

## **2003 BCSECCOM 438**

### **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications – Relief from prohibition against collateral benefits – Offerors entering into a non-competition agreement with the principal shareholder of the offeree issuer – non-competition agreement negotiated at arm’s length and on terms that are commercially reasonable and consistent with industry practice

### **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 107(2) and 114(2)(a)

**IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH  
COLUMBIA, ALBERTA, SASKATCHEWAN, MANITOBA, ONTARIO,  
QUÉBEC, NOVA SCOTIA, AND NEWFOUNDLAND AND LABRADOR**

**AND**

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

**AND**

**IN THE MATTER OF RUSSEL METALS INC.**

**AND**

**RUSSEL ACQUISITION INC.**

**AND**

**ACIER LEROUX INC./LEROUX STEEL INC.**

### **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, and Newfoundland and Labrador (the “Jurisdictions”) has received an application from Russel Metals Inc. (“Russel”), for a decision pursuant to securities legislation of the Jurisdictions (the “Legislation”), in connection with a take-over bid (the “Offers”) dated May 15, 2003 made by Russel and/or its wholly-owned subsidiary, Russel Acquisition Inc. (“RAI”, and collectively with Russel, the “Offerors”) to acquire all of the issued and outstanding shares (the “Shares”) and debentures (the “Debentures”, and collectively with the Shares, the “Securities”) of Acier Leroux Inc./Leroux Steel

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Inc. ("Leroux Steel"), that the non-competition agreement and related letter agreement (the "Non-Competition Agreement") which the Offerors have entered into with Gilles Leroux ("Leroux"), Chairman of the Board, President, Chief Executive Officer and principal shareholder of Leroux Steel, is made for reasons other than to increase the value of the consideration paid to Leroux for his Securities and that the Non-Competition Agreement may be entered into despite the Legislation;

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

AND WHEREAS, unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 or in Quebec Commission Notice 14-101;

AND WHEREAS the Offerors having represented to the Decision Maker that:

1. Russel is a corporation existing under the laws of Canada. Russel is a reporting issuer or the equivalent in each of the Jurisdictions and its common shares are listed and posted for trading on The Toronto Stock Exchange (the "TSX").
2. RAI is a wholly-owned subsidiary of Russel existing under the *Companies Act* (Québec).
3. Leroux Steel is a corporation existing under the *Companies Act* (Québec).
4. The authorized capital of Leroux Steel consists of an unlimited number of Class A multiple voting shares (the "Class A Shares"), an unlimited number of Class B subordinate voting shares (the "Class B Shares") and an unlimited number of preferred shares. As at May 20, 2003, there were 3,550,567 Class A Shares, 6,918,446 Class B Shares and no preferred shares issued and outstanding. Each of the issued and outstanding Class A Shares carries 10 votes whereas each issued and outstanding Class B Share carries one vote. The Class A Shares and the Class B Shares have the same rights in every other respect. The Class A Shares and Class B Shares are listed on the TSX under the symbols LER.A and LER.B, respectively.
5. On July 21, 1994, Leroux Steel issued 8% unsecured subordinated debentures with a par value of \$8,158,000 convertible into Class B Shares at a price of \$7.00 per share and maturing on August 4, 2004 (the "8% Debentures"). On May 16, 1996, Leroux Steel issued an aggregate amount of \$19,000,000 in 7.25% unsecured subordinated debentures convertible into Class B Shares at a

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price of \$7.75 per share and maturing on May 29, 2006 (the “7.25% Debentures”). As at May 20, 2003, there was \$7,658,800 aggregate principal amount of 8% Debentures and \$11,184,500 aggregate principal amount of 7.25% Debentures outstanding. The 8% Debentures and the 7.25% Debentures are listed on the TSX under the symbols LER.DB and LER.DB.A, respectively.

6. In addition, as at May 20, 2003, there were outstanding stock options (the “Stock Options”) granted under the stock option plan of Leroux Steel providing for the issuance of 369,000 Class B Shares upon the exercise thereof.
7. Leroux is the Chairman of the Board, President and Chief Executive Officer of Leroux Steel.
8. Leroux holds, directly and indirectly, or exercises control or direction over 2,547,895 Class A Shares, 8,100 Class B Shares, exercisable Stock Options to acquire an additional 131,000 Class B Shares and \$5,500 aggregate principal amount of 8% Debentures. The aggregate 2,686,995 Shares held by Leroux on a partially-diluted basis (after giving effect to the exercise of Stock Options but not to the conversion of any Debentures) represent approximately 24.8% of the outstanding Shares and carry approximately 59.9% of the votes attached to all outstanding Shares, in each case on a partially-diluted basis (calculated in the same manner).
9. The Offerors made the Offers to acquire all of the issued and outstanding Securities, including any Class B Shares issuable on the exercise of Stock Options or on the conversion of Debentures.
10. In the case of the Shares, the Offers are made on the basis of, at the option of each holder, (A) \$6.30 cash, (B) \$4.60 cash and one-third of one common share in the capital of Russel (a “Russel Share”) or (C) 1.2353 Russel Shares for each Class A Share or Class B Share; provided, however, that Russel shall not be required to issue more than 3,612,672 Russel Shares in the aggregate to all holders of Class A Shares and Class B Shares.
11. In the case of the Debentures, the purchase price payable under the Offers is a cash amount equal to the principal amount thereof plus accrued and unpaid interest.
12. The offer to acquire the Class A Shares is subject to the following conditions, among others: (i) there shall have been validly deposited under the relevant Offers and not withdrawn as at the expiry time of the Offers: (A) such number

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of Class A Shares as represents at least two-third of the Class A Shares outstanding; and (B) such number of Class B Shares as represents at least two-third of the Class B Shares outstanding on a partially-diluted basis; and (ii) there shall have been validly deposited under the relevant Offers and not withdrawn as at the expiry time of the Offers for the 8% Debentures and the 7.25% Debentures: (A) such aggregate principal amount of 8% Debentures as represents at least two-third of the aggregate principal amount of 8% Debentures outstanding; and (B) such aggregate principal amount of 7.25% Debentures as represents at least two-third of the aggregate principal amount of 7.25% Debentures outstanding.

