

Headnote

Process for Exemptive Relief Applications in Multiple Jurisdictions – Issuer to enter into equity distribution agreement with underwriter to distribute common shares through the facilities of the TSXV or other marketplace in Canada – such distribution an “at-the-market” distribution under NI 44-102 – Issuer granted exemption from the prospectus delivery requirement and prospectus form requirements, subject to conditions – decision and application also held in confidence by decision makers, until the earlier of the entering into of an equity distribution agreement, waiver of confidentiality, public announcement of the ATM Offering, or 90 days from the date of the decision.

Applicable Legislative Provisions

Sections 129, 213 and 221(5) of the *Securities Act* (Alberta)

Item 20 of Form 44-101 *Short Form Prospectus* and section 8.1 of National Instrument 44-101 *Short Form Prospectus Distributions*

Section 2.2 and 2.4 of Part 2 of Appendix A and section 11.1 of National Instrument 44-102 *Shelf Distributions*

Citation: Re Radiant Technologies Inc., 2020 ABASC 37

Date: 20200324

In the Matter of
the Securities Legislation of
Alberta and Ontario (the **Jurisdictions**)

and

In the Matter of
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of
Radiant Technologies Inc. (the **Issuer**) and National Bank Financial Inc.
(the **Agent** and, together with the Issuer, the **Filers**)

Decision

Background

The securities regulatory authority or regulator in each of the Jurisdictions (**Decision Makers**) has received an application (the **Application**) from the Filers for a decision under the securities legislation of the Jurisdictions (the **Legislation**) for the following relief (the **Exemption Sought**):

- (a) that the requirement that a dealer, not acting as agent of the purchaser, who receives an order or subscription for a security offered in a distribution to which the prospectus requirement applies, send or deliver to the purchaser the latest prospectus (including the applicable prospectus supplement(s) in the case of a base shelf prospectus) and any amendment to the prospectus (the **Prospectus Delivery Requirement**) does not apply to the Agent or any other registered investment

dealer acting on behalf of the Agent as a selling agent (a **Selling Agent**) in connection with any "at-the-market distribution" of common shares (the **Common Shares**) of the Issuer as defined in National Instrument 44-102 *Shelf Distributions (NI 44-102)* in Canada (**ATM Distribution**) pursuant to the Prospectus (as defined below) and one or more substantially identical equity distribution agreements to be entered into between the Issuer and the Agent (each, an **Equity Distribution Agreement**); and

- (b) that the requirement to include in a prospectus supplement, or in any amendment to a prospectus supplement, a forward-looking underwriter certificate in the form specified in sections 2.2 or 2.4, as applicable, of Appendix A to NI 44-102 (the **Prospectus Form Requirements**) does not apply to a prospectus supplement of the Issuer or to any amendment thereto in respect of an ATM Distribution (**Prospectus Supplement**).

The Decision Makers have also received a request from the Filers for a decision that the Application and this decision be kept confidential and not be made public until the earliest of: (i) the date on which the Filers enter into an Equity Distribution Agreement; (ii) the date on which the Filers jointly advise the Decision Makers that there is no longer any need for this Application and this decision to remain confidential; (iii) the date on which the Filers publicly announce the ATM Offering, and (iv) the date that is 90 days after the date of this decision (the **Confidentiality Relief**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

- (a) the Alberta Securities Commission is the principal regulator for the Application;
- (b) the Filers have provided notice that section 4.7(1)(c) of Multilateral Instrument 11-102 *Passport System (MI 11-102)* is intended to be relied upon in British Columbia, Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador (together with the Jurisdictions, the **Reporting Jurisdictions**); and
- (c) this decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

Terms defined in National Instrument 14-101 *Definitions*, NI 44-102 or MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filers:

The Issuer

1. The Issuer is a corporation amalgamated under the *Canada Business Corporations Act*. The head office of the Issuer is located in Edmonton, Alberta.
2. The Issuer is a reporting issuer or the equivalent under the securities legislation of each of the Reporting Jurisdictions and is not in default of securities legislation in any jurisdiction of Canada.
3. The Common Shares are listed on the TSX Venture Exchange (the **TSXV**).

The Agent

4. The Agent is registered as an investment dealer under the securities legislation of each of the provinces of Canada, is a member of the Investment Industry Regulatory Organization of Canada, and is a participating organization of the TSXV.
5. The Agent is not in default of any requirements under applicable securities legislation in any of the jurisdictions of Canada.

