

2011 BCSECCOM 566

July 29, 2011

Headnote

Multilateral Instrument 11-102 Passport System and National Policy 11-203
Process for Exemptive Relief Applications in Multiple Jurisdictions – Securities Act, s. 48 - exemption from registration requirement - A lender under an equity line of credit wants relief from the requirement to register as an underwriter - The lender will not solicit any offers to purchase the securities it acquires from the issuer and will resell any securities through an exchange, using a registered dealer unaffiliated with the issuer or the lender

Securities Act, s. 84 – exemption from prospectus delivery requirement - A lender under an equity line of credit wants relief from the requirement to deliver a prospectus - The issuer will file a supplement to its base shelf prospectus describing the terms of the equity purchase agreement; the issuer will issue a news release upon entering into the equity purchase agreement and file the agreement on SEDAR; the news release will indicate that the shelf prospectus and supplement have been filed and will specify where and how purchasers may obtain a copy

National Instrument 44-101, s. 8.1 - exemption from short form prospectus form requirements - Disclosure – An issuer wants relief from the requirement to include in the prospectus a statement of purchasers’ statutory rights in the prescribed form - The issuer is distributing securities to purchasers on the TSX or TSX-V through a lender under an equity line of credit; the purchasers will have all statutory rights except those rights triggered by delivery of the prospectus; the issuer will provide an amended statement of rights in the prospectus so that the prospectus properly describes applicable rights and purchasers are not misled

National Instrument 44-102, s. 11.1 – exemption from shelf prospectus form requirements - An issuer wants relief from the requirement to include certain disclosure in the base shelf prospectus - The issuer is distributing securities to purchasers on the TSX or TSX-V through a lender under an equity line of credit; the purchasers will have all statutory rights except those rights triggered by delivery of the prospectus; the issuer will include in its base shelf prospectus all disclosure required under s. 5.5 but will eliminate or modify statements that specifically refer to delivery of the prospectus

Securities Act s. 169 *Confidentiality* – An applicant wants to keep an application and order confidential for a limited amount of time after the order is granted – The record provides intimate financial, personal or other information; the disclosure of the information before a specific transaction would be detrimental to the person affected; the information will be made available after a specific date

Applicable Legislative Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 34, 48, 83, 84 and 169
NI 44-101, s. 8.1, Form 44-101F1, NI 44-102, ss. 5.5 and 11.1

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In the Matter of
the Securities Legislation of
British Columbia and Ontario
(the Jurisdictions)

and

In the Matter of
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of
iCo Therapeutics Inc. (Issuer), Dutchess Opportunity Cayman Fund, Ltd.
(Dutchess) and Dutchess Capital Management II, LC (the Manager and, together
with iCo and Dutchess, the Filers)

Decision

Background

- ¶ 1 The securities regulatory authority or regulator in each of the Jurisdictions (the Decision Makers) have received an application (the Application) from the Filers for a decision under the securities legislation of the Jurisdictions (the Legislation) that:
- (a) the following disclosure requirements under the Legislation (the Prospectus Disclosure Requirements) do not apply to the Issuer in connection with the Distribution (as defined below):
 - (i) the statement in the Prospectus Supplement (as defined below) respecting statutory rights of withdrawal and rescission or damages in the form required by Item 20 of Form 44-101F1 of National Instrument 44-101 *Short Form Prospectus Distributions* (NI 44-101); and
 - (ii) the statements required by Subsections 5.5(2) and (3) of National Instrument 44-102 *Shelf Distributions* (NI 44-102) (the Prospectus Disclosure Relief);
 - (b) the prohibition from acting as a dealer unless the person is registered as such (the Dealer Registration Requirement) does not apply to Dutchess or

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the Manager in connection with the Distribution (the Dealer Registration Relief);

