

## **2003 BCSECCOM 732**

### **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications – issuer bids – relief granted from the valuation requirement in connection with an offer by the issuer for out-of-the-money convertible debentures - conversion feature of no material value – debentures trade like non-convertible, unsecured debt – circular to include summary of opinion letter on convertibility feature

### **Applicable British Columbia Provisions**

*Securities Rules*, B.C. Reg. 194/97, ss. 162(2) and 162(3)

**IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH COLUMBIA, ALBERTA, SASKATCHEWAN, MANITOBA, ONTARIO, QUEBEC, 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 SHERRITT INTERNATIONAL CORPORATION**

### **MRRS DECISION DOCUMENT**

WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in each of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia and Newfoundland and Labrador (the “Jurisdictions”) has received an application (the “Application”) from Sherritt International Corporation (“Sherritt”) for a decision under the securities legislation of the Jurisdictions (the “Legislation”) that the requirement contained in the Legislation to obtain a formal valuation (the “Valuation Requirement”) shall not apply to the proposed exchange by Sherritt of a portion of its outstanding 6.00% Convertible Unsecured Subordinated Debentures due December 15, 2006 (the “6% Debentures”) pursuant to a formal issuer bid (the “Proposed Offer”);

AND WHEREAS pursuant to the Mutual Reliance Review System for Exemptive Relief Applications (the “System”), the Ontario Securities Commission is the principal regulator for the Application;

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

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AND WHEREAS Sherritt has represented to the Decision Makers that:

1. Sherritt was incorporated under the *Business Corporations Act* (New Brunswick) on October 4, 1995. Its principal and head office is located in Toronto, Ontario.
2. Sherritt is a reporting issuer or the equivalent in each of the Jurisdictions and is not in default of any requirements of the Legislation.
3. Sherritt is authorized to issue 100 multiple voting shares and an unlimited number of restricted voting shares (the "Restricted Voting Shares"). As of October 7, 2003, Sherritt had outstanding 100 multiple voting shares and 131,174,679 Restricted Voting Shares.
4. As of October 7, 2003, Sherritt had outstanding 6% Debentures in the aggregate principal amount of \$600,000,000.
5. To the knowledge of management of Sherritt, no person or company holds more than 10% of the aggregate principal amount of the 6% Debentures.
6. The 6% Debentures were issued pursuant to an indenture dated as of November 28, 1996 (the "Indenture") between Sherritt and The R-M Trust Company (now CIBC Mellon Trust Company), as trustee, and distributed pursuant to a short form prospectus dated November 21, 1996 by way of instalment receipts.
7. Since December 16, 1999, Sherritt has been entitled to redeem the 6% Debentures in whole or, from time to time, in part, at any time at par plus accrued and unpaid interest, but only if the weighted average trading price of the Restricted Voting Shares on the Toronto Stock Exchange (the "TSX") during the 20 consecutive trading days ending five trading days preceding the date on which the notice of redemption is given exceeds specified prices in respect of each year, which prices decrease over time.
8. Sherritt may, at its option and subject to all regulatory approvals, elect to redeem the 6% Debentures by payment of that number of freely tradeable Restricted Voting Shares (the "Share Redemption Option") obtained by dividing the principal amount of the outstanding 6% Debentures by 95% of the weighted average trading price of the Restricted Voting Shares on the TSX for the 20 consecutive trading days ending five trading days preceding the date on which the notice of Sherritt's intention to pay in Restricted Voting Shares on the redemption date is first given.

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9. At no time since 1999 have the Restricted Voting Shares traded at a price which would permit redemption of the 6% Debentures. However, even if Sherritt is able to redeem the 6% Debentures, it has no intention of triggering the Share Redemption Option prior to, or during the course of, the Proposed Offer.
10. The Indenture provides that Sherritt may purchase for cancellation any or all of the 6% Debentures in the open market by tender or by private contract, subject to any regulatory approval required by law, provided that Sherritt is not in default under the Indenture and that the price at which such 6% Debenture is purchased does not exceed its principal amount, together with accrued and unpaid interest and costs of purchase. Sherritt is not in default under the Indenture. There are no other restrictions upon Sherritt's ability to purchase the 6% Debentures.
11. The 6% Debentures are unsecured and subordinated and are convertible at the 6% Debenture holder's option into Restricted Voting Shares at any time prior to the earlier of December 15, 2006 and the last business day immediately preceding the date specified for redemption by Sherritt. The conversion price is \$8.775 per Restricted Voting Share, being a rate of approximately 113.96 Restricted Voting Shares per \$1,000 principal amount of 6% Debentures.
12. The Restricted Voting Shares and the 6% Debentures are listed on the TSX.
13. Over the twelve month period prior to October 8, 2003, the 6% Debentures traded at a price range of \$795 to \$960 per \$1,000 of principal amount of 6% Debentures with an average daily volume of \$642,498 on the days traded.
14. Over the twelve month period prior to October 8, 2003, the Restricted Voting Shares have traded on the TSX in a range between \$5.10 and \$3.99 with an average daily volume of 261,649 shares.
15. The closing price of the Restricted Voting Shares on the TSX on October 7, 2003 was \$5.06 per share. The closing price of the 6% Debentures on the TSX on October 7, 2003 was \$960 per \$1,000 principal amount of 6% Debentures.
16. Under the Proposed Offer, Sherritt intends to offer to exchange up to an aggregate principal amount of \$300,000,000 of 6% Debentures,

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representing approximately 50% of the outstanding 6% Debentures, for an equal amount of new convertible unsecured subordinated debentures (the “New Debentures”).

17. Sherritt anticipates that the terms of the New Debentures will be substantially the same as the 6% Debentures except with respect to an enhanced interest rate, extended maturity, reduced conversion price, and certain conversion and redemption conditions, all of which will be determined in accordance with market terms at the time the Proposed Offer is made. Sherritt intends to apply to have the New Debentures listed and posted for trading on the TSX.
18. National Bank Financial Inc., in its letter dated October 7, 2003 (the “Opinion Letter”), opines that:
  - (i) the convertibility feature of the 6% Debentures is of no material value, and
  - (ii) the 6% Debentures trade on the TSX like non-convertible, subordinated, unsecured debt based on the underlying creditworthiness of Sherritt.
19. The Proposed Offer will proceed by way of an issuer bid circular which will include prospectus level disclosure on Sherritt and the New Debentures and a summary and a copy of the Opinion Letter.
20. The Proposed Offer will be made in compliance with the requirements in the Legislation applicable to formal bids made by issuers, except to the extent exemptive relief is granted by the Decision Makers.
21. The Proposed Offer will be an “issuer bid” within the meaning of the Legislation in the Jurisdictions because the 6% Debentures are convertible debt securities.

AND WHEREAS pursuant to the System, this MRRS Decision Document evidences the Decision of each of the Decision Makers (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;

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THE DECISION of the Decision Makers under the Legislation is that, in connection with the Proposed Offer, the Valuation Requirement contained in the Legislation shall not apply to Sherritt, provided that:

- (i) prior to, or during the course of, the Proposed Offer, Sherritt shall not have indicated any intention of triggering the Share Redemption Option;
- (ii) at the date the Proposed Offer is made, National Bank Financial Inc. shall have confirmed in writing to Sherritt that the conclusions stated in the Opinion Letter remain valid as of the day before the date the Proposed Offer is made; and
- (iii) Sherritt complies with the other requirements in the Legislation applicable to formal bids made by issuers.

DATED this 28<sup>th</sup> day of October, 2003.

Ralph Shay, Director,  
Take-over Bids, Mergers & Acquisitions