

# 2006 BCSECCOM 537

August 30, 2006

## **Headnote**

### Mutual Reliance Review System for Exemptive Relief Applications

Securities Act s. 114(2) Issuer Bids - Exemption from Issuer Bid Requirements - An issuer conducting an issuer bid under a modified dutch auction procedure requires relief from the requirement to take up and pay for securities deposited on a pro rata basis and the associated disclosure requirement - Under the modified dutch auction procedure all shares deposited at prices above the clearing price will be returned to the shareholder instead of being taken up and paid for on a pro rata basis; shareholders who tender above the clearing price are not prepared to sell at the clearing price and therefore they suffer no prejudice if their shares are not taken up and paid for; returning their shares respects their intentions; shareholders who are prepared to sell at the clearing price are treated equally as their shares are taken up pro rata

Securities Rules s. 162(3) - Exemption from the Valuation Requirements - An issuer wants relief from the requirement to obtain a formal valuation in connection with an issuer bid for its outstanding securities - A liquid market for the issuer's securities exists prior to the bid; after the bid, there will be a market for the issuer's securities that is not materially less liquid than before the bid

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 105(g) and 114(2)

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

Form 62-903F, Item 9

In the Matter of  
the Securities Legislation of  
British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova  
Scotia, New Brunswick and Newfoundland and Labrador  
(the Jurisdictions)

and

In the Matter of  
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of  
QLT Inc.  
(the Filer)

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## MRRS Decision Document

### **Background**

¶ 1 The local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the Legislation) that, in connection with the proposed purchase by the Filer of a portion of its outstanding common shares (the Shares) under an issuer bid (the Offer), the Filer be exempt from the requirements in the Legislation to:

- (i) take up and pay for the Shares on a pro rata basis according to the number of securities deposited by each shareholder;
  - (ii) provide disclosure in the issuer bid (the Circular) of the proportionate take up and payment; and
  - (iii) except in Ontario and Quebec, to obtain a formal valuation of the Shares (the Valuation Requirement;
- (collectively, the Requested Relief).

Under the Mutual Reliance Review System for Exemptive Relief Applications

- (a) the British Columbia Securities Commission is the principal regulator for this application, and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

### **Interpretation**

¶ 2 Defined terms contained in National Instrument 14-101 *Definitions* have the same meaning in this decision unless they are defined in this decision.

### **Representations**

¶ 3 This decision is based on the following facts presented by the Filer:

1. the Filer is incorporated under the *Business Corporations Act* (British Columbia) with its head office in Vancouver, British Columbia;
2. the Filer is authorized to issue 500,000,000 Shares and 5,000,000 first Preference Shares; as of July 26, 2006, the Filer had 88,152,671 Shares and no first Preference Shares issued and outstanding;

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3. the Shares trade on the Toronto Stock Exchange under the trading symbol QLT and on NASDAQ under the traders symbol QLTI;
4. the Filer is a reporting issuer or the equivalent in each of the Jurisdictions and, to its knowledge, is not in default of any requirement of the Legislation;
5. to the Filer's knowledge and based on publicly available information, the only shareholder that currently holds greater than 10% of the Shares is MacKenzie Financial Corporation, which holds 9,335,286 Shares as of July 26, 2006, representing approximately 10.6% of the issued and outstanding Shares;
6. the Filer intends to acquire up to 13,000,000 Shares (the Specified Number of Shares) under the Offer;
7. the Offer will be made pursuant to a modified Dutch auction procedure as follows:
  - (a) the Filer will offer to purchase up to the Specified Number of Shares;
  - (b) the Filer will pay a price per Share (the Purchase Price) between the range of US\$7.00 to US\$8.00 (the Price Range) which is specified in the Circular;
  - (c) shareholders wishing to tender to the Offer may
    - (i) specify the lowest price within the Price Range that they are willing to sell all or a portion of their Shares (an Auction Tender), or
    - (ii) elect to tender their Shares at the Purchase Price determined in accordance with paragraph (d) below (a Purchase Price Tender);
  - (d) the Purchase Price will be the lowest price that will enable the Filer to purchase up to the Specified Number of Shares, subject to additional Shares being taken up due to rounding as described in paragraph (f) below, and will be determined based upon the number of Shares tendered under Auction Tenders and Purchase Price Tenders, with each Purchase Price Tender being considered a tender at the lowest price in the Price Range for the purposes of determining the Purchase Price;
  - (e) shareholders may also tender Shares subject to the condition that a minimum number of the Shares tendered, as specified by the shareholder,

