

2007 BCSECCOM 408

June 27, 2007

Headnote

Mutual Reliance Review System for Exemptive Relief Applications – *Securities Act* s. 114(2) Issuer Bids - Exemption from the formal issuer bid requirements in Part 13 of the Act - General - An issuer wants to complete an issuer bid to persons who are not employees or consultants - The issuer bid satisfies the conditions of the exemption set out in s. 99(d) except that the bid will be made to individuals who are not employees or former employees of the issuer; the individuals are former directors, officers, or consultants of the issuer

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 105 to 108, 110 and 114(2)

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

and

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

and

In the Matter of
Forbes Medi-Tech Inc.
(the Company)

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 Company for a decision under the securities legislation of the Jurisdictions (the Legislation) that, in connection with the proposed implementation of the Company's 2007 Stock Option Plan (the New Plan) and the proposed cancellation of options outstanding pursuant to the Company's Existing Amended and Restated 2000 Stock Option Plan (the Existing Plan), that the Company be exempt from the requirements contained in the Legislation relating to, among other things, commencement and delivery of an issuer bid circular and any notices of change or variation thereto, minimum deposit periods and withdrawal rights, take-up of and payment for

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securities tendered to an issuer bid, disclosure, restrictions upon purchases of securities, formal valuation, identical consideration and collateral benefits contained in the Legislation (collectively, the Issuer Bid Requirements);

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 represented by the Company:
- 1. the Company is a corporation continued under the Canada Business Corporations Act (CBCA) and is in good standing under the CBCA;
 - 2. the Company is a reporting issuer in British Columbia and Ontario; it is not a reporting issuer in Manitoba;
 - 3. to the best of its knowledge, the Company is not in default of any requirement of the Legislation and is not on the list of defaulting reporting issuers maintained under the Legislation, where applicable;
 - 4. the authorized capital of the Company consists of an unlimited number of common shares and 50,000,000 Preferred Shares, issuable in series; there are currently 38,402,100 common shares and no preferred shares issued and outstanding;
 - 5. the Company's common shares are listed and trading on the Toronto Stock Exchange and on the NASDAQ Global Market;
 - 6. as of April 12, 2007, the board of directors of the Company (the Board), subject to regulatory and shareholder approval,
 - (a) adopted the New Plan, and

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- (b) subject to implementation, reduced existing options to purchase up to 3,915,375 common shares under the Company's existing stock option plan (the Ending Options), down to 2,229,900 common shares (the New Options) under the New Plan, as described below;
7. the Board considers it in the interests of both the Company and its shareholders to adopt the New Plan to bring the Company's option plan more in line with current industry standards, and in particular, to replace the fixed Existing Plan with a "rolling" or "evergreen" plan; as the maximum number of shares issuable under the New Plan is currently less, on a percentage of outstanding shares basis, than under the Existing Plan, the number of shares currently subject to option will need to be reduced;
 8. to induce optionees under the Existing Plan to reduce their options outstanding, and to help attract and retain qualified personnel, the Board has, subject to regulatory and shareholder approval, granted new options to purchase common shares at \$1.00 to replace options under the Existing Plan having exercise prices greater than \$1.00 (the Ending Options);
 9. the exercise price of the New Options has been set at \$1.00 per common share, versus option exercise prices of the Ending Options varying from \$1.77 to \$4.90 per common share; the New Options will expire on March 31, 2012, versus the Ending Options which have various expiry dates ranging from June 30, 2007 to March 31, 2012; options to purchase up to 40,000 common shares at \$0.66 per common share, options to purchase up to 15,000 common shares at \$0.96 per common share, and options to purchase up to 711,500 common shares at \$1.00 per common share, currently outstanding under the Existing Plan, will continue to remain outstanding under the New Plan (the Continuing Options);
 10. the Ending Options are currently held by directors, employees and consultants of the Company (the Optionees); the New Options will be offered to the Optionees in replacement of the Ending Options;
 11. the majority of the Optionees in Canada are resident in British Columbia; two Optionees are resident in Manitoba and four Optionees are resident in Ontario;
 12. the New Plan and the granting of the New Options in replacement of the Ending Options have been approved by the Company's shareholders at the Company's Annual General and Special Meeting (the Meeting) held May 17, 2007; the information circular filed on SEDAR and mailed to shareholders in connection with the Meeting contains disclosure explaining the New Plan and the granting of the New Options in replacement for the Ending Options; the

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information circular has been or will be made available to all Optionees being offered New Options in replacement of Ending Options; the New Plan and the New Options will be implemented on such date as the Board of Directors determines, and the Ending Options will then be cancelled;

13. the New Plan is a 10% “rolling” plan; the maximum number of common shares which may be subject to option under the New Plan at any particular time is 10% of the Company’s issued and outstanding common shares at such time, which is currently 3,840,210 common shares (the Rolling Maximum);
14. the Existing Plan is a “fixed” plan; the maximum number of common shares which may be issued pursuant to the exercise of options under the Existing Plan was last set, on April 13, 2004, at 6,000,000, or approximately 15.6% of the Company’s current outstanding shares (the Fixed Maximum);
15. the Rolling Maximum is approximately 64% of the Fixed Maximum;
16. the number of New Options to be granted in replacement of Ending Options will vary per Optionee, so that upon implementation of the New Plan, each Optionee receiving New Options will hold total options, consisting of New Options plus Continuing Options, equal to approximately 64% of the total number of options held by the Optionee prior to implementation of the New Plan;
17. both the Ending Options and the New Options are non-transferable, and accordingly, there is no published market for either of them;
18. the cancellation of the Ending Options and their replacement with the New Options constitutes an issuer bid under the applicable provisions of the Legislation, with the result that the transaction must meet the Issuer Bid Requirements;
19. an exemption from certain of the Issuer Bid Requirements is available under the Legislation if the securities which are the subject of the bid are acquired from a current or former employee of the issuer or of an affiliate of the issuer (the Employee Exemption); there is no limitation on the exemption if there is no published market in respect of the securities;
20. the Employee Exemption does not apply to directors or consultants;
21. the Employee Exemption applies to the majority of Optionees as most are in fact employees of the Company; therefore, exemptive relief is required in

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order to extend the Employee Exemption to the independent directors of the Company and to the Company's consultants; and

22. the Toronto Stock Exchange has conditionally accepted the New Plan, subject to the filing of certain documents including the final version of the New Plan.

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 Company is exempt from the Issuer Bid Requirements in connection with:

- (a) the cancellation of the Ending Options issued to the independent directors and consultants of the Company; and
- (b) the replacement of the Ending Options and the issuance of the New Options to the independent directors and consultants of the Company.

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