- (c) the requirement under the Legislation that a dealer send a copy of the Prospectus (as defined below) to a subscriber or purchaser in the context of a distribution (the Prospectus Delivery Requirement) does not apply to Dutches and the Manager or the dealer(s) through whom Dutches distributes the Common Shares (as defined below) and that, as a result, rights of withdrawal or rights of rescission, price revision or damages for non-delivery of the Prospectus do not apply in connection with the Distribution (the Prospectus Delivery Relief); and
- (d) the Application and this decision be held in confidence by the Decision Makers (the Confidentiality Relief).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

- (a) the British Columbia Securities Commission is the principal regulator for this application,
- (b) the Filers have provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in Alberta, and
- (c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

- ¶ 2 Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

- ¶ 3 This decision is based on the following facts represented by the Filers:

The Issuer

1. the Issuer is a corporation existing under the *Business Corporations Act* (British Columbia) with its head office located in Vancouver, British Columbia;

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2. the Issuer is a reporting issuer in the Provinces of British Columbia and Alberta and is not in default of any requirements under the securities legislation in any jurisdiction of Canada;
3. the share capital of the Issuer consists of an unauthorized number of common shares (the Common Shares), of which 41,057,301 are issued and outstanding. An aggregate of 1,846,429 Common Shares are issuable on conversion of outstanding stock options and an aggregate of 235,000 Common Shares are issuable on conversion of outstanding common share purchase warrants;
4. the Common Shares are listed and posted for trading on the TSX Venture Exchange (the TSXV) under the symbol "ICO";
5. upon filing a notice of intention to be qualified to file a short form prospectus pursuant to Section 2.6 of NI 44-101, the Issuer will, within 10 business days after filing such notice, be eligible to file a short form prospectus under Section 2.2 of NI 44-101 and base shelf prospectus under Section 2.2 of NI 44-102;
6. the Issuer intends to file in the Provinces of British Columbia, Alberta and Ontario a base shelf prospectus (such base shelf prospectus and any amendments thereto is referred to as the Base Shelf Prospectus);
7. the statements included in the Base Shelf Prospectus pursuant to Subsection 5.5(2) and 5.5(3) of NI 44-102 will be qualified, in each case, by adding "except in cases where an exemption from such delivery requirements has been obtained";

Dutchess and the Manager

8. Dutchess is an investment fund established as a Cayman Islands exempt limited partnership with its head office located in the Cayman Islands;
9. the Manager, a limited liability corporation incorporated under the laws of Delaware with its head office in Boston, Massachusetts;
10. the Manager is an investment manager for funds which have made direct investments in growth-stage and mature public companies which span a wide array of sectors using various investment structures such as equity line facilities, equity-linked securities and direct placements;
11. Dutchess is an affiliate of the Manager and one of several investment funds managed by the Manager;

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12. neither Dutchess nor the Manager is a reporting issuer under the securities legislation of any jurisdiction of Canada or registered as a registered firm as that term is defined National Instrument 31-103 *Registration Requirements and Exemptions* in any jurisdiction of Canada;
13. neither Dutchess nor the Manager are in default of securities legislation in any jurisdiction of Canada;

Proposed Distribution Arrangements

14. the Issuer and Dutchess propose to enter into an equity line facility agreement (the Equity Line Facility Agreement), pursuant to which Dutchess will agree to subscribe for, and the Issuer will have the right, exercisable from time to time for a period of 36 months (the Commitment Period), to issue and sell to Dutchess, up to \$10,000,000 of Common Shares (the Maximum Commitment Amount);
15. under the Equity Line Facility Agreement, the Issuer will, subject to paragraph 16, be entitled to deliver to Dutchess, at any time during the Commitment Period, a draw down notice (a Draw Down Notice), which notice shall (i) notify Dutchess of its intention to draw down funds under the Equity Line, (ii) specify the amount of the proposed draw down and (iii) specify the lowest price per share at which the Issuer will issue Common Shares in connection with such Draw Down Notice (the Minimum Price); provided, however, that the Minimum Price may not be lower than the volume-weighted average price per Common Share on the TSXV over a period of five consecutive trading days immediately preceding the applicable Draw Down Notice, less the permitted discount under the private placement rules contained in the TSXV Corporate Finance Manual;
16. the Issuer may not deliver a Draw Down Notice during the period beginning 10 trading days before the Issuer's next subsequent annual financial statements or quarterly financial statements are to be publicly released and ending 2 trading days after such report is released, or during any other period in which the Issuer is in possession of material non-public information;
17. the Equity Line Facility Agreement will provide the Issuer with the ability to raise capital as needed from time to time; Dutchess regularly engages in such transactions; Dutchess will, in most cases, finance its commitment to subscribe for Common Shares on a draw down through short-sales or resales out of existing holdings of the Issuer's securities;

