

## **2002 BCSECCOM 834**

### **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications - relief from registration and prospectus requirements granted for the distribution of securities in connection with the Canadian aspects of the sale of the management consulting and technology services businesses of an accounting firm to a foreign reporting issuer

### **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 34(1)(a), 48, 61 and 76

### **IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH COLUMBIA, ALBERTA, ONTARIO, QUÉBEC, NEW BRUNSWICK AND NOVA SCOTIA**

**AND**

### **IN THE MATTER OF THE MUTUAL RELIANCE REVIEW SYSTEM FOR EXEMPTIVE RELIEF APPLICATIONS**

**AND**

### **IN THE MATTER OF PRICEWATERHOUSECOOPERS LLP, PWC CONSULTING, INTERNATIONAL BUSINESS MACHINES CORPORATION AND IBM ACQUISITION II INC.**

### **MRRS DECISION DOCUMENT**

WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in each of British Columbia, Alberta, Ontario, Québec, New Brunswick and Nova Scotia (the “Jurisdictions”) has received an application from PricewaterhouseCoopers LLP (“PwC LLP”), PwC Consulting (“PwCC”), International Business Machines Corporation (“IBM”) and IBM Acquisition II Inc. (“CanadaCo”) (collectively the “Applicants”) for a decision pursuant to the securities legislation of the Jurisdictions (the “Legislation”) that:

- (a) the requirements contained in the Legislation to be registered to trade in a security and to file and obtain a receipt for a preliminary prospectus and a prospectus (the “Registration and Prospectus Requirements”) shall not apply to certain trades of securities made in connection with the Canadian aspects of the proposed global sale (the “Global Sale”) to IBM and its subsidiaries of a substantial part of the management consulting and technology services businesses (the “Consulting Business”) currently

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carried on by the worldwide member firms of PricewaterhouseCoopers International Limited (“PwC”);

- (b) the Registration and Prospectus Requirements shall not apply to certain trades of securities made in connection with the exchange for IBM Shares (as defined below) of Exchangeable Shares (as defined below) issued under the Canadian portion of the Global Sale (the “Canadian Rollup and Sale”); and
- (c) the requirement of the Legislation of the province of Ontario to pay a fee in connection with the trade of any securities made in reliance on this Decision (as defined below) shall only apply to certain of the trades comprising the Canadian Rollup and Sale;

AND WHEREAS pursuant to the Mutual Reliance Review System for Exemptive Relief Applications (the “System”), the Ontario Securities Commission is the principal regulator for this application;

AND WHEREAS, unless otherwise defined, terms herein have the meaning set out in National Instrument 14-101 *Definitions*, or in Quebec Commission Notice 14-101;

AND WHEREAS the Applicants have represented to the Decision Makers as follows:

1. PwC LLP is a limited liability partnership formed under the laws of Ontario which provides audit, chartered accountancy and certain other related services in Canada and has approximately 420 partners.
2. PwCC is a partnership formed under the laws of Ontario which acts as agent for Management CS LP (“MCSLP”) in providing services of the Consulting Business in Canada (the “Canadian Consulting Business”). MCSLP is a limited partnership formed under the laws of Ontario which holds the Canadian Consulting Business. PwC Company (“Sub”), an unlimited liability company incorporated under the laws of Nova Scotia, is a general partner of MCSLP. Sub is a wholly-owned subsidiary of PwC LLP. The limited partners of MCSLP are PwC LLP, PwCA (as defined below) and PwCC.
3. PricewaterhouseCoopers Associates (“PwCA”) is a partnership formed under the laws of Ontario and has approximately 120 partners. Such partners are resident in each of the Jurisdictions other than Nova Scotia. PwCA provides consulting services to PwC LLP and MCSLP.

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4. PricewaterhouseCoopers Associates 2002 (“NewPwCA”) is a partnership formed under the laws of Ontario pursuant to a partnership agreement dated June 1, 2002.
5. IBM is a corporation incorporated under the laws of the State of New York. IBM common shares (the “IBM Shares”) are listed on the New York Stock Exchange, the Chicago Stock Exchange and the Pacific Stock Exchange. IBM is a reporting issuer in the provinces of Ontario and Québec and has no present intention of becoming a reporting issuer or the equivalent in any of the other Jurisdictions.
6. CanadaCo is a corporation incorporated under the laws of Canada for the purposes of the Canadian Rollup and Sale. At Closing, the authorized share capital of CanadaCo will include an unlimited number of common shares and an unlimited number of Exchangeable Shares (as defined below) having the attributes described below, and may include an unlimited number of senior and junior preference shares issuable in series. CanadaCo is an indirect wholly-owned subsidiary of IBM.
7. 3065718 Nova Scotia Company (“Call Right PurchaseCo”) is an unlimited liability company incorporated under the laws of Nova Scotia for the purposes of holding all of the common shares of CanadaCo and participating in the transactions described herein. Call Right PurchaseCo is an indirect wholly-owned subsidiary of IBM.
8. Other than as set out in paragraph 5, the entities described above are not, and have no intention of becoming, reporting issuers or the equivalent in any of the Jurisdictions. IBM has no intention of listing and posting for trading the IBM Shares on a recognized Canadian stock exchange.
9. The Canadian Rollup and Sale will initially involve a reorganization of certain Canadian PwC member firms in order to facilitate the sale of the Canadian Consulting Business to CanadaCo. As a part of this reorganization, immediately before completion of the sale of the Canadian Consulting Business to CanadaCo described below (“Closing”), PwCC will withdraw as a limited partner of MCSLP and PwCA will be wound up. The property of PwCA, including its limited partnership interests in MCSLP, will be distributed to its partners. Immediately thereafter those partners of PwCA who will not become employees of a Canadian subsidiary of IBM immediately following Closing, will transfer their limited partnership interests in MCSLP to NewPwCA. As a result, the limited partnership interests in MCSLP will then be held by PwC LLP, NewPwCA and those partners of PwCA who will become employees of a Canadian subsidiary of IBM immediately following

