

2010 BCSECCOM 381

June 15, 2010

Headnote

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – Securities Act s. 76 – Prospectus Requirements – An issuer wants relief from prospectus requirements in connection with the use of electronic roadshow materials during the waiting period for a prospectus offering – The issuer is offering securities by prospectus in Canada and the US; the electronic roadshow will comply with US offering rules; all sales to Canadian investors will be made through a Canadian registration; if the electronic roadshow materials contain a misrepresentation, any Canadian investor who views the materials and subsequently purchases under the Canadian prospectus has a right to sue the issuer and the Canadian underwriters

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 61, 76 and 78

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
Med BioGene Inc.
(the Filer)

Decision

Background

- ¶ 1 The securities regulatory authority or regulator in each of the Jurisdictions (the Decision Maker) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the Legislation) for a ruling exempting the Filer from the prospectus requirement to permit the Filer to post certain Website Materials during the portion of the Waiting Period between the date of this decision document and the date of the Final Prospectus (the Exemption Sought).

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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 Filer has 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 Filer:
- 1. the Filer's predecessor was incorporated under the Canada Business Corporations Act on October 16, 2002, and transitioned to the Business Corporations Act (British Columbia) on July 20, 2005; effective April 28, 2006, to facilitate a listing of the Filer's common shares on the TSX Venture Exchange, the Filer's predecessor company acquired Dragon-Tex (Group) Limited, a company incorporated under the Business Corporations Act (Alberta); in connection with the acquisition, the Filer undertook a series of concurrent transactions resulting in the Filer being a company amalgamated under the Business Corporation Act (British Columbia) on April 28, 2006;
 - 2. the Filer has one wholly-owned subsidiary, DTX Acquisition Company Inc., which is a company amalgamated under the Business Corporation Act (Alberta) on April 28, 2006; DTX Acquisition Company Inc. has no active business and holds no assets;
 - 3. the principal office of the Filer is located at 300–2386 East Mall, Gerald McGavin Building, Vancouver, British Columbia, Canada V6T 1Z3;
 - 4. on June 9, 2010, the Filer filed an amended and restated preliminary short form prospectus (Preliminary Prospectus) in British Columbia, Alberta and Ontario (the Canadian Jurisdictions) in respect of an offering of 2,777,778 common shares of the Filer (the Offering); contemporaneously, the Filer also

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filed an amended registration statement with the United States Securities and Exchange Commission (SEC) in respect of the Offering;

5. on June 10, 2010, the Filer received a receipt from the British Columbia Securities Commission, as principal regulator, in respect of the Preliminary Prospectus and on June 9, 2010, the Filer received a confirmation receipt from the SEC in respect of the registration statement;
6. during the period between the date of the receipt for the Preliminary Prospectus and the date of the receipt for the final prospectus (the Final Prospectus) for the Offering (the Waiting Period), the Filer intends to utilize electronic roadshow materials (the Website Materials) as part of the marketing of the Offering; in light of the international nature of the Offering, the Filer intends to make the Website Materials available equally to prospective Canadian and U.S. Investors;
7. Rule 433(d)(8)(ii) under the U.S. Securities Act of 1933, which came into effect in December 2005, requires the Filer to either file the Website Materials with the SEC or make them “available without restriction by means of graphic communication to any person...”;;
8. compliance with applicable U.S. securities laws requires the Filer to either make the Website Materials available in a manner that affords unrestricted access to the public, or file the Website Materials on the SEC’s EDGAR system, which will have the same effect of affording unrestricted access;
9. doing so is contrary to Canadian securities laws, in particular, the prospectus requirement and activities that are permissible during the Waiting Period which, when applied together, require that access to the Website Materials be controlled by the Filer or the underwriters by such means as password protection and otherwise, as suggested by National Policy 47-201 *Trading Securities Using the Internet and Other Electronic Means* (NP 47-201);
10. the Filer wishes to comply with applicable U.S. securities laws by posting the Website Materials on the website www.retailroadshow.com without any restriction on their accessibility;
11. all information about the Filer’s securities will be contained in the Preliminary Prospectus;
12. the Website Materials will contain a statement that information conveyed through the Website Materials does not contain all of the information in the Preliminary Prospectus, including any amendments to it, and the Final

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Prospectus, including any amendments to it, and that prospective purchasers should review all of those prospectuses, in addition to the Website Materials, for complete information;

13. the Website Materials will be fair and balanced;
14. Canadian purchasers will only be able to purchase common shares of the Filer under the Offering through an underwriter that is registered in the Jurisdiction of residence of the purchaser under the Final Prospectus;
15. the Filer acknowledges that the Exemption Sought relates only to the posting of the Website Materials, and not in respect of the Final Prospectus; and
16. the Filer is not in default of securities legislation.

Decision

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

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted provided that:

- (a) the Filer and the Canadian underwriters provide each Canadian purchaser of the Filer's common shares under the Final Prospectus, including any amendments to it, with a contractual right of action against the Filer and the Canadian underwriters as described in the disclosure required by condition 2;
- (b) the Preliminary Prospectus, including any amendments to it, and the Final Prospectus, including any amendments to it, state that Canadian purchasers of the Filer's common shares have a contractual right of action against the Filer and the Canadian underwriters, substantially in the following form:

“We may make available certain material describing the Offering (the “Website Materials”) on website services such as www.retailroadshow.com and/or www.netroadshow.com under the heading “Med BioGene Inc.” in accordance with US federal securities laws during the period prior to obtaining a final receipt for the final short form prospectus relating to this offering (the “Final Prospectus”) from the securities regulatory authorities in British Columbia, Alberta and Ontario (the “Canadian Jurisdictions”). In order to give purchasers in each of the Canadian Jurisdictions the same unrestricted access to the Website Materials as provided to US purchasers, we have applied for and

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obtained exemptive relief in a decision dated June [], 2010 from the securities regulatory authorities in each of the Canadian Jurisdictions. Under the terms of that exemptive relief, we and each of the Canadian Underwriters signing the certificate contained in the Final Prospectus agreed that, if the Website Materials contained any untrue statement of a material fact or omitted to state a material fact required to be stated or necessary in order to make any statement therein not misleading in light of the circumstances in which it was made (a “misrepresentation”), a purchaser resident in a Canadian Jurisdiction who purchases Offered Shares under the Final Prospectus during the period of distribution has, without regard to whether the purchaser relied on the misrepresentation, rights against us and each of the Canadian Underwriters for the misrepresentation that are equivalent to the rights under section 131 of the *Securities Act* (British Columbia) or the comparable provision of the securities legislation in each of the other Canadian Jurisdictions, as if that misrepresentation was contained in the Final Prospectus.”;

- (c) the Website Materials will not include comparables unless the comparables are also included in the Preliminary Prospectus;
- (d) the Website Materials will also contain a hyperlink to the Preliminary Prospectus, including any amendments to it, and the Final Prospectus including any amendments to it, as at and after such time as a particular prospectus is filed; and
- (e) at least one underwriter signing the Preliminary Prospectus, including any amendments to it, and the Final Prospectus, including any amendments to it, will be registered in each of the Canadian Jurisdictions.

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