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must be purchased if any of such shareholder's Shares are purchased ("Conditional Tender");

- (f) the aggregate amount that the Filer will pay for Shares tendered to the Offer will not be determined until the Purchase Price is established;
- (g) the Filer will take up and pay for all Shares tendered at or below the Purchase Price at the Purchase Price, calculated to the nearest whole Share, so as to avoid the creation of fractional Shares and subject to prorating as described in paragraph (h) below if the aggregate number of Shares tendered at or below the Purchase Price exceeds the Specified Number of Shares;
- (h) the Filer will return all Shares tendered at prices above the Purchase Price to the appropriate shareholders;
- (i) all Shares tendered by shareholders who specify a tender price that falls outside the Price Range will be considered to have been improperly tendered, will be excluded from the determination of the Purchase Price, will not be purchased by the Filer and will be returned to the tendering shareholders;
- (j) if the number of Shares tendered at or below the Purchase Price is greater than the Specified Number of Shares, the Filer will purchase Shares tendered at or below the Purchase Price on a *pro rata* basis, except that the Filer will first accept for purchase, and will not prorate, Shares properly deposited by any shareholder who beneficially holds fewer than 100 Shares who
  - (i) deposits all such Shares under either an Auction Tender at or below the Purchase Price, or a Purchase Price Tender, and
  - (ii) who checks the "Odd Lots" box in the Letter of Transmittal relating to the Offer;
- (k) after accepting the Odd Lots, the Corporation will next accept the other Shares on a pro-rata basis; and
- (l) only if necessary to permit the purchase of the Specified Number of Shares, the Corporation will next accept Shares tendered pursuant to a Conditional Tender for which the condition was not initially satisfied; in selecting any such Conditional Tenders, the Corporation's depository will select by random lot the Shares to be accepted and will limit its purchase

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of such Shares to the minimum number of Shares specified by the shareholder;

8. prior to the expiry of the Bid, all information regarding the number of Shares tendered and the prices at which such Shares are tendered will be kept confidential until the offer expires and the Purchase Price has been determined;
9. the Filer intends to rely upon the exemptions from the valuation requirement in subsections 1.2(1)(a) and 3.4(3) of Ontario Securities Commission Rule 61-501 (Rule 61-501) and subsections 1.3(1)(a) and 3.4(3) of Quebec Regulation Policy Statement Q-27 (Q-27) (the Liquid Market Exemptions) on the basis that there is a published market for the Shares, namely the TSX and NASDAQ and it is reasonable to conclude that, following the completion of the Offer, there will be a market for shareholders who did not tender to the Offer that is not materially less liquid than the market that existed at the time of the making of the Offer; and
10. the Circular:
  - (a) discloses the mechanics for the take up of and payment for, or the return of, Shares as described in paragraph 7 above;
  - (b) explains that, by tendering the Shares at the lowest price in the Price Range, a Shareholder can reasonably expect that the Shares so tendered will be purchased at the Purchase Price, subject to proration as described in paragraph 7 above;
  - (c) specifies that the number of Shares that the Filer intends to purchase under the Offer will be up to the Specified Number of Shares; and
  - (d) contains the disclosure prescribed by Legislation for issuer bids, except to the extent exemptive relief is granted by this decision.

### **Decision**

- ¶ 4 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 Requested Relief is granted provided that

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- (a) Shares deposited under the Offer and not withdrawn are taken up and paid for, or returned to Shareholders, in the manner described in representation 7, and
- (b) the Filer can rely on the Liquid Market Exemptions and complies with representations 9 and 10.

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