

2008 BCSECCOM 393

July 7, 2008

Headnote

Multilateral Instrument 11-102 *Passport System* and National Policy NP 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* - National Instrument 51-102, s. 13.1 Continuous Disclosure Obligations – An issuer requires relief from the requirement to include certain financial statements in a business acquisition report – The issuer made a significant acquisition of a private company; the necessary information to prepare the required financial statements is unavailable; the BAR will contain sufficient alternative information about the acquisition

Applicable British Columbia Provisions

National Instrument 51-102, s. 13.1 Continuous Disclosure Obligations

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
Intrinsyc Software International, Inc.
(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) for an exemption under Section 13.1 of National Instrument 51-102 - *Continuous Disclosure Obligations* (NI 51-102) from the requirement in subsection 8.4(1) of NI 51-102

2008 BCSECCOM 393

to include certain audited annual financial statements in a business acquisition report (the Exemption Sought);

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

- (a) British Columbia 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, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland; 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 incorporated under the federal laws of Canada and its head office is located in Vancouver, British Columbia;
 - 2. the Filer is authorized to issue an unlimited number of common shares without par value; as of the date hereof, the Filer has 150,895,563 common shares issued and outstanding;
 - 3. the common shares of the Filer are listed for trading on the Toronto Stock Exchange;
 - 4. the Filer's current fiscal year end is December 31; the Filer has recently changed its year end and its previous financial year end was August 31; the last annual financial statements of the Filer were filed for the four month period ended December 31, 2007;
 - 5. Destinator Technologies Inc. (Destinator) is a private company that is a provider of wireless software for global positioning system (GPS) devices and navigation software for wireless devices;

2008 BCSECCOM 393

6. Destinator's financial position has been deteriorating for some time; it is insolvent and has sought court protection, as described below;
7. on May 19, 2008, the Filer entered into an asset purchase agreement with Destinator and certain of its subsidiaries, Destinator Technologies Inc. (Canada) and Destinator Technologies Properties Inc., whereby the Filer will acquire a substantial portion of the assets of Destinator and such subsidiaries; the Filer will also acquire the shares of Destinator Technologies Inc. (China) and Destinator Technologies Inc. (Israel) Ltd., two of Destinator's subsidiaries (the foregoing is hereafter referred to as the Transaction); the Transaction will result in the acquisition of a business which represents approximately 80% of the current business of Destinator;
8. the Transaction will occur pursuant to orders granted under the *Companies Creditors' Arrangement Act* (the CCAA) and recognized under the *U.S. Bankruptcy Code*; the asset purchase agreement between the parties constitutes a stalking horse bid in a going concern sale process approved by the Ontario Superior Court of Justice and the United States Bankruptcy Court for the District of Delaware; the court approved sale process concluded on or about June 25, 2008 and the Transaction is to occur on or about July 9, 2008;
9. on May 20, 2008, the Ontario Superior Court of Justice rendered an initial order (the Initial Order) in favour of Destinator under the CCAA to, among other things:
 - (a) order that all proceedings against Destinator and its assets be stayed and suspended;
 - (b) appoint RSM Richter Inc. as Monitor pursuant to the CCAA and appoint John Poptsis of the Acceleris Group Inc. as the Chief Restructuring Officer;
 - (c) authorize and direct the Monitor to apply to the United States Bankruptcy Court for the District of Delaware for an order recognizing the CCAA proceedings and giving full force and effect to the Initial Order in the United States of America; and
 - (d) authorize and approve the Transaction and the sale process;
10. on May 23, 2008 the United States Bankruptcy Court for the District of Delaware granted a provisional order recognizing and enforcing the Ontario court's Initial Order in the United States of America;

2008 BCSECCOM 393

11. in order to complete the sale process, Destinator has arranged a debtor in possession financing facility (the DIP Loan) of \$3,250,000, which is required in order for Destinator to continue operations through the sale process to consummation of a going concern sale; the cash flows filed with the Canadian and U.S. courts demonstrate that the full amount of the DIP Loan of \$3,250,000 will be required to fund operating expenses and insolvency professional costs through the end of the process;

