2002 BCSECCOM 935

Headnote
Mutual Reliance Review System for Exemptive Relief Applications - relief from prospectus requirements for resales of securities acquired in connection with an arrangement under the *Companies' Creditors Arrangement Act* (Canada)

Applicable British Columbia Provisions
Securities Act, R.S.B.C. 1996, c. 418, ss. 61 and 76

IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH COLUMBIA, ALBERTA, SASKATCHEWAN, MANITOBA, ONTARIO, QUÉBEC, NOVA SCOTIA, NEW BRUNSWICK, NEWFOUNDLAND AND LABRADOR AND PRINCE EDWARD ISLAND

AND

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

AND

IN THE MATTER OF 360NETWORKS (HOLDINGS) LTD.

MRRS DECISION DOCUMENT

WHEREAS the local securities regulatory authority or regulator (the "Decision Maker") in each of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, Nova Scotia, New Brunswick, Newfoundland and Labrador and Prince Edward Island (the "Jurisdictions") has received an application from 360networks (holdings) ltd. (the "Filer" or "Holdings"), a wholly-owned subsidiary of 360networks inc. ("360"), for a decision under the securities legislation of the Jurisdictions (the "Legislation") that the requirements contained in the Legislation to be registered to trade in a security (the "Registration Requirement") and to file and obtain a receipt for a preliminary prospectus and a prospectus (the "Prospectus Requirement") shall not apply to certain trades in connection with a plan of compromise and arrangement under the *Companies' Creditors Arrangement Act* (Canada) (the "Canadian Plan") and a related plan of reorganization under the U.S. *Bankruptcy Code* (the "U.S. Plan" and, together with the Canadian Plan, the "Plans");

AND WHEREAS under the Mutual Reliance Review System for Exemptive Relief Applications (the "System"), the Ontario Securities Commission (the "OSC") is the principal regulator for this application;

AND WHEREAS the Filer has represented to the Decision Makers that:

360networks inc.

1. 360 is a company continued under the *Companies Act* (Nova Scotia). Its head office is located in Vancouver, British Columbia.

2. 360, through its subsidiaries, is in the business of offering optical network services to telecommunications and data communications companies in North America.

3. The authorized share capital of 360 consists of 500 billion Subordinate Voting Shares (the "360 Common Shares"), 500 billion Multiple Voting Shares and 500 billion non-voting Preferred Shares issuable in series, of which 741,531,333 360 Common Shares, 81,840,000 Multiple Voting Shares and 700,000 series 1 non-voting Preferred Shares were outstanding as at August 31, 2002.

4. 360 is, and has been for longer than 12 months, a reporting issuer or the equivalent under the Legislation of each of the Jurisdictions. 360 is also a foreign private issuer under the U.S. *Securities Exchange Act of 1934*, as amended, and is subject to the reporting requirements of that Act.

5. The 360 Common Shares are listed on the Toronto Stock Exchange ("TSX") but are suspended from trading and were, prior to July 27, 2001, listed on the Nasdaq National Market ("Nasdaq").

6. As a result of 360's failure to file financial statements required under the Legislation the securities of 360 have, since July 19, 2002, been subject to cease trade orders of the OSC and the Executive Director of the British Columbia Securities Commission and have, since July 23, 2002 and August 2, 2002, been subject to cease trade orders of the Québec Securities Commission and the Alberta Securities Commission, respectively.

7. Other than the shares of Holdings it owns, 360 itself has no material assets or operations of any material value to the business of the 360 group of companies, and is not a party to the Plans. Upon implementation of the Plans, Holdings will replace 360 as the ultimate parent company in the 360 group.

360networks (holdings) ltd.

8. Holdings is currently amalgamated under the *Business Corporations Act* (Alberta), but is in the process of being continued under the *Canada Business*

Corporations Act (the "CBCA"). Its head office is located in Vancouver, British Columbia.

9. The authorized share capital of Holdings currently consists of an unlimited number of each of the following: (i) Class "A" Common Voting Shares, (ii) Class "B" Common Voting Shares, (iii) Class "C" Common Non-Voting Shares, (iv) Class "I" Preferred Voting Shares, (v) Class "II" Preferred Non-Voting Shares, and (vi) Class "III" Preferred Non-Voting Shares. As of August 31, 2002, 30,297,073 Class "A" Common Voting Shares were outstanding, all of which were held by 360. Once Holdings is continued under the CBCA, its authorized share capital will consist of one class of an unlimited number of Preference shares and one class of an unlimited number of Common shares (the "Holdings Common Shares"); only Holdings Common Shares will be outstanding at the time of implementation of the Plans.

10. Holdings is not a reporting issuer or the equivalent under the securities legislation of any province or territory of Canada.

The Plans – General

11. On June 28, 2001 the Supreme Court of British Columbia (the "BC Court") granted an order under the CCAA (such order, as amended and restated by an order made July 20, 2001, the "Original Order") that, among other things, provided most of the Canadian companies in the 360 group protection from their creditors until December 31, 2001. The BC Court subsequently granted orders extending the stay of proceedings provided for in the Original Order until October 31, 2002.