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closing (the “PwCA Consulting Partners”). In addition, as part of the reorganization, certain wholly-owned subsidiaries of MCSLP which carry on part of the Canadian Consulting Business (the “Transferred Subsidiaries”) will be transferred from MSCLP to either PwC LLP alone or to both PwC LLP and New PwCA.

10. Upon completion of the foregoing preliminary reorganization, the following steps of the Canadian Rollup and Sale will occur sequentially on the Closing date:
  - (a) The limited partners of MCSLP, namely PwC LLP, NewPwCA and the PwCA Consulting Partners, will transfer their respective limited partnership interests in MCSLP to Sub in consideration of common shares of Sub (“Sub Shares”);
  - (b) Certain partners of PwC LLP will receive a distribution of Sub Shares from PwC LLP. These partners of PwC LLP will also become employees of a Canadian subsidiary of IBM immediately following the Closing and together with the PwCA Consulting Partners are referred to herein as the “Canadian Consulting Partners”. There are approximately 76 Canadian Consulting Partners who are resident in the provinces of British Columbia, Alberta, Ontario and Québec;
  - (c) PwC LLP, NewPwCA and the individual Canadian Consulting Partners will sell their Sub Shares (and in the case of PwC LLP and NewPwCA, the shares of any Transferred Subsidiaries) to CanadaCo. In consideration, Canadian Consulting Partners will be entitled to elect to receive either IBM Shares, shares of CanadaCo (the “Exchangeable Shares”) which are economically equivalent to, and may be exchanged for, IBM Shares, or a combination thereof. The sale of Sub Shares in consideration for Exchangeable Shares will permit the Canadian Consulting Partners to take advantage of certain tax deferral provisions under the *Income Tax Act* (Canada). In the case of PwC LLP and NewPwCA, the consideration received on the sale will consist of cash (or debt that will be converted to cash). The Canadian Rollup and Sale may also include the sale to CanadaCo or an affiliate of certain interests held by PwC LLP in connection with the PwC global business process outsourcing business.
11. The issuance of the Exchangeable Shares will result in the creation, pursuant to the terms of the Exchangeable Shares and the various agreements relating thereto, of rights on the part of IBM and Call Right PurchaseCo to acquire Exchangeable Shares in certain circumstances and rights on the part of the

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holders of Exchangeable Shares to cause such shares to be purchased by IBM or Call Right PurchaseCo in certain circumstances.

12. The Exchangeable Shares will be retractable at any time at the option of the holder on a one-for-one basis for IBM Shares, subject to the overriding call right of Call Right PurchaseCo to purchase the retracted Exchangeable Shares in consideration of IBM Shares on a one-for-one basis (the "PurchaseCo Call Right"). The Exchangeable Shares will be redeemable at the option of CanadaCo in specified circumstances in consideration of IBM Shares on a one-for-one basis, subject to the PurchaseCo Call Right. In certain other circumstances (including on a liquidation, dissolution or insolvency of CanadaCo or the liquidation or dissolution of IBM), IBM will be required to purchase or may be required by the holders of Exchangeable Shares to purchase Exchangeable Shares on a one-for-one basis for IBM Shares, subject to the PurchaseCo Call Right. IBM or Call Right PurchaseCo will also have a call right to acquire the Exchangeable Shares in consideration of IBM Shares, on a one-for-one basis, if there has been a change in Canadian tax law that allows substantially all of the Canadian resident holders of Exchangeable Shares who hold such shares as capital property to exchange such shares for IBM Shares on a tax deferred basis.
13. The holders of Exchangeable Shares will be entitled to receive dividends and other distributions from CanadaCo, on a per share basis, in amounts (or property in the case of non-cash dividends or distributions) which are equivalent to, and which are payable at the same time as, dividends and distributions that are declared and paid on the IBM Shares.
14. The Exchangeable Shares will not have any voting rights, except as required by law and in other limited circumstances. There will not be any voting rights in IBM provided to holders of Exchangeable Shares. The information provided to partners in connection with the Partner Vote referred to in paragraph 17 below included a description of these limited voting rights. Assuming the maximum consideration to which Canadian Consulting Partners may become entitled and that all of such consideration is taken in Exchangeable Shares, the percentage vote which Canadian Consulting Partners would be entitled to cast at a meeting of holders of IBM Shares would be less than 0.03% if the holders of Exchangeable Shares were entitled to equivalent voting rights in IBM. Implementing procedures to permit the holders of Exchangeable Shares to vote at meetings of IBM shareholders and the costs of administering such mechanics on an ongoing basis are excessive in relation to the *de minimis* number of votes that holders of Exchangeable Shares would have.

