

# 2007 BCSECCOM 12

December 14, 2006

## Headnote

### Mutual Reliance Review System for Exemptive Relief Applications

Securities Rules s. 162(3) - Exemption from the Valuation Requirements - An issuer wants relief from other than in New Brunswick, the requirements to obtain a formal valuation in connection with the proposed securities take-over bid to be made by a wholly owned subsidiary of the issuer, for all of the issued and outstanding securities of the issuer - Although structured as an indirect issuer bid, the bid is an alternative way to continue the corporation to another jurisdiction; shareholders who tender to the bid will have the same interest in the same underlying assets as before the take over bid

Securities Act s. 114(2) Issuer Bids - Exemption from Issuer Bid Requirements - An issuer wants relief from the prescribed time periods in securities legislation in connection with making a formal bid - The offeror is organized under the laws of Switzerland and the majority of its shareholders reside outside of Canada; the bid will be governed by the laws of Switzerland and the Netherlands; the offer periods under the bid will substantially comply with the time periods under the *Securities Act* (British Columbia)

Securities Act s. 114(2) Issuer Bids - Exemption from Issuer Bid Requirements - An issuer wants relief from the requirement to send a directors' circular to shareholders of the subsidiary of the issuer - The circular will be prepared in accordance with the laws of Switzerland and the Netherlands; although there is no requirement to deliver a directors' circular to shareholders in these jurisdictions, the issuer has represented in the decision document that the circular will comply with the requirements under the *Securities Act* (British Columbia) relating to the required disclosure required under the take-over bid and directors' circular forms

## Applicable British Columbia Provisions

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 105, 109, and 114(2)

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

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

and

# 2007 BCSECCOM 12

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

and

In the Matter of  
IsoTis S.A. (the Filer) and IsoTis, Inc.

## 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:
1. in the Jurisdictions other than New Brunswick, the requirement to obtain a formal valuation will not apply in connection with the proposed securities exchange take-over bid (the Bid) to be made by a IsoTis, Inc., a wholly-owned subsidiary of the Filer (IsoTis Delaware), for all of the issued and outstanding securities of the Filer (the Valuation Relief);
  2. IsoTis Delaware be exempt from the prescribed time periods under the Legislation of each of the Jurisdictions in connection with making a formal bid (the Timing Relief); and
  3. the Filer be exempt from the requirement to send a directors' circular to shareholders of the Filer under the Legislation of each of the Jurisdictions (the Director Circular 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) the 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 Filer:

## 2007 BCSECCOM 12

1. the Filer was formed under the laws of Switzerland on June 27, 1996 and is a medical company specializing in orthobiologics;
2. the Filer's principal executive office is located at 2 Goodyear, Irvine, California, 92618, U.S.A. and its registered head office is located at 1 Rue de Sébeillon, 1004, Lausanne, Switzerland;
3. the Filer is a reporting issuer, or the equivalent, in each of British Columbia, Alberta, Ontario and Québec and is not in default of any applicable requirements under the Legislation;
4. the Filer's common shares (the Shares) are listed for trading on the Toronto Stock Exchange (the Exchange), the mainboard of the SWX Swiss Exchange (the SWX) and the Official Market Segment of the Stock Market of Euronext Amsterdam NV (Euronext);
5. in the United States, the Shares are registered under Section 12(g) of the *Securities Exchange Act* of 1934, and the Filer is a "Foreign Private Issuer";
6. under NI 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Filers*, the Filer is classified as an "SEC Foreign Issuer";
7. the Filer is authorized to issue 86.7 million Shares with a par value of CHF (Swiss Franc) 1 per share, of which approximately 70.9 million Shares are currently outstanding; approximately 16% of the Filer's outstanding Shares are beneficially held by residents in Canada;
8. the Filer is proposing to reorganize under the laws of the State of Delaware, quote its Shares for trading on the NASDAQ Global Market (NGM), and delist its Shares from trading on the Exchange, the Euronext and, when possible, the SWX;
9. the board of directors of the Filer believes that the Filer's current structure adversely affects trading in the Shares and acts as an impediment to its ability to efficiently raise capital for the following reasons:
  - (a) the Filer is a Swiss company and the Shares are listed on three different exchanges; the board of directors of the Filer believes that the trading price of the Shares would better reflect the value of the company and that the Filer would be able to more efficiently access capital markets in the United States by becoming a "domestic issuer" in the United States and having a single listing of its Shares on the NGM;

