

# 2006 BCSECCOM 611

September 14, 2006

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act s. 114(2) Issuer Bids - General - An issuer wants relief from the issuer bid requirements for bids that will be made for tax reasons just prior to, but in connection with, an arrangement - The issuer bids are taking place just prior to, but as part of, an arrangement; the bids are solely for tax reasons to preserve the tax status of securityholders that hold their securities through holding companies; following the issuer bid, the securityholders will directly hold the same number of securities of the company doing the arrangement as they held indirectly before the issuer bids

## **Applicable British Columbia Provisions**

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

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

and

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

and

In the Matter of  
Hummingbird Ltd. (Hummingbird)  
(the Filer)

## MRRS Decision Document

## **Background**

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) for an exemption from the issuer bid requirements of the Legislation in respect of the Safe Income Tuck-In Transactions (the Requested Relief).

Under the Mutual Reliance Review System for Exemptive Relief Applications

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- (a) the Ontario Securities Commission is the principal regulator for this application, and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

### **Interpretation**

Defined terms contained in National Instrument 14-101 *Definitions* have the same meaning in this decision unless they are otherwise defined in this decision.

“Acquisition Sub” means 6575064 Canada Inc.;

“Act” means the *Securities Act* (Ontario);

“Arrangement” means the proposed arrangement under the provisions of section 192 of the CBCA as set out in the Plan of Arrangement, subject to any amendments or variations thereto made in accordance with the Arrangement Agreement or Section 5.1 of the Plan of Arrangement or made at the direction of the Court in the final order approving the Arrangement;

“Arrangement Agreement” means the Arrangement Agreement dated as of August 4, 2006, between Parent, Acquisition Sub and Hummingbird and any amendment thereto made in accordance with such agreement;

“Arrangement Resolution” means the special resolution of Shareholders approving the Plan of Arrangement to be considered at the Meeting and set out in Appendix A to the Circular;

“Board” means the board of directors of Hummingbird;

“CBCA” means the *Canada Business Corporations Act*;

“Circular” means the management information circular of Hummingbird, including the notice of special meeting of Shareholders of Hummingbird dated August 18, 2006 and all schedules, appendices and exhibits and all documents incorporated by reference therein;

“Decision Maker” means the local securities regulatory authority or regulator in each of the Jurisdictions;

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“Dissent Rights” means rights of dissent with respect to Hummingbird Shares pursuant to and in the manner set forth in Section 190 of the CBCA and the Arrangement;

“Filer” means Hummingbird Ltd.;

“Holdco” means a newly-formed Canadian holding company holding Hummingbird Shares;

“Holdco Shareholder” means a Shareholder who beneficially owns Hummingbird Shares through one or more newly-formed Canadian holding companies;

“Hummingbird Shares” means the common shares in the capital of Hummingbird;

“Interim Order” means an interim order of the Ontario Superior Court of Justice (Commercial List);

“Issuer Bid Requirements” means the issuer bid provisions as set out in Sections 89 to 105 of the Act and the equivalent provisions of the Legislation of the other Jurisdictions;

“Jurisdictions” means, collectively, British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia and Newfoundland and Labrador;

“Legislation” means the securities legislation of the Jurisdictions;

“Meeting” means the special meeting of Shareholders, and all adjournments and postponements thereof, called and held to consider and pass the Arrangement Resolution;

“Options” means options to acquire Hummingbird Shares granted under the Stock Option Plan;

“Parent” means Open Text Corporation;

“Plan of Arrangement” means the plan of arrangement substantially in the form of Schedule C to the Circular as amended or varied pursuant to the terms thereof;

“Safe Income Tuck-In Transaction” means the transaction described in paragraphs 17-20 of the Representations;

“Shareholders” means the holders of Hummingbird Shares;

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“Stock Option Plan” means the 1996 Employee Stock Option Plan of Hummingbird;

“Tax Act” means the *Income Tax Act* (Canada); and

“TSX” means the Toronto Stock Exchange.

### **Representations**

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

1. Hummingbird, Parent and Acquisition Sub have entered into the Arrangement Agreement providing for the proposed arrangement involving Hummingbird, Parent and Acquisition Sub. The Arrangement would, subject to applicable shareholder, regulatory, and court approvals, effect an arrangement pursuant to the Plan of Arrangement under the CBCA pursuant to which, among other things, Acquisition Sub would acquire all of the issued and outstanding Hummingbird Shares at a price of US\$27.85 per share.
2. Hummingbird was incorporated under the CBCA on September 27, 1984 as 135748 Canada Inc. Its corporate name was changed to Voiceterm Inc. on December 12, 1984, to Hummingbird Communications Ltd. on February 20, 1985, and to Hummingbird Ltd. on March 31, 2000.
3. Hummingbird’s head office is located at 1 Sparks Avenue, North York, Ontario M2H 2W1.
4. Hummingbird is currently subject to the reporting requirements of the Act and is a “reporting issuer” under the Act and under the Legislation of each of the other Jurisdictions, and is not in default of its obligations as a reporting issuer under the Legislation of any of the Jurisdictions.
5. The authorized share capital of Hummingbird consists of an unlimited number of common shares and an unlimited number of preference shares issuable in series. As at August 18, 2006, Hummingbird has issued and outstanding 17,618,199 Hummingbird Shares, each of which entitles the holder thereof to one vote at meetings of Shareholders other than those meetings where only the holders of shares of another class or of a particular series are entitled to vote. There are presently no preferred shares issued and outstanding.
6. In addition, as at August 18, 2006, there are outstanding Options to purchase 1,226,537 Hummingbird Shares.