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15. IBM, CanadaCo and Call Right PurchaseCo will enter into a support agreement in which, among other things, IBM will covenant to ensure that CanadaCo satisfies the terms of the Exchangeable Shares, to ensure that Call Right PurchaseCo is able to satisfy its obligations under the various call rights and to provide for adjustments to maintain the economic equivalence of the Exchangeable Shares to IBM Shares in the event of certain actions, such as the subdivision, consolidation or reclassification of the IBM Shares or the distribution of stock dividends, bonus shares, options, rights or warrants in respect of the IBM Shares. In addition, IBM will enter into an exchange rights agreement with the holders of Exchangeable Shares that will provide for various exchange rights and obligations of IBM.
16. The Exchangeable Shares will not be listed on any stock exchange. IBM and the Canadian Consulting Partners will enter into Redemption and Non-Competition Agreements which will impose certain restrictions on the ability of Canadian Consulting Partners to transfer the Exchangeable Shares and IBM Shares (including IBM Shares received on the exchange of Exchangeable Shares) for a period of up to five years following Closing.
17. The PwC member firms in Canada held a vote of their partners (the "Partner Vote") with respect to the Canadian Rollup and Sale and over 90% of the partners eligible to vote approved the Canadian Rollup and Sale and related transactions. Prior to the Partner Vote, detailed information with respect to the Global Sale and the Canadian Rollup and Sale (including some of IBM's most recent SEC filings) was made available to the partners, including Canadian Consulting Partners. Such information contained certain financial statements relating to the Consulting Business that were not audited or reported on by an independent auditor and were prepared generally in accordance with U.S. generally accepted accounting principles ("GAAP"), without any reconciliation to Canadian GAAP.
18. On completion of the Canadian Rollup and Sale, it is anticipated that residents of Canada will own directly or indirectly less than 0.3% of the outstanding IBM Shares and represent in number less than 4% of the total number of owners directly or indirectly of IBM Shares.
19. Holders of Exchangeable Shares will be concurrently provided with all of the disclosure materials provided by IBM to holders of IBM Shares resident in Canada.
20. There is presently no intention to have IBM Shares qualified for sale to the public in Canada. The IBM Shares will be issued pursuant to various exemptions from registration under U.S. securities law and accordingly they

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will not be freely tradeable in the United States for a period of up to two years after completion of the Canadian Rollup and Sale.

AND WHEREAS pursuant to the System this MRRS Decision Document evidences the decision of each of the Decision Makers (the “Decision”);

AND WHEREAS each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Makers with the jurisdiction to make the Decision has been met;

THE DECISION of the Decision Makers pursuant to the Legislation is that the Registration and Prospectus Requirements shall not apply to any trades of securities made in connection with the various steps involved in the Canadian Rollup and Sale as described in paragraphs 9, 10, 11 and 12 above, including any trades made in connection with the issuance of IBM Shares and Exchangeable Shares under the Canadian Rollup and Sale and in connection with the exchange for IBM Shares of the Exchangeable Shares issued under the Canadian Rollup and Sale, provided that the first trade in IBM Shares or Exchangeable Shares: (i) issued in connection with the Canadian Rollup and Sale; or (ii) acquired by Canadian Consulting Partners on the exchange of Exchangeable Shares, will be deemed a distribution or a primary distribution to the public under the Legislation of each Jurisdiction unless:

- (a) the issuer of the relevant securities is and has been a reporting issuer in a Jurisdiction for the 12 months immediately preceding the trade;
- (b) except in Québec, such trade is not a “control distribution” as defined in Multilateral Instrument 45-102 *Resale of Securities*;
- (c) no unusual effort is made to prepare the market or to create a demand for the shares that are the subject of such trade;
- (d) no extraordinary commission or other consideration is paid in respect of such trade; and
- (e) if the selling security holder is an insider or officer of the issuer of the relevant securities, such selling security holder has no reasonable grounds to believe that the issuer is in default of the Legislation.

AND THE FURTHER DECISION of the Decision Maker in Ontario is that no fee shall be payable pursuant to the Legislation of Ontario in connection with the trade of any securities made in reliance on this Decision Document except for the

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trade of IBM Shares and Exchangeable Shares to Canadian Consulting Partners as described in paragraph 10(c) above.

DATED September 27<sup>th</sup>, 2002.

Howard I. Wetston

H. Lorne Morphy