Proposed ATM Distribution

6. Subject to mutual agreement on terms and conditions, the Filers propose to enter into an Equity Distribution Agreement for the purpose of ATM Distributions involving the periodic sale of Common Shares by the Issuer through the Agent, as agent, under the shelf procedures prescribed by Part 9 of NI 44-102.
7. The Issuer has filed a Short Form Base Shelf Prospectus dated January 21, 2020 (for Québec) and Amended and Restated Short Form Base Shelf Prospectus dated January 21, 2020 amending and restating the Short Form Base Shelf Prospectus dated January 2, 2020 (for all Provinces of Canada other than Québec) (the **Shelf Prospectus**) in each of the Reporting Jurisdictions providing for the distribution from time to time of securities of the Issuer. The Shelf Prospectus constitutes an "unallocated shelf" within the meaning of Part 3 of NI 44-102, and pertains to the issuance of Common Shares, debt securities, convertible securities, warrants, subscription receipts and units comprised of the foregoing. The Issuer included in the Shelf Prospectus a forward-looking certificate of the Issuer in the form prescribed by Appendix A to NI 44-102.
8. Prior to making an ATM Distribution, the Issuer will have filed the Prospectus Supplement in each of the Reporting Jurisdictions describing the terms of such ATM Distribution, including the terms of the Equity Distribution Agreement in respect thereof, and otherwise supplementing the disclosure in the Shelf Prospectus.
9. Upon entering into an Equity Distribution Agreement the Issuer will immediately issue and file a news release pursuant to section 3.2 of NI 44-102 to announce the Equity Distribution

Agreement and file the Equity Distribution Agreement on SEDAR (the news release will state that the Shelf Prospectus and the Prospectus Supplement have been filed on SEDAR and will specify where and how purchasers may obtain copies).

10. Each Equity Distribution Agreement will limit the number of Common Shares that the Issuer may issue and sell pursuant to any ATM Distribution to the 10% limitation set out in section 9.1(1) of NI 44-102.
11. The Issuer will conduct ATM Distributions through the Agent, as agent, directly or through a Selling Agent, through the facilities of the TSXV or any other Canadian "marketplace" (as defined in National Instrument 21-101 *Marketplace Operation*) upon which the Common Shares are listed, quoted or otherwise traded (each, a **Canadian Marketplace**).
12. The Agent will act as the sole agent of the Issuer in connection with the sale of the Common Shares on the TSXV or any other Canadian Marketplace pursuant to an Equity Distribution Agreement, directly by the Agent or through one or more Selling Agents, and will be paid an agency fee or commission by the Issuer in connection with such sales. The Agent will sign an agent's certificate in the Prospectus Supplement filed on SEDAR in the form set out in paragraph 29 below.
13. If sales are effected through a Selling Agent, the Selling Agent will be paid a seller's commission for effecting the trades on behalf of the Agent. A purchaser's rights and remedies under applicable securities legislation against the Agent, as agent of an ATM Distribution through a Canadian Marketplace, will not be affected by a decision to effect the sale directly or through a Selling Agent.
14. The aggregate number of Common Shares sold on all Canadian Marketplaces pursuant to ATM Distributions on any trading day will not exceed 25% of the trading volume of the Common Shares on all Canadian Marketplaces on that day.
15. Each Equity Distribution Agreement will provide that, at the time of each Sell Notice (as defined below), the Issuer will represent to the Agent that the Shelf Prospectus, as supplemented by the Prospectus Supplement, including the documents incorporated by reference in the Shelf Prospectus and any applicable amendment or supplement to the Shelf Prospectus or the Prospectus Supplement (together, the **Prospectus**) contains full, true and plain disclosure of all material facts relating to the Issuer and the Common Shares; the Issuer would, therefore, be unable to proceed with sales pursuant to an ATM Distribution when it is in possession of undisclosed information that would constitute a material fact or a material change in respect of the Issuer or the Common Shares.
16. After the date of the Prospectus Supplement and before the termination of an ATM Distribution, if the Issuer disseminates a news release disclosing information that, in the Issuer's determination, constitutes a "material fact" (as defined in the Legislation), the Issuer will designate such news release as a "designated news release" for the purposes of the Prospectus and identify it as such on the face page of the SEDAR-filed version of such news release (any such news release, a **Designated News Release**). The Prospectus Supplement will provide that any such Designated News Release will be deemed to be incorporated by reference into the Prospectus. A Designated News Release will not be used

to update disclosure in the Prospectus by the Issuer in the event of a "material change" (as defined in the Legislation).