12. Also on June 28, 2001, certain U.S. companies in the 360 group filed voluntary petitions in the U.S. Bankruptcy Court (the "U.S. Court") pursuant to Chapter 11 of the U.S. *Bankruptcy Code*.

13. On September 4, 2002 the BC Court declared, among other things, that the Canadian Plan is fair and reasonable and granted its final approval of the Canadian Plan. The approval of the U.S. Court to the U.S. Plan was obtained on October 1, 2002.

14. The purpose of the Plans is, among other things, to provide for the compromise, settlement and payment of claims of certain creditors of the 360 group of companies by way of the distribution of cash, notes and/or equity shares of Holdings to such creditors.

15. None of 360's subsidiaries carrying on business outside of North America is covered by the Plans. The subsidiaries engaged in the 360 group's trans-Atlantic business are not being restructured and will be disposed of or liquidated in due course. The 360 group's European and Asian affiliates are in the process of being liquidated under the laws of each applicable country. The South American affiliates that comprise the 360americas group of companies (formerly, GlobeNet) are pursuing their own debt restructuring outside of any insolvency court. The South American affiliates that are not part of the 360americas group of companies will be disposed of or liquidated in due course.

16. Currently, North American operations constitute the largest and only revenue producing part of the 360 group's business. Such operations are held by those Canadian and U.S. subsidiaries covered by the Plans. Holdings will be the ultimate parent company of those subsidiaries upon implementation of the Plans.

17. 360's issued shares are not dealt with in any way under the Plans, and shareholder approval of the Plans is not required under the CCAA or applicable corporate legislation.

18. For purposes of considering and voting on the Canadian Plan and receiving distributions under it, there are two classes of creditors: The senior lender class and the general creditor class. The U.S. Plan has those same classes plus certain other classes such as for other secured creditors, intercompany claims and equity interests. The creditors in the senior lender class under the Plans are herein collectively called the "Senior Lenders". The creditors in the general creditor class under the Canadian Plan, together with general unsecured creditors under the U.S. Plan, are herein collectively called the "General Creditors".

19. The Senior Lenders and the general creditors under the Canadian Plan approved the Canadian Plan at separate meetings held on August 27, 2002. In connection with the meetings, such creditors were provided with an information circular containing detailed disclosure respecting the reorganization under the Plans and a copy of the Canadian Plan (in the case of creditors of the Canadian Companies). A Disclosure Statement was also sent to all creditors of the applicable U.S. companies in connection with the U.S. Plan, together with a copy of the U.S. Plan. Creditors of the U.S. companies had until September 24, 2002 to submit ballots in respect of the U.S. Plan. Such creditors have now approved the U.S. Plan.

Steps in Implementing the Plans

20. In connection with and as a condition of implementation of the Plans:

    (a) certain Canadian subsidiaries of the 360 group will transfer a portion of the shares of entities of the Urbanlink group of companies owned by them to an entity qualified to hold the same pursuant to the requirements of the Canadian Radio-television and Telecommunications Commission;

    (b) 360 will transfer and/or assign certain shares in a subsidiary, inter-corporate debt and contractual rights to Holdings and certain other of its subsidiaries for nominal consideration;

    (c) Holdings and other subsidiaries of the 360 group will assign certain inter-corporate debt to certain other subsidiaries of the 360 group, including 360networks holdings (USA) inc. ("Holdings USA"), a U.S. company of the 360 group;

    (d) Holdings will issue, at the direction of Holdings USA, Holdings Common Shares to JPMorgan Chase Bank (the "Agent") as agent and collateral agent for the Senior Lenders under a senior secured credit facility granted to the Senior Lenders, in satisfaction of a portion of the indebtedness owed to the Senior Lenders; and

    (e) Holdings will file Articles of Reorganization under the CBCA to consolidate its authorized and issued Holdings Common Shares, such that 360 will hold $^{2}/_{3}$ of a post-consolidation Holdings Common Share ("New Common Share") and the Agent will hold two New Common Shares on behalf of the Senior Lenders.

21. Thereafter, Holdings will issue additional New Common Shares in exchange for further shares of Holdings USA for distribution under the Plans. Such New Common Shares will be allocated as follows:

    (a) 80.5% to the Senior Lenders (the "Senior Lender Pool");

    (b) 2% to the General Creditors under the Canadian Plan (the "Canadian Creditor Pool") and 10% to General Creditors under the U.S. Plan (the "U.S. Creditor Pool"); and

    (c) 7.5% to certain personnel ("Employees") of companies of the 360 group (the "Employee Pool").

22. Under the Plans, the Senior Lenders will receive in the aggregate:

(a) U.S.$135 million of cash;

(b) new senior secured notes of Holdings in the aggregate principal amount of U.S.$215 million ("New Notes"); and

(c) New Common Shares, as more particularly described below.

Such cash, New Notes and New Common Shares will be issued to the Agent on behalf of the Senior Lenders, at the instruction of Holdings USA.