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18. the maximum amount that the Issuer shall be entitled to draw down pursuant to any Draw Down Notice shall not exceed the greater of (i) \$250,000 or (ii) 200% of the product of the average daily trading volume of Common Shares on the TSXV during the three days immediately preceding the date of such Draw Down Notice and the average of the closing price of the Common Shares on the TSXV during such three day period;
19. the subscription price of Common Shares to be issued pursuant to a Draw Down Notice will equal 95% of the lowest daily volume-weighted average trading price of the Common Shares on the TSXV during the five consecutive trading days immediately preceding the date of the Draw Down Notice (the Draw Down Pricing Period); provided, however, that the subscription price shall not be less than the Minimum Price;
20. subject to early settlement in certain circumstances, the gross proceeds to be received by the Issuer with respect to the issuance of Common Shares pursuant to a Draw Down Notice will be settled on the seventh trading day (each date on which Common Shares are issued pursuant to a Draw Down Notice, a Settlement Date) following delivery of the Draw Down Notice to Dutchess; provided, however, that the obligation of Dutchess to subscribe for Common Shares pursuant to a Draw Down Notice shall be subject to delivery to Dutchess, on the date of the Draw Down Notice and the Settlement Date, of a certificate of a senior officer of the Issuer certifying that the Prospectus, as supplemented, contains full, true and plain disclosure of all material facts relating to the Issuer and does not omit to state a material fact that is required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it is made; the Issuer would therefore be unable to issue Common Shares under the Equity Line Facility Agreement when it is in possession of undisclosed information that would constitute a material fact or material change;
21. on or after a Settlement Date, Dutchess may seek to sell some or all of the Common Shares issued to Dutchess pursuant to the applicable Draw Down Notice;
22. during the term of the Equity Line Facility Agreement, Dutchess and its affiliates, associates or insiders, as a group, will not own at any time, directly or indirectly, Common Shares representing more than 9.9% of the issued and outstanding Common Shares at such time;
23. Dutchess and its trading affiliates will not hold a “net short position” in Common Shares during the term of the Equity Line Facility Agreement; provided, however, Dutchess may, after the receipt of a Draw Down Notice,

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seek to short-sell Common Shares to be issued pursuant to the Draw Down Notice, or engage in hedging strategies, in order to reduce the economic risk associated with its commitment to subscribe for Common Shares, provided that:

- (a) Dutchess complies with applicable rules of the TSXV and applicable securities laws;
 - (b) Dutchess and its affiliates, associates, partners and insiders do not during the period between a Draw Down Notice and the corresponding Settlement Date, directly or indirectly, sell Common Shares or grant any right to purchase or acquire any right to dispose of, nor otherwise dispose for value of, any Common Shares or any securities convertible into or exchangeable for Common Shares, in an amount exceeding the number of Common Shares to be issued to Dutchess pursuant to the applicable Draw Down Notice; and
 - (c) Dutchess and its affiliates, associates, partners and insiders do not, directly or indirectly, sell Common Shares or grant any right to purchase or acquire any right to dispose of, nor otherwise dispose for value of, any Common Shares or any securities convertible into or exchangeable for, any Common Shares, between the time of delivery of a Draw Down Notice and the filing of the press release announcing the draw down;
24. disclosure of the activities of Dutchess and its affiliates, associates or insiders, as well as the restrictions thereon, the whole as described in paragraph 23 above, will be included in the Base Shelf Prospectus. In addition, the Issuer will include in the Base Shelf Prospectus a risk factor that explains that Dutchess may engage in short-sales, resales or other hedging strategies to reduce or eliminate investment risks associated with a draw down and that such risk factor will disclose the possibility that such transactions may result in significant dilution to existing shareholders and could have a significant effect on the price of the Common Shares;
25. no extraordinary commission or consideration will be paid by Dutchess or the Manager to a person or company in respect of the disposition of Common Shares by Dutchess to purchasers who purchase them from Dutchess through the dealer(s) engaged by Dutchess through the TSXV (the TSXV Purchasers);
26. the Issuer has agreed to pay up to \$30,000 of the fees and expenses incurred by Dutchess in connection with the Equity Line Facility Agreement;