12. the Monitor has filed a First Report with the Canadian and U.S. courts; in the First Report, the Monitor advises as follows:

The principal purpose of the insolvency process is to market for sale the Company's [Destinator's] business and assets, using a stalking horse process, consistent with Section 363 of the US Bankruptcy Code. The Sale Process, as described, is required pursuant to the [Filer's] Offer. It is presently contemplated that the Monitor will market the Company for sale for a thirty (30) day period; a prolonged sale process could put the Company's viability at risk given its cash constraints and fragile stakeholder relationships. It is the Monitor's observation that stakeholders require certainty that the Company's business will emerge from these proceedings, and that it does so on a timely basis. Additionally, the DIP Loan is estimated to only be sufficient to fund the business for a time frame consistent with the contemplated duration of the Sale Process;

13. the Transaction, if completed, will constitute a "significant acquisition" for the purposes of NI 51-102 and the Filer will be required to file a business acquisition report (BAR) within 75 days of the closing of the Transaction;

14. under Section 8.4 of NI 51-102, the BAR must be accompanied by:

- (a) annual financial statements for Destinator for its two most recently completed fiscal years prior to the acquisition, being the fiscal years ending January 31, 2008 and January 31, 2007; the financial statements for the most recently completed financial year prior to the acquisition must be audited;
- (b) unaudited interim financial statements for Destinator for its most recently completed interim period; and
- (c) pro form financial statements of the Filer giving effect to the Transaction;

2008 BCSECCOM 393

15. Annual financial statements of Destinator for the year ended January 31, 2008 do exist but Deloitte & Touche LLP, Destinator's former auditors, have represented to the Filer that it is not possible to audit them because:
- (a) certain required historical accounting records have been lost and are unavailable;
 - (b) Destinator has had a high turnover in accounting staff and the personnel that would have the information necessary to complete an audit are no longer employees of Destinator; this lack of continuity specifically limits the auditors' ability to fulfill its obligations in conducting an audit under GAAS;
 - (c) Destinator lacks the senior financial management required to undertake an audit;
 - (d) the current temporary financial staff are unable to provide the required explanations to the auditors in respect of the certain documents; and
 - (e) the Monitor has advised that Destinator does not have the financial resources or personnel for the preparation of audited financial statements; all available resources are required to maintain operations in order to maximize value through a going concern sale, and avoid shut down, liquidation, and substantial losses to creditors;
16. apart from the requirement to include annual financial statements for Destinator for the year ended January 31, 2008, the Filer is otherwise able to prepare and file the BAR in accordance with NI 51-102;
17. the Filer will include in the BAR additional disclosure requirements as set out under section 8.9(4)(b) of the Companion Policy 51-102 CP;
18. if the Transaction occurs after August 1, 2008, the Filer will include more current interim financial statements for Destinator in its BAR as required by section 8.4(3) of NI 51-102; and
19. to the best of the Filer's knowledge, it is not in default of any obligations under the securities legislation in the Jurisdictions.

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.

2008 BCSECCOM 393

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted provided that:

- (a) the Filer includes the following financial information in the BAR:
 - (i) unaudited, reviewed consolidated Financial Statements of Destinator for the year ended January 31, 2008;
 - (ii) an audited statement of assets acquired and liabilities assumed as at the closing date of the Transaction;
 - (iii) unaudited consolidated interim Financial Statements of Destinator required under section 8.4(3) of NI 51-102;
 - (iv) an unaudited pro forma balance sheet of the Filer, as at the date of the Filer's most recent balance sheet filed, that gives effect, as if it had taken place as at the date of the pro forma balance sheet, to the Transaction. The pro forma balance sheet figures for Destinator will be based upon the audited statement of assets acquired and liabilities assumed;
 - (v) pro forma income statements of the Filer required under section 8.4(5)(b) of NI 51-102; and
 - (vi) pro forma earnings per share information of the Filer required under section 8.4(5)(c) of NI 51-102;
- (b) representation (17) above is true; and
- (c) the Transaction occurs within 60 days of the date of this decision.

Noreen Bent
Acting Director, Corporate Finance
British Columbia Securities Commission