17. If, after the Issuer delivers a sell notice to the Agent directing the Agent to sell Common Shares on the Issuer's behalf pursuant to an Equity Distribution Agreement (a **Sell Notice**), the sale of Common Shares specified in the Sell Notice, taking into consideration prior sales under all previous ATM Distributions, would constitute a material fact or material change, the Issuer will suspend sales under an Equity Distribution Agreement until either: (i) it has disseminated and filed a Designated News Release, in the case of a material fact, or has filed a material change report or amended the Prospectus; or (ii) circumstances have changed such that the sales would no longer constitute a material fact or material change.
18. In determining whether the sale of the Common Shares specified in a Sell Notice would constitute a material fact or material change, the Issuer will take into account a number of factors including, without limitation:
 - (a) the parameters of the Sell Notice, including the number of Common Shares proposed to be sold and any price or timing restrictions that the Issuer may impose with respect to the particular ATM Distribution;
 - (b) the percentage of the outstanding Common Shares represented by the number of Common Shares proposed to be sold pursuant to the Sell Notice;
 - (c) sales under earlier Sell Notices;
 - (d) the trading volume and volatility of the Common Shares;
 - (e) recent developments in the business, affairs and capital structure of the Issuer; and
 - (f) prevailing market conditions generally.
19. It is in the interest of the Issuer and the Agent to minimize the market impact of sales under an ATM Distribution. The Agent has experience and expertise in managing sell orders to limit downward pressure on trading prices. Therefore, the Agent will closely monitor the market's reaction to trades made pursuant to each ATM Distribution in order to evaluate the likely market impact of future trades; if the Agent has concerns as to whether a particular sell order placed by the Issuer may have a significant effect on the market price of the Common Shares, the Agent will recommend against effecting the trade at that time.

Disclosure of Common Shares Sold in ATM Distributions.

20. Within seven calendar days after the end of any calendar month during which the Issuer conducts an ATM Distribution, the Issuer will file on SEDAR and make publicly available as a notice of proceeds a report disclosing, in respect of such ATM Distribution, the number and average price of Common Shares distributed, gross proceeds, commissions and net proceeds. The Issuer will also disclose the number and average price of Common Shares sold pursuant to ATM Distributions, as well as gross proceeds, commissions and net

proceeds, in its annual and interim financial statements and management's discussion and analysis filed on SEDAR.

Prospectus Delivery Requirement

21. Pursuant to the Prospectus Delivery Requirement, a dealer effecting a trade of securities offered under a prospectus is required to deliver a copy of the prospectus (including the applicable prospectus supplement(s) in the case of a base shelf prospectus) to the purchaser within prescribed time limits.
22. Delivery of a prospectus is not practicable in the circumstances of an ATM Distribution because neither the Agent nor any Selling Agent effecting the trade will know the identity of the purchasers.
23. The Prospectus (together with all documents incorporated by reference therein) will be filed and readily available electronically via SEDAR to all purchasers under ATM Distributions; as stated in section 9 above, the Issuer will issue a news release that specifies where and how copies of the Prospectus can be obtained.
24. The liability of an issuer or an underwriter (or others) for a misrepresentation in a prospectus pursuant to the civil liability provisions of the Legislation will not be affected by the grant of an exemption from the Prospectus Delivery Requirement, as purchasers of securities offered under a prospectus during the period of distribution have a right of action for damages or rescission without regard to whether the purchaser relied on the misrepresentation or in fact received a copy of the prospectus.

Withdrawal Right and Right of Action for Non-Delivery

25. Pursuant to the Legislation, an agreement to purchase securities in respect of a distribution to which the prospectus requirement applies is not binding on the purchaser if a dealer receives, not later than midnight on the second day, exclusive of Saturdays, Sundays and holidays, after receipt by the purchaser of the latest prospectus or any amendment to the prospectus, a notice in writing that the purchaser does not intend to be bound by the agreement of purchase (the **Withdrawal Right**).
26. Pursuant to the Legislation, a purchaser of securities to whom a prospectus was required to be, but was not in fact, sent or delivered in compliance with the Prospectus Delivery Requirement, has a right of action for rescission or damages against the dealer who did not comply with the Prospectus Delivery Requirement (the **Right of Action for Non-Delivery**).
27. Neither the Withdrawal Right nor the Right of Action for Non-Delivery is workable in the context of an ATM Distribution because of the impracticability of delivering the Prospectus to a purchaser of Common Shares thereunder.