23. Upon implementation of the Plans:

(a) each Senior Lender will receive its pro-rata share of the Distributable Cash (as defined in the Plans), together with its pro-rata share of:

(i) the New Notes; and

(ii) the 12,075,000 New Common Shares allocated to the Senior Lender Pool;

(b) each General Creditor will, subject to the below, receive a *pari passu* distribution of the 300,000 New Common Shares allocated to the Canadian Creditor Pool (in the case of General Creditors receiving New Common Shares under the Canadian Plan) or the 1,500,000 New Common Shares allocated to the U.S. Creditor Pool (in the case of General Creditors receiving New Common Shares under the U.S. Plan);

(c) each General Creditor with a distribution claim of greater than U.S.$100,000 and who makes a Lump Sum Election (as defined in the Plans) will, subject to the availability of sufficient funds, receive cash in lieu of New Common Shares equal to the amount such General Creditor would otherwise be entitled to receive under the Plans;

(d) each General Creditor with a claim of U.S.$100,000 or less will be deemed to have made a Lump Sum Election and will receive cash rather than New Common Shares;

(e) each General Creditor under the U.S. Plan will receive a percentage of certain U.S. preference recoveries, which are only available under U.S. law; and

(f) certain Employees will receive New Common Shares from the 1,125,000 New Common Shares allocated to the Employee Pool, or options to acquire same (the "Arrangement Options"). In addition, certain Employees and outside directors of Holdings will be granted stock options of Holdings under the 2002 Long Term Incentive and Share Award Plan referred to in the Plans, and New Common Shares will be conditionally allotted and reserved for issuance to the Employees and outside directors upon the exercise of such options. The allocation and eligibility, if any, of each Employee or outside director for such New Common Shares and options is to be determined.

24. The formal valuation, minority approval and related requirements of OSC Rule 61-501 *Insider Bids, Issuer Bids, Going Private Transactions and Related Party Transactions* and Québec Securities Commission Local Policy Statement Q-27 *Requirements for Minority Security Holders Protection in Certain Transactions* do not apply to the reorganization to be effected pursuant to the Plans.

25. Holdings intends to rely on exemptions provided under the U.S. *Bankruptcy Code* and exemptions set out in section 3(a)(10) of the United States *Securities Act of 1933* (the "1933 Act"), so that the securities to be issued to creditors in the United States under the U.S. Plan and the Canadian Plan, respectively, will not be required to be registered under the 1933 Act. Holdings has been advised that the resale of such securities in the United States will not be subject to any restriction under U.S. federal securities laws, except in respect of any recipients who constitute "underwriters" within the meaning of the U.S. *Bankruptcy Code*.

26. Holdings intends, after implementation of the Plans, to exercise its right to repurchase the fractional New Common Share held by 360, so that 360 itself will no longer be an affiliate of any company of the 360 group.

27. As a result of the implementation of the Plans, Holdings will replace 360 as the ultimate parent company in the corporate structure of the 360 group of companies.

28. The steps of implementation of the Plans involve or may involve a number of trades of securities in the Jurisdictions (all such trades under and in connection with the Plans, the "Trades").

29. There may be no exemptions from the Prospectus Requirement and the Registration Requirement in the Legislation of certain of the Jurisdictions in respect of certain of the Trades.

30. The Filer has been advised that the implementation of the Plans is necessary for the business of the 360 group of companies to continue as a going concern.

AND WHEREAS under the System, this MRRS Decision Document evidences the decision of each Decision Maker (collectively, the "Decision");

AND WHEREAS 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:

1. except in British Columbia, the Registration Requirement and the Prospectus Requirement shall not apply to the Trades, provided that the first trade in securities acquired under or in connection with the Plans in a Jurisdiction shall be deemed to be a distribution or primary distribution to the public under the Legislation of such Jurisdiction; and

2. the Prospectus Requirement shall not apply to the first trade in securities acquired under or in connection with the Plans or to the first trade in securities acquired upon the exercise of the Arrangement Options if

    (a) except in Québec, the conditions in subsections (3) or (4) of section 2.6 or subsections (2) or (3) of section 2.8 of Multilateral Instrument 45-102 *Resale of Securities* ("MI 45-102") are satisfied; and provided further that the requirement contained in paragraphs 2.6(3)1., 2.6(4)1., 2.8(2)1. and 2.8(3)1 of MI 45-102 that the issuer have been a reporting issuer for a specified period of time prior to the trade shall not apply to such first trade if, on or before the date of such first trade, the issuer shall have filed a (final) prospectus with, and received a (final) receipt from, one or more of the Decision Makers; and

    (b) in Québec,

        (i) the issuer is a reporting issuer in Québec,

        (ii) no unusual effort is made to prepare the market or to create a demand for the securities that are the subject of the trade,

        (iii) no extraordinary commission or consideration is paid to a person or company in respect of the trade, and

(iv) if the selling shareholder is an insider or officer of the issuer, the selling shareholder has no reasonable grounds to believe that the issuer is in default of securities legislation.

DATED October 25th, 2002.

R.W. Korthals H. P. Hands