promise to deliver Shares on a future date provided that the RSU Award has vested on or before such date. In the case of the Canadian Plan, the delivery date for any Share in respect of an RSU is the same date as the date the corresponding RSU Award vests (the “Vesting Date”). The Canadian Plan requires that all Shares in respect of vested RSU Awards be delivered to Canadian Plan Participants no later than December 31 of the third calendar year after the date the RSU Award was made.
8. Subsequent to an award of RSUs, the Company will provide funds by way of one or more payments to an independent trust (the “Canadian Trust”) to enable the trustee of the Canadian Trust (the “Trustee”) to arrange for the purchase of Shares on the open market corresponding to the number of RSUs awarded to Canadian Plan Participants prior to their Vesting Date. All such Shares will be acquired through the facilities of the TSX, NASDAQ or any other stock exchange on which the Shares are listed and posted for trading (any such exchange, a “Stock Exchange”) by the Trustee or a Stock Exchange participating organization retained by the Trustee. The aggregate number of Shares that may be purchased for all purposes pursuant to the Canadian Plan may not exceed 1.8 million Shares.
9. The Trustee is a trust company existing under the laws of Canada and has its head office in Ontario.
10. Shares acquired pursuant to the Canadian Plan will be registered in the name of the Trustee and held by the Trustee for the benefit of Canadian Plan Participants. The Trustee will hold the Shares in the Canadian Trust until such time as any corresponding RSU Awards vest, in which case the Trustee will deliver the corresponding number of Shares from its holdings to Canadian Plan Participants or to a trustee, custodian or administrator acting on their behalf.
11. If a Canadian Plan Participant resigns or his or her employment with the Company is terminated for any reason, the Canadian Plan Participant shall forfeit all RSUs relating to unvested RSU Awards effective the date of resignation or termination. In the event that a Canadian Plan Participant dies, all unvested RSU Awards of the Canadian Plan Participant shall immediately vest.

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12. The Company does not have any interest in the Shares held by the Trustee. To the extent that the vesting conditions of an RSU Award are not met and there are excess Shares in the Canadian Trust, the Trustee may apply such Shares to meet obligations relating to other RSU Awards or may sell the Shares and apply the net proceeds from sale to the payment of its costs. Upon termination of the Canadian Plan, if there are any funds remaining after payment of the Trustee's costs, the excess funds are returned to the Company.
13. The U.S. Plan provides for awards ("Restricted Share Awards") by the Company to participants in the U.S. Plan ("U.S. Plan Participants") of Shares ("Restricted Shares") subject to forfeiture over a three-year period (the "Forfeiture Period").
14. Subsequent to granting an award of Restricted Shares, the Company will provide funds to a broker registered in the United States (the "Broker") to acquire the number of Shares on the open market in the United States corresponding to the number of Restricted Shares awarded. All such Shares will be acquired through the facilities of a Stock Exchange by the Broker or a Stock Exchange participating organization retained by the Broker. The aggregate number of Shares that may be purchased for all purposes pursuant to the U.S. Plan must not exceed 1.2 million Shares.
15. The Broker will be registered with the SEC under applicable legislation in the United States and a member of the National Association of Securities Dealers. The Broker is not registered in any of the Jurisdictions and does not operate through the services of a registrant in each of the Jurisdictions. The Company may replace the Broker at some point in the future, and any such successor may not be registered for trading in securities in each of the Jurisdictions.
16. Shares purchased by the Broker will be delivered to an independent custodian (the "Custodian"). The Shares will be registered in the name of the Custodian and the Custodian will hold the Shares as nominee for the benefit of U.S. Plan Participants until such time as the Forfeiture Period has expired and, upon expiry of the Forfeiture Period, will deliver to the U.S. Plan Participants, or to a trustee, custodian or administrator acting on their behalf, the corresponding number of Shares from the holdings of the Custodian.
17. Initially, the Custodian will be located in the province of Ontario. CIBC Mellon Trust Company will serve as the initial Custodian under the U.S. Plan.
18. Until the Forfeiture Period in respect of a Restricted Share expires, a U.S. Plan Participant's rights to the Restricted Share may not be sold, assigned,

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transferred, pledged or otherwise encumbered and no attempt to transfer the Share, whether voluntary or involuntary, by operation of law or otherwise, will vest the transferee with any interest or right in or with respect to the Restricted Share.

19. The Company does not have any interest in the Shares held by the Custodian. To the extent that the Restricted Shares are forfeited, the Custodian shall sell such Shares and return the proceeds to the Company. In the event of death, disability, termination of employment or retirement, the Restricted Shares will be subject to forfeiture on substantially the same terms as the RSUs in the Canadian Plan.
20. The exemption from the Registration Requirement contained in Section 2.4 of Multilateral Instrument 45-105 ("MI 45-105") is not available for certain trades in Shares acquired by the Trustee or Broker unless the securities were acquired under an exemption that makes the first trade of the security subject to Section 2.6 of Multilateral Instrument 45-102. The Shares acquired by the Trustee or Broker in accordance with the Plans will not be acquired under such an exemption.

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 under the Legislation is that the Registration Requirement shall not apply to trades in Shares made by a Broker, Trustee, Custodian or Participant, or their legal representatives, provided that

- (a) the trades are made in accordance with the Plans, and
- (b) the Decision will terminate upon the coming into force of amendments to MI 45-105, substantially in the form of the amendments published by the Ontario Securities Commission on September 5, 2003.

DATED October 27, 2003.

Paul K. Bates

Wendell S. Wigle