Modified Certificates and Statements

28. To reflect the fact that an ATM Distribution is a continuous distribution, the Prospectus Supplement and any amendment thereto will include the following issuer certificate (with appropriate modifications in respect of the filing of an amendment prescribed by section 2.4 of Appendix A to NI 44-102) which will supersede and replace any issuer certificate included in the Shelf Prospectus solely with regard to ATM Distributions:

The short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and the supplement, as required by the securities legislation of each of the provinces of Canada.

29. To reflect the fact that an ATM Distribution is a continuous distribution, the Prospectus Supplement and any amendment thereto will include the following underwriter certificate (with appropriate modifications in respect of the filing of an amendment prescribed by section 2.4 of Appendix A to NI 44-102):

To the best of our knowledge, information and belief, the short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and the supplement, as required by the securities legislation of each of the provinces of Canada.

30. A different statement of purchasers' rights than that required by the Legislation is necessary so that the Prospectus will accurately reflect the relief granted from the Prospectus Delivery Requirement. Accordingly, the Prospectus Supplement will state the following, with the date reference completed:

Securities legislation in certain of the provinces of Canada provides purchasers with the right to withdraw from an agreement to purchase securities and with remedies for rescission or, in some jurisdictions, revision of the price or damages if the prospectus, prospectus supplements relating to the securities purchased by a purchaser and any amendment are not delivered to the purchaser, provided that the remedies are exercised by the purchaser within the time limit prescribed by securities legislation. However, purchasers of the Common Shares under an at-the-market distribution will not have the right to withdraw from an agreement to purchase the Common Shares and will not have remedies of rescission or, in some jurisdictions, revision of the price or damages for non-delivery of the prospectus supplement, the accompanying prospectus and any amendment thereto relating to the Common Shares purchased by such purchaser because the prospectus supplements, the accompanying prospectus and any amendment thereto relating to the Common Shares

purchased by the purchaser will not be delivered as permitted under a decision dated ●, 2020 and granted pursuant to National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions.

Securities legislation in certain of the provinces of Canada also provides purchasers with remedies for rescission or, in some jurisdictions, revision of the price, or damages if the prospectus supplement, the accompanying prospectus and any amendment thereto relating to the securities purchased by a purchaser and any amendment contain a misrepresentation, provided that the remedies are exercised by the purchaser within the time limit prescribed by securities legislation. Any remedies under securities legislation that a purchaser of the Common Shares under an at-the-market distribution may have against the Issuer or the Agent for rescission, or in some jurisdictions, revision of the price, or damages if the prospectus, prospectus supplements relating to the securities purchased by a purchaser or any amendment contain a misrepresentation remain unaffected by the non-delivery and the decision referred to above.

Purchasers should refer to any applicable provisions of the securities legislation of the purchaser's province and the decision referred to above for the particulars of these rights or consult with a legal adviser.

31. Each Prospectus Supplement will disclose that, in respect of ATM Distributions under the Prospectus Supplement, the statement prescribed in section 30 above supersedes the statement of purchasers' rights contained in the Shelf Prospectus.

Confidentiality

32. The Issuer has not yet publically announced its intention to enter into an Equity Distribution Agreement; premature disclosure of this intention may have an adverse effect on the Issuer.

Decision

Each of the Decision Makers is satisfied that this decision satisfies the test set out in the Legislation for the Decision Maker to make the decision.

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

- (a) the Issuer makes the disclosure described in paragraphs 20, 28, 29, 30 and 31;

- (b) the Issuer complies with the representations in paragraphs 2, 8, 9, 10, 11, 14, 15, 16, 17 and 18; and
- (c) the Agent complies with the representations in paragraphs 4, 5, 9, 10, 11, 12, 13, 14, 15 and 19.

This decision will terminate 25 months from the date of the receipt for the Shelf Prospectus.

The further decision of the Decision Makers is that the Confidentiality Relief is granted.

For the Commission:

“original signed by”

Tom Cotter
Vice-Chair

“original signed by”

Kari Horn
Vice-Chair