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7. The Hummingbird Shares are listed on the National Association of Securities Dealers Automated Quotation Stock Market (NASDAQ) and the TSX under the symbols “HUMC” and “HUM”, respectively.
8. Pursuant to the Plan of Arrangement, at the effective time all of the outstanding Hummingbird Shares shall be transferred to Acquisition Sub in exchange for US\$27.85 cash per share.
9. The Plan of Arrangement also provides that all Options that are outstanding immediately prior to the effective time of the Arrangement shall be deemed to be conditionally vested and will be transferred to Hummingbird in exchange for a cash payment from or on behalf of Hummingbird equal to the amount (if any) by which US\$27.85 exceeds the exercise price payable under such Options (as converted into U.S. dollars pursuant to the Plan of Arrangement).
10. Holders of Hummingbird Shares may exercise rights of dissent with respect to such shares pursuant to and in the manner set forth in the Dissent Rights in connection with the Arrangement and the Interim Order. Holders of Hummingbird Shares who duly exercise such rights of dissent and who:
  - (a) are ultimately determined to be entitled to be paid fair value for their Hummingbird Shares shall be deemed to have transferred such Hummingbird Shares to Acquisition Sub, to the extent the fair value therefor is paid by Acquisition Sub on the effective date of the Arrangement; or
  - (b) are ultimately determined not to be entitled, for any reason, to be paid fair value for their Hummingbird Shares shall be deemed to have participated in the Arrangement on the same basis as a non-dissenting holder of Hummingbird Shares.
11. The special committee of the Board has unanimously determined that the Arrangement is fair to Shareholders and in the best interests of Hummingbird and has unanimously recommended that the Board approve the Arrangement and recommend that Shareholders vote for the resolution approving the Arrangement.
12. The Board (other than Andrew Malik who did not vote due to his employment as a Managing Director at Lehman Brothers Inc., a financial advisor to Hummingbird) has unanimously determined that the Arrangement is fair to Shareholders and in the best interests of Hummingbird. Accordingly, the Board has approved the Arrangement Agreement and unanimously recommends that shareholders vote for the Arrangement Resolution. All of

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the directors and executive officers of Hummingbird have advised Hummingbird that they intend to vote or cause to be voted all Hummingbird Shares beneficially held by them in favour of the Arrangement Resolution.

13. Hummingbird has obtained the Interim Order from the Court which requires that the Plan of Arrangement be approved by the Shareholders. The Interim Order provides for the calling and holding of the Meeting to vote on the Arrangement. It is also a condition to the closing of the Arrangement that a final order of the Court approving the Arrangement be granted.
14. The Arrangement will be effected by way of the Plan of Arrangement which will require the affirmative vote of at least 66 2/3% of the votes cast by the holders of the Hummingbird Shares present in person or by proxy and entitled to vote at the Meeting.
15. In connection with the Meeting, Hummingbird has delivered the Circular to its Shareholders. The Circular contains a detailed description of the Arrangement and complies with applicable provisions of the CBCA and the Interim Order.
16. In connection with the Arrangement, a Shareholder may choose to incorporate a newly-formed Holdco, transfer to the Holdco all of his, her or its Hummingbird Shares and transfer to Hummingbird all of the issued and outstanding shares of the Holdco in exchange for the same number of new Hummingbird Shares as are held by the Holdco at the time of purchase and sale of the Holdco Shares (a Safe Income Tuck-In Transaction).
17. The purpose of a Safe Income Tuck-In Transaction is to enable Holdco Shareholders to achieve certain tax planning objectives relating to the ownership of their Hummingbird Shares. Such transactions are intended to allow a Holdco Shareholder access to the amount of "safe income" for purposes of the Tax Act attributable to the Holdco Shareholder's investment in Hummingbird Shares, without affecting the cost basis for tax purposes of Hummingbird Shares held by other Shareholders.
18. All costs and expenses incurred by Hummingbird, Parent, Acquisition Sub, or a Holdco in connection with the Safe Income Tuck-In Transactions will be paid for by the participating Holdco Shareholders. Such Holdco Shareholders will be required to indemnify Hummingbird, Parent, Acquisition Sub and the relevant Holdco for any liabilities that any of them may incur in connection with the Safe Income Tuck-In Transactions and to provide a release of Hummingbird, Parent, Acquisition Sub and such Holdco.

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19. Following completion of the Safe Income Tuck-In Transactions, the Holdco Shareholders will own the same number of Hummingbird Shares that they each owned immediately prior to the Safe Income Tuck-In Transactions and will have the same rights and benefits in respect of such shares that each had immediately prior to the Safe Income Tuck-In Transactions.
20. The Safe Income Tuck-in Transactions must be completed no later than five business days prior to the effective date of the Arrangement.
21. Hummingbird intends to wind-up each Holdco acquired by it pursuant to the Safe Income Tuck-In Transactions under the CBCA prior to the effective time of the Arrangement.

### **Decision**

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 Requested Relief is granted.

Paul M. Moore

Suresh Thakrar