13. The offer to acquire the Debentures is subject to there having been validly deposited under the relevant Offers and not withdrawn as at the expiry time of the Offers: (i) such number of Class A Shares as represents at least two-third of the Class A Shares outstanding; (ii) such number of Class B Shares as represents at least two-third of the Class B Shares outstanding on a partially-diluted basis; (iii) such aggregate principal amount of 8% Debentures as represents at least two-third of the aggregate principal amount of 8% Debentures outstanding; and (iv) such aggregate principal amount of 7.25% Debentures as represents at least two-third of the aggregate principal amount of 7.25% Debentures outstanding.
14. The Offerors have entered into an agreement with Leroux and certain corporations controlled by him (the "Leroux Holding Companies") pursuant to which Leroux and the Leroux Holding Companies have agreed to tender to the Offers 2,547,895 Class A Shares, 139,100 Class B Shares (including the Class B Shares issuable upon the exercise of Stock Options) (representing approximately 24.8% of the Shares outstanding) and \$5,500 aggregate principal amount of 8% Debentures.
15. The Offers provides that beneficial owners of Shares may tender to the Offers, in lieu of Shares, all of the outstanding shares of a corporation incorporated on or after October 1, 1999 that is the registered and beneficial owner of Shares and that satisfies certain other conditions.
16. Leroux is party to an employment agreement (the "Existing Employment Agreement") with Leroux Steel dated December 12, 2002 pursuant to which Leroux is entitled to receive, among other things, a base salary of \$450,000 per year, an annual bonus equal to 2% of the annual consolidated profits of Leroux Steel and certain additional and customary benefits.
17. The Existing Employment Agreement provides that in the event of a Change of Control of Leroux Steel (as defined in the Existing Employment

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Agreement), Leroux shall be entitled to receive the equivalent of three times his annual salary (the "Change of Control Payment"), payable on the Change of Control, in one lump sum, for a one-time Change of Control Payment of \$1,350,000. The completion of the Offers will constitute a Change of Control for purposes of the Existing Employment Agreement.

18. Russel has been advised that the Existing Employment Agreement was approved by the Corporate Governance Committee of Leroux Steel at a meeting held on December 12, 2002. According to the Management Proxy Circular of Leroux Steel dated March 18, 2003, the Corporate Governance Committee is comprised solely of "unrelated" directors within the meaning of the Corporate Governance Guidelines adopted by the TSX.
19. The Offerors have entered into the Non-Competition Agreement with Leroux. The Non-Competition Agreement provides that:
  - (a) subject to certain exceptions, Leroux shall not deal in the business of procurement, warehousing, processing or distribution of steel or steel products in Canada or the United States for a period of three years from the first date on which the Offerors take up and pay for Shares or Debentures tendered under the Offers;
  - (b) conditional upon:
    - (i) the Existing Employment Agreement having been terminated without payment of any amount (including the Change of Control Payment) as a result of or in connection with (A) the termination of such agreement, (B) the termination of Leroux's employment by Leroux Steel or any of its affiliates or (C) the termination of Leroux's position as a director and officer of Leroux Steel or any of its affiliates; and
    - (ii) Leroux having unconditionally and irrevocably released Leroux Steel and each of its affiliates from all liabilities or obligations of any nature whatsoever they may have in connection with (A) the Existing Employment Agreement, (B) the termination of such agreement, (C) the termination of Leroux's employment by Leroux Steel or any of its affiliates or (D) the termination of Leroux's position as a director and officer of Leroux Steel or any of its affiliates and from all manner of action, causes of action, claims or demands whatsoever which Leroux may have in connection therewith,

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then on each of (x) the business day next following the date on which the Offerors take up and pay for Shares under the Offers and (y) each monthly anniversary thereof ending on the thirty-fifth such anniversary, Russel shall pay or shall cause one of its affiliates (which may include Leroux Steel) to pay to Leroux by cheque in immediately available funds the amount of \$37,500 (the "Non-Competition Payments") for an aggregate amount of \$1,350,000 over the term of such agreement; and

- (c) in the event of a breach by Leroux of his non-competition or non-solicitation covenants, he shall cease to be entitled to any further Non-Competition Payments from and after the date of such breach.

- 20. The Non-Competition Agreement, including the structuring of the Non-Competition Payments, has been negotiated at arm's length and is on terms that are commercially reasonable and consistent with industry standards. The Non-Competition Payments are intended to provide an incentive for Leroux to comply with the Non-Competition Agreement.
- 21. The Offerors would not have agreed to make the Offers if Leroux had not entered into the Non-Competition Agreement.
- 22. The Non-Competition Agreement has been entered into for valid business reasons unrelated to Leroux's holdings of Securities and not for the purpose of Russel or the Offeror conferring an economic or collateral benefit on Leroux that the other securityholders of Leroux Steel do not enjoy.

AND WHEREAS pursuant to 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, in connection with the Offers, the Non-Competition Agreement is being entered into for reasons other than to increase the value of the consideration paid to Leroux for his Securities and the Non-Competition Agreement may be entered into despite the Legislation.

DATED this 11th day of June, 2003.

Paul Moore

Harold P. Hands