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27. in effecting any disposition of the Common Shares, Dutchess and the Manager will not engage in any sales, marketing or solicitation activities of the type undertaken by underwriters in the context of a public offering. More specifically, Dutchess and the Manager will not (i) advertise or otherwise hold itself out as a dealer; (ii) purchase or sell securities as principal from or to customers; (iii) carry a dealer inventory in securities; (iv) quote a market in securities; (v) extend or arrange for the extension of credit in connection with securities transactions; (vi) run a book of repurchase and reverse repurchase agreements; (vii) use a carrying broker for securities transactions; (viii) lend securities for customers; (ix) guarantee contract performance or indemnify the Issuer for any loss or liability from the failure of the transaction to be successfully consummated; (x) participate in a selling group; (xi) effect any disposition other than in accordance with applicable securities laws; (xii) provide investment advice; or (xiii) issue or originate securities;
28. Dutchess will not solicit offers to purchase Common Shares and will complete all sales of Common Shares through a dealer unaffiliated with Dutchess, the Manager and the Issuer;

Prospectus Supplements

29. the Issuer intends to file a supplement to the Base Shelf Prospectus (a Prospectus Supplement) in the Provinces of British Columbia, Alberta and Ontario within two business days after the final Settlement Date for each draw down under the Equity Line Facility Agreement;
30. each Prospectus Supplement will include (i) the number of Common Shares sold, (ii) the price per share, (iii) the information required by NI 44-102, including the disclosure required by Subsection 9.1(3) thereof, (iv) other information required by NI 44-101 omitted from the Base Shelf Prospectus in accordance with NI 44-102, and (v) the following statement:

Securities legislation in certain of the provinces of Canada provides purchasers with the right to withdraw from an agreement to purchase securities. This right may be exercised within two business days after receipt or deemed receipt of a prospectus and any amendment. In several of the provinces, the securities legislation further provides a purchaser with remedies for rescission or, in some jurisdictions, revisions of the price or damages if the prospectus and any amendment are not delivered to the purchaser, provided that the remedies for rescission, revisions of the price or damages are exercised by the purchaser within the time limit prescribed by the securities legislation of the purchaser's province. However, such

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rights and remedies will not be available to purchasers of common shares distributed under this prospectus because the prospectus will not be delivered to purchasers, as permitted under a decision document issued by the British Columbia Securities Commission on _____, 2011.

In several of the provinces, the securities legislation further provides a purchaser with remedies for rescission or, in some jurisdictions, revisions of the price or damages if the prospectus and any amendment contain a misrepresentation, provided that the remedies for rescission, revisions of the price or damages are exercised by the purchaser within the time limit prescribed by the securities legislation of the purchaser's province. Such remedies remain unaffected by the non-delivery of the prospectus, as permitted under the decision document referred to above.

The purchaser should refer to any applicable provision of the securities legislation of the purchaser's province for the particulars of these rights or consult with a legal adviser.

