

# 2006 BCSECCOM 316

February 24, 2006

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications - National Instrument 51-102, s. 13.1 - Continuous Disclosure Obligations - Information circular - An issuer wants relief from the requirement to include disclosure in its information circular regarding executive compensation, indebtedness of directors, and securities authorized for issuance under equity compensation plans - The required disclosure is not relevant to the matters to be dealt with at the meeting for which the information circular is required; certain of the required disclosure is contained in a circular prepared, filed and sent to securityholders of the issuer in connection with the issuer's annual general meeting and there has been no material change to the required disclosure

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 11 and 119

National Instrument 51-102, ss. 9.1 and 13.1

Form 51-102F5, Items 8, 9 and 10

In the Matter of  
the Securities Legislation of  
Alberta, British Columbia, Ontario, and Québec  
(the Jurisdictions)

and

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

and

In the Matter of  
Environmental Management Solutions Inc.  
(the Applicant)

## MRRS Decision Document

## **Background**

The local securities regulatory authority or regulator (each, a Decision Maker and collectively, the Decision Makers) in each of the Jurisdictions has received an application from the Applicant for a decision under the securities legislation of the Jurisdictions (the Legislation) for an exemption from the requirement to include in the Applicant's Information Circular (defined below) the information required in Form 51-102F5 of National Instrument 51-102 - *Continuous Disclosure*

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*Obligations* by Item 8 - Executive Compensation, Item 9 - Securities Authorized for Issuance under Equity Compensation Plans, and Item 10 - Indebtedness of Directors and Executive Officers (the Required Disclosure).

In accordance with the provisions of section 5.3 of National Policy 12-201 *Mutual Reliance Review System for Exemptive Relief Applications*, the Applicant has requested that the Decision Makers treat this decision document, and the application and supporting materials submitted in connection herewith, in confidence until the earlier of March 15, 2006, and such date as the Applicant mails and files the Information Circular, which is expected to occur on or about March 1, 2006 (the exemption from the requirement to make the Required Disclosure referred to in the first recital together with the confidential treatment of this decision document, and the application and supporting materials submitted in connection herewith, being hereafter referred to, collectively, as the Requested Relief).

Under the Mutual Reliance Review System for Exemptive Relief Applications (the System):

- (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 (collectively, the Decision).

### **Interpretation**

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

### **Representations**

This Decision is based on the following facts represented by the Applicant:

1. The Applicant was incorporated on August 31, 2000, under the Business Corporations Act (Alberta) and was continued under the Canada Business Corporations Act on September 28, 2004, and to the best of its knowledge, is not in default of any of the requirements of the securities legislation of any of the Jurisdictions.
2. The Applicant's authorized capital consists of an unlimited number of common shares and an unlimited number of preferred shares, issuable in series. As at February 2, 2006, there were 38,012,247 common shares and no preferred shares issued and outstanding.

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3. The Applicant's common shares are listed and posted for trading on the Toronto Stock Exchange under the symbol "EMS".
4. The Applicant has called a special meeting (the Special Meeting) to be held on or about March 22, 2006, to ask shareholders to consider and if thought advisable, to pass a resolution authorizing the Company to complete a financing agreement (the Financing) with ONCAP II, L.P. (ONCAP) under which the Applicant would be provided with \$20,000,000 of new capital through the issuance of 20,000 units; each unit consisting of a \$950 principal amount of secured convertible debenture (each a Debenture, and collectively the Debentures) and 500, \$0.10 convertible preferred shares in the capital of the Applicant (each a Preferred Share, and collectively the Preferred Shares).
5. This capital will be used by the Applicant to: (i) repay all existing indebtedness of the Applicant and its subsidiaries, except for approximately \$800,000 in capital leases; (ii) acquire the minority interest in a subsidiary of the Applicant, Les Composts du Quebec Inc. (CDQ) of approximately 29% so that the Applicant will indirectly own 100% of CDQ; (iii) pay for the \$1.7 million settlement with a shareholder of the Applicant, Frank D'Addario and certain of his related parties; (iv) finance approved capital expenditures; and (v) pay the fees associated with the ONCAP Financing.
6. To be implemented, the Financing must be approved by a majority of the votes cast by the shareholders at the Special Meeting.
7. The management proxy circular of the Applicant (the Information Circular) in connection with the Special Meeting will be mailed to the shareholders of the Applicant on or about March 1, 2006.
8. The Debentures, of which an aggregate principal amount of \$19,000,000 will be issued at closing, will bear interest of 5% per annum payable quarterly. The terms of the Debentures include covenants and events of default customary for a convertible secured debenture in these circumstances. ONCAP will have the right to convert the Debentures (as a unit together with the applicable number of Preferred Shares) into common shares at a conversion price equal to \$0.323, subject to adjustment as further described in the Applicant's press release dated December 19, 2005, publicly available on SEDAR.
9. The Preferred Shares, of which 10 million will be issued at closing (having an aggregate principal amount of \$1,000,000), will carry a right to dividends equal to 5% per annum payable quarterly. The Preferred Shares will be convertible (as a unit together with the applicable amount of Debentures) into

