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Headnote

An issuer requires an exemption from all issuer bid requirements in connection with a share exchange agreement

Exemption Order

BioLytical Laboratories Inc.

Section 114(2)(c) of the *Securities Act*, R.S.B.C. 1996, c. 418

Background

- ¶ 1 BioLytical Laboratories Inc. applied for an exemption from the issuer bid requirements in sections 105 to 108 and 110 of the Act (the issuer bid requirements) in connection with a share exchange to be completed by BioLytical and 0710487 B.C. Ltd., one of its shareholders resident in British Columbia (487 Ltd.).

Representations

- ¶ 2 BioLytical represents that:
1. it was incorporated under the *Canada Business Corporations Act* on January 2, 2002;
 2. it is not a reporting issuer in any jurisdiction of Canada or the equivalent in any jurisdiction outside of Canada;
 3. its authorized share capital consists of an unlimited number of common shares of which 108,883,040, and options to purchase an additional 3,360,000, were outstanding, as of February 1, 2006, for a total of 112,243,040 common shares outstanding on a fully diluted basis;
 4. as of February 1, 2006,
 - (a) 487 Ltd. beneficially owned 83,116,000 common shares, representing approximately 76% of the outstanding common shares, and

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- (b) the balance of BioLytical's outstanding common shares were held by in excess of 200 shareholders resident primarily in Canada and the United States;
5. certain of the beneficial owners of 487 Ltd. are also directors and/or senior officers of BioLytical;
 6. 487 Ltd. acquired its common shares from a third party in December 2004 with the purchase price for the shares payable in installments;
 7. the next (and final) installments for 487 Ltd.'s common shares are due on February 28, 2006 and February 28, 2008;
 8. in April 2005, 487 Ltd. and BioLytical commenced a private placement to jointly raise \$10 million by selling 20 million common shares, comprised of common shares held by 487 Ltd. and common shares to be issued from BioLytical's treasury, using the accredited investor and close person friend exemptions from the dealer registration and prospectus requirements;
 9. to date, BioLytical and 487 Ltd. have sold 17,111,040 common shares under the private placement (so that 2,888,960 shares remain to be sold under the private placement), of which 8,084,000 were sold by 487 Ltd. and the proceeds used to pay previous installments of the purchase price for its shares and to make the loan described in paragraph 10 below, and 9,027,040 were sold by BioLytical;
 10. 487 Ltd. loaned approximately \$2,700,000 of the proceeds it has realized from the private placement to BioLytical to finance BioLytical's operating expenses, of which approximately \$2,000,000 is still owing by BioLytical;
 11. in connection with the private placement, BioLytical and 487 Ltd. represented to potential investors that BioLytical would not have more than 112,512,000 common shares outstanding, on a fully diluted basis, on the completion of the offering (the capital representation);
 12. BioLytical has commitments from investors to purchase an aggregate of approximately 10,268,960 common shares (the additional subscriptions) which, if completed, would result in it having in excess of 112,512,000 common shares outstanding on a fully diluted basis, breaching the capital representation;

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13. 487 Ltd. cannot sell more of its own common shares to satisfy the additional subscriptions without incurring significant tax liability in addition to what it has already incurred under the private placement;
14. 487 Ltd. previously incurred the tax liability under the private placement because it needed funds to pay the purchase price for its common shares and did not have time to structure the private placement in a more tax efficient manner;
15. BioLytical must raise funds to repay the loan to 487 Ltd. and to finance its operating expenses, and 487 Ltd. needs BioLytical to repay the loan so it can pay the next installment of the purchase price;
16. to complete the private placement without breaching the capital representation and provide BioLytical with funds to finance its operating expenses without causing 487 Ltd. to realize a significant tax liability, BioLytical and 487 Ltd. intend to complete the following steps (the share exchange process):
 - (a) BioLytical will create a new class of non-voting preferred shares that are convertible into common shares on a one-for-one basis, and retractable and redeemable at \$0.52 per preferred share,
 - (b) 487 Ltd. and BioLytical will agree that 487 Ltd. will exchange all of its common shares in accordance with Section 85 of the *Income Tax Act* (Canada) for preferred shares and new common shares which in aggregate will be equal in value and number to the original common shares held by 487 Ltd.,
 - (c) BioLytical will issue 2,888,960 common shares from treasury under a portion of the additional subscriptions to close the final portion of the private placement,
 - (d) using the proceeds of the portion of the additional subscriptions referred to in paragraph (c), BioLytical will redeem 2,888,960 preferred shares held by 487 Ltd., and
 - (e) 487 Ltd. will use all of the redemption proceeds received by it from BioLytical to make a cash capital contribution to BioLytical (the capital contribution);
17. the capital contribution will not be a debt of BioLytical, and there is no agreement or understanding between BioLytical and 487 Ltd. that the capital contribution will ever be repaid;