## 2007 BCSECCOM 12

- (b) the greater level of transparency that will be afforded by becoming a “domestic issuer” and the trading of the Filer’s securities on the NGM would provide greater assurance to investors regarding the business and financial condition of the Filer;
- 10. the board of directors of the Filer has determined that it is in the best interests of the Filer and its securityholders to cause the Filer to reorganize and re-domicile itself under the laws of the State of Delaware;
- 11. the Filer has incorporated IsoTis Delaware as a wholly-owned subsidiary under the laws of the State of Delaware, with an authorized capital consisting of 100,000,000 common shares and 10,000,000 preference shares issuable in series; the directors and officers of IsoTis Delaware will be identical to the directors and officers of the Filer with the exception of one director;
- 12. IsoTis Delaware will make a Bid to acquire all of the Shares in accordance with applicable Swiss, Dutch and Canadian law, which will constitute a securities exchange take-over bid under the Legislation and the Bid will comply with applicable law in Canada, except to the extent exemptions from such requirements are obtained;
- 13. under the terms of the Bid and pursuant to applicable Swiss and Dutch law (i) IsoTis Delaware will offer one new share of IsoTis Delaware for each ten Shares of IsoTis and the offer will initially remain open for a minimum of 34 days (the Initial Closing Date), (ii) no later than four trading days on the SWX, Euronext and TSX (Trading Days) after the Initial Closing Date, IsoTis Delaware will make a public announcement as to whether the Bid is unconditional (the Unconditional Date), (iii) if the Bid is determined to be unconditional, no later than five (5) Trading Days after the Unconditional Date, IsoTis Delaware will take up and pay for Shares initially tendered under the Bid, (iv) shareholders that have not tendered their Shares will have ten (10) Trading Days from the Unconditional Date (the Post-Acceptance Period) to tender their Shares and (v) IsoTis Delaware will make a public announcement of the results of the Bid no later than four (4) Trading Days after the Post-Acceptance Period ends and all such additional Shares tendered will be taken up and paid for no later than five (5) Trading Days after such announcement;
- 14. under the terms of the Bid, IsoTis Delaware may extend the Bid past the Initial Closing Date such that the Bid is open for a total of 40 Trading Days (or beyond such 40 Trading Day period with the consent of the Swiss take-over board);

## 2007 BCSECCOM 12

15. under the terms of the Bid, any Shares tendered under the Bid may be withdrawn until the Initial Closing Date and during the Post-Acceptance Period;
16. shareholders will be paid cash for fractional shares resulting from the exchange of new shares of IsoTis Delaware for Shares, except that Canadian shareholders may refrain from accepting cash for fractional Shares in order to avoid possible adverse Canadian tax consequences;
17. IsoTis Delaware will prepare and mail a securities exchange take-over bid circular (the Circular) to all shareholders of the Filer in Canada and, in accordance with applicable law, will make the Circular available to shareholders outside Canada other than in respect of shareholders in Switzerland that will receive a Swiss offer document in accordance with Swiss law, offering to purchase each outstanding Share held by them.; the consideration offered by IsoTis Delaware under the Bid for each ten Shares will consist of one new share of IsoTis Delaware, as a result of which certain NGM listing requirements would also be met;
18. the Circular will include substantially all of the information prescribed by the take-over bid form, including the information prescribed by the issuer bid form, and directors' circular form under the Legislation and the information required by the form of prospectus applicable to the Filer and IsoTis Delaware, including:
  - (a) audited annual and unaudited interim financial statements;
  - (b) a *pro forma* balance sheet as well as *pro forma* income statements of IsoTis Delaware after giving effect to the exchange of securities as of the date of the balance sheet of IsoTis Delaware and as of the most recent year end of the Filer that is included in the Circular, based on the information in the most recent audited financial statements of the Filer;
  - (c) a description of the basis of preparation of the *pro forma* financial statements; and
  - (d) the basic and fully-diluted (if applicable) earnings per share based on the *pro forma* financial statements;
19. one of the conditions of the Bid will be that shareholders of the Filer holding in aggregate at least 67% of the outstanding Shares tender their Shares to the Bid by the Initial Closing Date (or extension thereof);

## 2007 BCSECCOM 12

20. in addition, it is a condition of the Bid that on or prior to the Initial Closing Date, the shares of IsoTis Delaware be approved for quotation on the NGM;
21. in the event that at least 67% but less than 90% of the Shares are tendered under the Bid, IsoTis Delaware plans to maintain its listing on the SWX with respect to such untendered Shares; however, IsoTis Delaware may subsequently propose to acquire such non-tendered Shares, including by way of a public or private offer in respect thereof;
22. following the expiry of the Bid, in the event that at least 90% but less than 98% of the Shares are tendered under the Bid, IsoTis Delaware will form a wholly-owned subsidiary under the laws of Switzerland and merge this entity with the Filer; shareholders of the Filer that have not tendered their Shares under the Bid will receive shares of IsoTis Delaware in exchange for their Shares and the Filer will cease to exist; and
23. upon completion of the proposed transactions and assuming all Shares are tendered under the Bid: (i) the current shareholders of the Filer will become shareholders of IsoTis Delaware, the Filer will be a wholly-owned subsidiary of IsoTis Delaware and shareholders will hold the same relative percentage interest in IsoTis Delaware as they do in the Filer; and (ii) the Filer will subsequently apply to cease to be a reporting issuer, or will voluntarily surrender its reporting issuer status, in all Jurisdictions.

### **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 is that under the applicable Legislation is that:

1. in the Jurisdictions other than New Brunswick, the Valuation Relief is granted; and
2. the Timing Relief is granted in all the Jurisdictions; and
3. the Director Circular Relief is granted in all the Jurisdictions.

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