

Citation: 2013 BCSECCOM 60

Headnote

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

National Instrument 52-107, s. 5.1 *Acceptable Accounting Principles and Auditing Standards* – An issuer wants relief from the requirement that financial statements required by securities legislation to be audited must be accompanied by an auditor’s report that does not contain a reservation – The issuer made a significant acquisition of wholly owned subsidiaries of a public company; the underlying information needed to support an unqualified auditor’s opinion on the acquisition statements is not available; the issuer can otherwise comply with the acquisition statement requirements for a business acquisition report (BAR); the BAR will contain sufficient alternative information about the acquisition

Applicable Legislative Provisions

National Instrument 52-107, ss. 3.12 and 5.1, *Acceptable Accounting Principles and Auditing Standards*

February 26, 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
Endeavour Silver 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 requirement in subsection 3.12(2) of National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards* (NI 52-107) that an auditor's report accompanying audited acquisition statements must express an unmodified opinion (the GAAS Relief).

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, Ontario, Quebec, 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 was incorporated on March 11, 1981, under the former *Company Act* (British Columbia); the Filer's head office is located at Suite 301-700 West Pender Street, Vancouver, British Columbia V6C 1G8;
 - 2. the Filer is a reporting issuer in all provinces of Canada;
 - 3. the Filer is authorized to issue an unlimited number of common shares, of which 99,688,010 common shares were issued and outstanding as at February 1, 2013;
 - 4. the common shares of the Filer are listed and posted for trading on the Toronto Stock Exchange (TSX) and on the New York Stock Exchange;

5. MXRT Holdings Ltd. (MXRT Holdings) was formed by an amalgamation of two corporations on May 23, 2003, under the *Business Corporations Act* (Ontario) (the Ontario Act);
6. MXRT Holdings later became a reporting issuer in British Columbia, Alberta, Ontario, and New Brunswick and its shares were listed and traded on the TSX Venture Exchange until August 8, 2006, when AuRico Gold Inc., formerly Gammon Lake Resources Inc. (AuRico), a TSX-listed company, acquired all of the issued and outstanding shares of MXRT Holdings pursuant to a plan of arrangement (the Arrangement) under the Ontario Act;
7. by completing the Arrangement, AuRico indirectly acquired certain mineral concessions and related assets located in Mexico (the Mexican Assets) that were held by certain Mexican subsidiaries of MXRT Holdings (the Mexican Subsidiaries); the Mexican Subsidiaries were directly owned by MXRT Holdings (as to a 99.48% to 98.00% majority interest) and directly owned by AuRico (as to a 0.52% to 2.00% minority interest);
8. on July 13, 2012, the Filer indirectly acquired the Mexican Assets from AuRico through the purchase of all of AuRico's shareholdings in MXRT Holdings together with all of AuRico's direct minority interests in the Mexican Subsidiaries under an acquisition agreement dated April 13, 2012, as amended June 28, 2012, between the Filer and AuRico (the Transaction);
9. the Transaction constituted a "significant acquisition" by the Filer under section 8.3 of National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102), which triggered the requirement for the Filer to file a business acquisition report (BAR) within 75 days of the Transaction (by September 26, 2012);
10. to comply with subsection 8.4 of NI 51-102, the Filer's BAR must include, among other things, audited annual financial statements of MXRT Holdings for the financial year ended December 31, 2011 (the 2011 Annual Financial Statements);
11. under section 3.12 of NI 52-107, acquisition statements that are required by securities legislation to be audited must be accompanied by an auditor's report that expresses an unmodified opinion;
12. separate financial statements of MXRT Holdings (on a consolidated basis with the Mexican Subsidiaries) have never been prepared by AuRico management and AuRico historically prepared its financial statements on a consolidated basis with AuRico and all of its subsidiaries;

13. in preparing its financial statements on a consolidated basis, AuRico's materiality threshold for the collection and verification of data, and information in respect of its subsidiaries (including the Mexican Subsidiaries) and their operations, is at a significantly higher level than the materiality threshold that would apply to preparing financial statements for MXRT Holdings as a separate entity;
14. although the Filer has prepared the 2011 Annual Financial Statements to the best of its knowledge using information that is presently available from AuRico, the Filer's auditor has represented to the Filer that it is unable to verify the existence of certain assets due to the lack of sufficient underlying information and the passage of time;
15. in particular, the Filer's auditor has represented to the Filer that the following items result in a qualified opinion in respect of the 2011 Annual Financial Statements:
 - (a) *Inventory* – The count procedures used by AuRico's auditor to verify supplies inventory and work-in-process inventory were based on the materiality threshold for AuRico's consolidated financial statements. A stand-alone audit of MXRT Holdings would have required larger samples to meet generally accepted auditing standards. Such sampling can no longer be undertaken. Due to the passage of time, other procedures, such as "inventory roll" procedures, were insufficient to provide the Filer's auditor with evidence to verify the existence of supplies inventory and work-in-process inventory;
 - (b) *Capital Costs* – Mine development costs, which represent a component of MXRT Holdings' mineral property, plant and equipment, cannot be verified by the Filer's auditor, because the materiality threshold for MXRT Holdings would require detailed sampling at a lower materiality threshold from 2006 to 2011. The Filer is unable to verify development allocations to the lower materiality threshold due to the lack of detailed information and historic turnover of MXRT Holdings' staff. The Filer was advised by its auditor that sufficient audit procedures could not be performed on the allocation of mine development costs between capital and expense for costs incurred before December 31, 2010; and
 - (c) *Cost of Sales* – Because the Filer's auditor is unable to verify supplies inventory, work-in-process inventory, and depletion expense associated with mine development costs, they also cannot perform sufficient audit procedures on the Cost of Sales;

(collectively, the Qualified Matters)

16. apart from the requirement to provide an unmodified audit opinion on the 2011 Annual Financial Statements, the Filer is otherwise able to prepare and file the BAR in accordance with NI 51-102 and NI 52-107; and
17. except for the failure to file the BAR for the Transaction, the Filer is not in default of any requirement of Canadian securities laws.

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 GAAS Relief is granted provided that the Filer includes the following financial information in the BAR for the Transaction:

- (a) the 2011 Annual Financial Statements accompanied by an auditor's report that expresses a qualified opinion and the qualification is only in respect of the Qualified Matters;
- (b) unaudited annual financial statements of MXRT Holdings for the financial year ended December 31, 2010, in accordance with section 8.4(1) of NI 51-102;
- (c) the financial statements referred to in (a) and (b) include continuity schedules for consolidated mineral property interest that detail amounts capitalized, depletion for the year, and any impairment charges or reversals;
- (d) unaudited interim financial statements of MXRT Holdings for the six-month period ended June 30, 2012, and comparative period in the immediately preceding financial year;
- (e) an audited statement of assets acquired and liabilities assumed by the Filer as at the closing date of the Transaction; and
- (f) pro forma financial statements of the Filer giving effect to the Transaction, in accordance with section 8.4(5) of NI 51-102 and consisting of:
 - (i) a pro forma statement of financial position as at June 30, 2012;

- (ii) pro forma statements of comprehensive income for the year ended December 31, 2011, and the six-month period ended June 30, 2012;
and
- (iii) pro forma earnings per share information of the Filer based on the pro forma statements of comprehensive income referred to in (ii).

Peter Brady
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British Columbia Securities Commission