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common shares at a conversion price of \$0.323, subject to adjustment as further described in the Applicant's press release dated December 19, 2005, publicly available on SEDAR. The Preferred Shares will have the right to vote at all meetings of shareholders along with the issued and outstanding common shares. Following closing, ONCAP's voting position at meetings of shareholders will be approximately 21%.

10. Based on the number of issued and outstanding common shares as of the date hereof and assuming the conversion (as a unit) of the Debentures and the Preferred Shares, ONCAP would own approximately 63% of the common shares and have a voting position of approximately 63% at meetings of shareholders.
11. Under the terms of the Debentures, and as permitted by the Applicant's articles of continuance, the board of directors of the Applicant will be fixed at four directors, provided that ONCAP will have the right to nominate up to two additional directors at any time for appointment by the board. In addition ONCAP will have the right to appoint two observers who will have the right to receive notice of, and attend, all meetings of directors.
12. It is expected that at closing, four of the eight current directors of the Applicant will resign. The board will set the number of directors at four, as permitted by its articles of continuance. It is expected that immediately following closing the board will include the current President and CEO of the Applicant, Tony Busseri, and three existing independent directors. The Applicant intends to include disclosure describing these arrangements in the Information Circular and to include disclosure consistent with Item 7 of Form 51-102F5 in respect of these directors in the Information Circular.
13. It is a covenant of the Debentures that at the Applicant's next annual meeting in May 2006, and each subsequent meeting during the term of the Debenture, a slate of four directors, or, if ONCAP has triggered its right to nominate two additional directors, six directors (including the ONCAP nominees) will be put forward for election by shareholders.
14. The Legislation in the Jurisdictions requires that, subject to the relief referred to herein being granted, the Information Circular include the Required Disclosure.
15. The Required Disclosure was provided to the shareholders in the information circular dated March 31, 2005 (the 2005 Annual and Special Meeting Circular), that was mailed to shareholders in connection with the holding of

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the Applicant's annual and special meeting of shareholders held on April 29, 2005, and which is publicly available on SEDAR.

16. There has been no material change in the Required Disclosure since it was last publicly disclosed, and it is not relevant to a shareholder's decision whether or not to vote in favour of the Financing.
17. The Required Disclosure will be provided in an information circular that is to be prepared in connection with the Applicant's regular annual meeting that is scheduled to be held in May 2006. It is anticipated that such information circular will be mailed to shareholders on or about March 31, 2006.
18. Confidential treatment by the Decision Makers of this decision document, and the application and supporting materials submitted in connection herewith, until the earlier of March 15, 2006 and the date on which the Information Circular is mailed to the Applicant's shareholder and filed on SEDAR (which is expect to take place on or about March 1, 2006), is expected to avoid the potential for selective disclosure of certain aspects of the proposed Financing transaction prior to the date on which the Information Circular, which will contain comprehensive disclosure regarding same, is mailed to all of the Applicant's shareholders.

### **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.

Erez Blumberger  
Assistant Manager, Corporate Finance  
Ontario Securities Commission