

# **2003 BCSECCOM 481**

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications – issuer bids – relief granted from the valuation requirement in connection with an offer by the issuer for its out-of-the-money convertible debentures – conversion feature of no material value – debentures trade like non-convertible, subordinated, unsecured debt – offer otherwise to comply with issuer bid requirements – circular to include summary of opinion letter on convertibility feature

## **Applicable British Columbia Provisions**

*Securities Rules*, B.C. Reg. 194/97, ss. 162(2) and 162(3)

**IN THE MATTER OF THE SECURITIES LEGISLATION OF ONTARIO,  
ALBERTA, BRITISH COLUMBIA, MANITOBA, NEWFOUNDLAND  
AND LABRADOR, NOVA SCOTIA, QUEBEC AND SASKATCHEWAN**

**AND**

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

**AND**

**IN THE MATTER OF COUNSEL CORPORATION**

## **MRRS DECISION DOCUMENT**

WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in each of Ontario, Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, Quebec and Saskatchewan (the “Jurisdictions”) has received an application (the “Application”) from Counsel Corporation (“Counsel”) for a decision under the securities legislation of the Jurisdictions (the “Legislation”) that the requirement contained in the Legislation to obtain a formal valuation (the “Formal Valuation Requirement”) of the 6% Convertible Subordinated Debentures due October 31, 2003 (the “Debentures”) shall not apply to Counsel in connection with its proposed offer (the “Offer”) to acquire its outstanding Debentures;

## 2003 BCSECCOM 481

AND WHEREAS under 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 or in Quebec Commission Notice 14-101;

AND WHEREAS Counsel has represented to the Decision Makers that:

1. Counsel is governed by the *Business Corporations Act* (Ontario). Its head office is located in Toronto, Ontario.
2. Counsel is a reporting issuer or the equivalent in each Jurisdiction and is not in default of any requirements of the Legislation in the Jurisdictions.
3. Counsel’s authorized capital consists of an unlimited number of preferred shares and an unlimited number of common shares (the “Common Shares”). As at June 2, 2003 there were no preferred shares outstanding and 20,965,972 Common Shares were issued and outstanding.
4. The Common Shares are listed for trading on The Toronto Stock Exchange (the “TSX”) and The Nasdaq SmallCap Market and the Debentures are listed for trading on the TSX.
5. As at June 2, 2003, Counsel had outstanding US\$41,566,000 of the Debentures.
6. The Debentures were issued under a trust indenture (the “Indenture”) dated as of October 31, 1996.
7. The Debentures are unsecured and are convertible at the holder’s option into Common Shares at any time prior to the earlier of October 31, 2003 and the last business day immediately preceding the date specified for redemption. Originally, the Debentures were convertible at a price of US\$13.875 per Common Share. On June 8, 1999, Counsel declared a special dividend of C\$1.50 per Common Share (the “Special Dividend”) to holders of Common Shares of record as at July 12, 1999. As a result of the Special Dividend, the conversion price for the Debentures was adjusted from US\$13.875 to US\$11.726 effective July 20, 1999 (the “First Adjustment Date”).
8. On April 30, 2000, Counsel paid a dividend in kind which resulted in a further reduction of the conversion price for the Debentures to US\$11.472, effective

## 2003 BCSECCOM 481

April 30, 2000 (the “Second Adjustment Date”). All other attributes of the Debentures remain unchanged.

9. Over the twelve-month period immediately preceding June 2, 2003, the Common Shares have traded on the TSX in a range between C\$2.15 and C\$3.70 per Common Share.
10. On July 19, 1999, the last trading day before the First Adjustment Date on which the Debentures were traded, the closing price of the Debentures on the TSX was US\$780.00 per US\$1,000 principal amount.
11. On April 20, 2000 the last trading day before the Second Adjustment Date on which the Debentures were traded, the closing price of the Debentures on the TSX was US\$680.00 per US\$1,000 principal amount.
12. On June 2, 2003, the closing price of the Debentures on the TSX was US\$620.00 per US\$1,000 principal amount of Debentures.
13. Over the twelve-month period immediately preceding June 2, 2003, the Debentures traded on the TSX on only 108 out of the 252 trading days, with an average daily trading price of US\$679.86 on the days traded, and a price range per US\$1,000 principal amount of US\$610.00 to US\$795.00.
14. Since November 1, 2001, Counsel has been entitled to redeem the Debentures at any time at par plus accrued and unpaid interest.
15. The Indenture provides that Counsel may purchase any or all of the Debentures at any time when Counsel is not in default under the Indenture. Counsel is not in default under the Indenture.
16. On December 12, 2002, Counsel filed and the TSX accepted a Notice of Intention to Make a Normal Course Issuer Bid (the “Notice”). Pursuant to the Notice, Counsel may acquire through the TSX’s facilities up to a maximum of US\$2,128,050 of the outstanding Debentures, representing approximately 5% of the principal amount of Debentures outstanding as at December 9, 2002. Pursuant to the Notice, as of June 2, 2003, the Applicant has acquired through the TSX’s facilities:
  - (a) Between February 26, 2003 and April 9, 2003 US\$109,000 principal amount of the Debentures at a price of US\$692.00 per US\$1,000 principal amount.

## 2003 BCSECCOM 481

- (b) Between April 16, 2003 and April 23, 2003 US\$100,000 principal amount of the Debentures at a price of US\$682.40 per US\$1,000 principal amount.
  - (c) Between May 14, 2003 and May 16, 2003 US\$14,000 principal amount of the Debentures at a price of US\$620.00 per US\$1,000 principal amount.
  - (d) On May 26, 2003 US\$772,000 principal amount of the Debentures at a price of US\$625.00 per US\$1,000 principal amount.
17. Counsel proposes to make the Offer for its outstanding Debentures. The Offer will be an “issuer bid” within the meaning of the Legislation in the Jurisdictions because the Debentures are convertible debt securities. No purchases will be made under the Notice from the date the intention to make the Offer is publicly announced to the completion of the Offer.
18. In a letter (the “Opinion Letter”) dated May 22, 2003, BMO Nesbitt Burns (“BMO NB”) advised Counsel that, in BMO NB’s opinion:
- (i) the Debenture holders’ conversion option is of no material value, and
  - (ii) the Debentures trade on the TSX like non-convertible, subordinated, unsecured debt.
19. The Offer will be made in compliance with the requirements in the Legislation applicable to formal bids made by issuers, except to the extent exemptive relief is granted by the Decision Makers.
20. The issuer bid circular provided to holders of the Debentures in connection with the Offer will include a summary of the Opinion Letter.

AND WHEREAS under the System, this MRRS 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 requirement contained in the Legislation to comply with the Formal Valuation

## **2003 BCSECCOM 481**

Requirement shall not apply to Counsel provided that Counsel complies with the other requirements in the Legislation applicable to formal bids made by issuers.

DATED this 4th day of July, 2003.

Ralph Shay  
Take-over/Issuer Bids, Mergers & Acquisitions