(the Amended Statement of Rights);

31. the Base Shelf Prospectus, as supplemented by the Prospectus Supplements, will (i) qualify the distribution of the Common Shares to Dutchess on each Settlement Date of the draw down disclosed in the relevant Prospectus Supplement, (ii) qualify the distribution of Common Shares to TSXV Purchasers during the period that commences on the date of issuance of a Draw Down Notice to Dutchess and ends on the earlier of (x) the date on which the distribution of such Common Shares has ended or (y) the 40th day following such Settlement Date (collectively, a Distribution);
32. the Prospectus Delivery Requirements are not workable in the context of the Distribution because the TSXV Purchasers will not be readily identifiable as the dealer(s) acting on behalf of Dutchess may combine the sell orders made under the Prospectus with other sell orders and the dealer(s) acting on behalf of the TSXV Purchasers may combine a number of purchase orders;
33. each Prospectus Supplement will contain an underwriter's certificate in the form set out in Section 2.2 of Appendix B to NI 44-102 signed by Dutchess;
34. at least three business days prior to filing the Prospectus Supplement to be filed in connection with the initial Distribution, the Issuer will provide a draft

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of the Prospectus Supplement for comment to the Decision Makers a draft of such Prospectus Supplement;

Continuous Disclosure

35. following the execution of the Equity Line Facility Agreement, the Issuer will:

(a) promptly issue and file a press release on SEDAR disclosing the material terms of the Equity Line Facility Agreement, including the Maximum Commitment Amount; and

(b) within 10 days after the execution,

(i) file a copy of the Equity Line Facility Agreement on SEDAR; and

(ii) file a material change report on SEDAR;

36. the Issuer will promptly issue and file a press release on SEDAR upon each issuance of a Draw Down Notice, disclosing in each case the amount of the draw down, the maximum number of Common Shares to be issued pursuant to the Draw Down Notice, the Minimum Price, as well as the fact that the Base Shelf Prospectus is available on SEDAR and specifying how a copy of this document can be obtained;

37. the Issuer will

(a) issue and file a press release on SEDAR on, or as soon as practicable after, the final Settlement Date in respect of a draw down stating:

(i) the number of Common Shares issued to Dutchess and the price per Common Share;

(ii) that the Base Shelf Prospectus and the relevant Prospectus Supplement will be available on SEDAR and specifying how a copy of these documents can be obtained; and

(iii) the Amended Statement of Rights; and

(b) file a material change report on SEDAR within ten days of the final Settlement Date in respect of a draw down, if the relevant Distribution constitutes a material change under applicable securities legislation, disclosing at a minimum the number of Common Shares issued to, and the price per Common Share paid by, Dutchess;

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38. the Issuer will disclose in its financial statements and management's discussion and analysis filed on SEDAR pursuant to National Instrument 51-102 *Continuous Disclosure Obligations*, for each financial period, the number and price of Common Shares issued to Dutchess pursuant to the Equity Line Facility Agreement;

Deliveries Upon Request

39. the Issuer will deliver to the Decision Makers, upon request, a copy of each Draw Down Notice delivered by the Issuer to Dutchess under the Equity Line Facility Agreement; and
40. Dutchess and the Manager will provide to the Decision Makers, upon request, full particulars of trading and hedging activities by Dutchess and the Manager (and, if required, trading and hedging activities by their affiliates, associates, partners or insiders) in relation to securities of the Issuer during the term of the Equity Line Facility Agreement.

Decision

- ¶ 4 Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that

- (a) the Prospectus Disclosure Relief is granted provided that:
 - (i) the Issuer comply with the representations in paragraphs 7, 24, 30, 31, 35, 36, 37 and 39; and
 - (ii) the number of Common Shares distributed by the Issuer under the Equity Line Facility Agreement does not exceed, in any 12 month period, 19.9% of the aggregate number of Common Shares outstanding calculated at the beginning of such period;
- (b) both the Dealer Registration Relief and the Prospectus Delivery Relief are granted provided that Dutchess and/or the Manager, as the case may be, comply with the representations in paragraphs 23, 25, 27, 28, 33 and 40;
- (c) the Confidentiality Relief is granted until the earlier of
 - (i) the date the Issuer issues the press release described in paragraph 35(a); and

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- (ii) the date that is 90 days from the date of this decision; and
- (d) this decision will terminate 25 months after the date of the Base Shelf Prospectus.

Martin Eady, CA
Director, Corporate Finance
British Columbia Securities Commission