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18. the redemption price for the preferred shares is based on an internal valuation by management;
19. once the current private placement is complete, BioLytical will immediately issue approximately 7,380,000 common shares under the remaining additional subscriptions, and may commence further private placements from time to time;
20. BioLytical will use the capital contribution, the balance of the funds derived from the additional subscriptions and any funds derived from new private placements to
 - (a) repay the loan from 487 Ltd.,
 - (b) make an interest bearing loan to 487 Ltd., and
 - (c) pay general operating expenses and make capital investments;
21. 487 Ltd. will apply the proceeds of the loan repayment and the proceeds of the new loan from BioLytical towards paying the installment of the purchase price due on February 28, 2006, and intends to repay the loan as described in paragraph 26 below;
22. when the share exchange process is complete, 487 Ltd. will continue to hold a number of preferred shares issued to it under its agreement with BioLytical that were not redeemed by BioLytical;
23. 487 Ltd. intends to transfer the remaining preferred shares to a newly formed subsidiary of 487 Ltd. (Newco) in accordance with Section 85 of the *Income Tax Act* (Canada);
24. although the remaining preferred shares are redeemable at the option of the holder, Newco will agree with BioLytical, and 487 Ltd. has agreed with BioLytical, that Newco will not redeem the remaining preferred shares;
25. Newco intends to
 - (a) exchange the remaining preferred shares for common shares,
 - (b) sell the common shares to new investors, and

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- (c) distribute the proceeds of the sale of the common shares to 487 Ltd. by way of dividend;
- 26. 487 Ltd. will use the proceeds of the dividend from Newco to, among other things, repay the loan from BioLytical;
- 27. BioLytical intends to convene a special meeting of its shareholders on February 24, 2006 for the purpose of passing a special resolution to create the preferred shares;
- 28. 487 Ltd. will be excluded from voting its common shares in respect of the special resolution;
- 29. BioLytical's shareholders, other than 487 Ltd., will have the right to dissent on the resolution to create the preferred shares;
- 30. BioLytical's management will solicit proxies in connection with the shareholders' meeting and will deliver to each shareholder a management proxy circular;
- 31. the circular will describe
 - (a) the rights and restrictions to be attached to the preferred shares,
 - (b) the share exchange process,
 - (c) the use of the proceeds of the capital contribution as described in paragraph 20, and
 - (d) the steps Newco and 487 Ltd. intend to take as described in paragraphs 25 and 26;
- 32. BioLytical will provide the investors under the additional subscriptions with a copy of the circular, and they will have the choice to withdraw their commitments;
- 33. BioLytical will allocate 50% of its legal expenses incurred in connection with the share exchange process, and subsequent steps with Newco, to 487 Ltd.; and
- 34. because the capital contribution is an essential element of the share exchange process, none of BioLytical's other shareholders would be interested in participating in the share exchange process.

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Order

¶ 3 Considering that it is not prejudicial to the public interest, the Commission orders under section 114(2)(c) of the Act that BioLytical is exempt from the issuer bid requirements in connection with the share exchange process.

¶ 4 February 23, 2006

Robin E. Ford
Commissioner
British Columbia Securities Commission