

Citation: 2013 BCSECCOM 568

Headnote

Multilateral Instrument 11-102 Passport System and National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions

National Instrument 51-102, s. 13.1 Continuous Disclosure Obligations - BAR - An issuer requires relief from the requirement to include certain financial statements in a business acquisition report – The issuer is a mining company that acquired a mining property that is a significant acquisition; despite making every reasonable effort, the issuer is unable to obtain the information needed to prepare the required financial statements; the BAR will contain sufficient alternative information about the significant acquisition

Applicable British Columbia Provisions

National Instrument 51-102, ss. 8.4 and 13.1 Continuous Disclosure Obligations

December 20, 2013

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

and

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

and

In the Matter of
Capstone Mining Corp.
(the Filer)

Decision

Background

- ¶ 1 The securities regulatory authority or regulator in each of the Jurisdictions (the Decision Maker) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the Legislation) exempting the Filer from the requirements in section 8.4 of National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102) to include certain financial statements in a business acquisition report (BAR) (the Exemption Sought).

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

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

Interpretation

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

Representations

- ¶ 3 This decision is based on the following facts represented by the Filer:
 1. the Filer is a company existing under the *Business Corporations Act* (British Columbia) and has its head office in Vancouver, British Columbia;
 2. the Filer is a reporting issuer in each of the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador and is not in default of its obligations under the securities legislation of any of these jurisdictions;
 3. the common shares of the Filer are listed and posted for trading on the Toronto Stock Exchange;
 4. the financial year end of the Filer is December 31;
 5. the Filer's auditors are Deloitte LLP (Deloitte);
 6. in December 2012, the Filer entered into an auction process and bid to acquire from BHP Copper Inc. (BHP Copper), a subsidiary of BHP Billiton Ltd. (BHP Billiton), the assets and liabilities associated with BHP Copper's wholly owned Pinto Valley copper mining operation and the shares of the associated San Manuel Arizona Railroad Company in Arizona, USA (the Acquired Assets);
 7. the financial year end of BHP Copper is June 30;
 8. the Filer completed the acquisition of the Acquired Assets on October 11, 2013 (the Acquisition);
 9. the total cash consideration for the Acquired Assets was approximately \$653 million;

10. the Filer filed on December 11, 2013 a revised technical report (the PV Technical Report) respecting the Acquired Assets in connection with the acquisition;
11. the Acquisition constitutes a “significant acquisition” by the Filer under section 8.3 of NI 51-102, which triggered the requirement for the Filer to file a BAR;
12. under section 8.4 of NI 51-102, the Filer’s BAR must include:
 - (a) financial statements of the Acquired Assets for the years ended June 30, 2013 and June 30, 2012 and the interim periods ended September 30, 2013 and 2012; and
 - (b) unaudited pro forma financial statements of the Filer as of September 30, 2013, the year ended December 31, 2012 and the nine months ended September 30, 2013(together, the Acquisition Statements);
13. under subsection 8.4(2) of NI 51-102, the financial statements of the Acquired Assets for the year ended June 30, 2013 must be audited;
14. the Filer, being aware of the requirements under NI 51-102 to include certain financial statements in the BAR, ensured that the purchase agreement included a covenant of BHP Copper to provide access to the books and records, premises and employees necessary to conduct an audit of prior periods related to the Acquired Assets; the Filer also held discussions with BHP Copper regarding the requirements of NI 51-102 and the type of financial disclosure required in the BAR during negotiations relating to the Acquisition;
15. the Filer retained KPMG LLP to assist the Filer in the preparation of the Acquisition Statements; Deloitte was retained to conduct an audit with respect to the Acquisition Statements;
16. BHP Billiton has reporting requirements and prepares financial statements because its securities are publicly listed; however, it has not historically prepared stand-alone financial statements (and has not had significant audit work done) with respect to the Acquired Assets or BHP Copper in the context of the audit of BHP Billiton; BHP Copper contains other substantial assets, liabilities and activities beyond the Pinto Valley mining operation;
17. despite making every reasonable effort to obtain access to, or copies of, requisite financial information for the Acquired Assets in order to provide the required audited Acquisition Statements, the Filer was not able to obtain all of the required financial information;
18. the acquired business does not constitute a material portion of BHP Billiton’s business; as a result, the required information does not appear to be readily available to BHP Copper or BHP Billiton;
19. in addition to the missing audit evidence, during the course of the audit of the acquired business financial statements, Deloitte attempted unsuccessfully to reconcile material

differences of opinion between itself and BHP Copper with respect to the carrying amount of certain property, plant and equipment; even if the difference of opinion could be reconciled, Deloitte informed the Filer that the historical financial information necessary to audit the completeness and historical cost of mineral property and property, plant and equipment is not available;

20. the Filer faces two issues with respect to the preparation of the financial statements for the Acquired Assets under section 8.4 of 51-102:
 - (a) the Filer has been unable to obtain the specific financial information necessary to provide audit evidence for Deloitte to audit the acquired business financial statements for the year ended June 30, 2013; and
 - (b) the valuation of the opening property, plant and equipment as at July 1, 2012 and July 1, 2013 for the balance sheet in the Acquisition Statements remains unresolved and, even if resolved, lacks the necessary information to support an audit;
21. the Filer believes, and is informed by Deloitte that it also believes, that this difference of opinion is unlikely to be resolved and access to the required information is not forthcoming;
22. the Filer proposes to include the following alternative information in the BAR (the Alternate Disclosure):
 - (a) an audited statement of the assets acquired and liabilities assumed by the Filer as at October 11, 2013 (the Statement of Assets Acquired and Liabilities Assumed) that:
 - (i) includes all the assets and liabilities acquired;
 - (ii) includes a statement that the Statement of Assets Acquired and Liabilities Assumed is prepared using the measurement and recognition principles of IFRS 3, Business Combinations; and
 - (iii) includes an auditor's report that expresses an unmodified opinion and reflects the fact that the Statement of Assets Acquired and Liabilities Assumed was prepared in accordance with the basis of presentation disclosed in the notes to the Statement of Assets Acquired and Liabilities Assumed;
 - (b) a pro forma balance sheet as at the date of the Filer's most recent balance sheet filed that includes the assets acquired and liabilities assumed; and
 - (c) technical information related to the Acquired Assets in the form of the PV Technical Report which will be incorporated by reference into the BAR;
23. the PV Technical Report provides investors with a current estimate of the mineral resource that forms part of the Acquired Assets; additionally, the PV Technical Report contains disclosure on the reliability of that estimate of the mineral resource and the information and

methodology that was used to determine that estimate; because the Acquisition was of a mine whose value largely consisted of the value of the assets acquired, the information in the PV Technical Report will assist investors in evaluating the Acquisition; and

24. apart from the requirement to include the financial statements required under section 8.4 of NI 51-102 for the acquisition of the Acquired Assets, the Filer is otherwise able to prepare and file the BAR in accordance with NI 51-102, which will include the Alternate Disclosure.

Decision

- ¶ 4 Each of the Decision Makers is satisfied that the decision meets 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 with respect to the BAR for the Acquired Assets, provided that the Filer includes in the BAR the Alternate Disclosure and otherwise complies with applicable BAR requirements.

Brent W. Aitken
Vice Chair
British Columbia Securities Commission