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March 3, 2006

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications - *Securities Act* s. 76 - Prospectus Requirements - An issuer that is not a reporting issuer in Canada is seeking first trade relief for securities that it will issue or has issued to Canadian residents - The issuer meets all of the conditions of section 2.14 of Multilateral Instrument 45-102 Resale of Securities except that, at the date the securities were distributed, residents of Canada owned more than 10% of the securities of the class and represented more than 10% of the total number of holders of the securities of the class; the issuer is not seeking to create a market for its securities in Canada by offering its securities to new investors; the issuer will provide security holders who are resident in Canada with the same continuous disclosure materials that are provided to foreign shareholders

## **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 the Provinces of Alberta, British Columbia, New Brunswick, Nova Scotia,  
Ontario, Québec and Saskatchewan (collectively, the “Jurisdictions”)

and

In the Matter of Henry Birks & Sons Inc. (the “Filer”)

## MRRS Decision Document

## **Background**

The local securities regulatory authorities or regulator (the “Decision Maker”) in each of the Jurisdictions has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the “Legislation”) for:

an exemption from the prospectus requirements of the Legislation in respect of the resale, following the Merger Transaction (as such term is defined below), of the Filer’s Pre-Merger Transaction Birks Class A Shares (as such term is defined below), in accordance with the conditions set out in this MRRS decision document. (the “Requested Relief”)

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) the Autorité des marchés financiers is the principal regulator for this application, and

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- (b) this MRRS decision document evidences the decision of each Decision Maker.

### **Interpretation**

Defined terms contained in National Instrument 14-101 Definitions have the same meaning in this decision unless they are defined in this decision.

### **Representation**

This decision is based on the following facts represented by the Filer:

1. The Filer is a corporation existing under the *Canada Business Corporations Act* and its corporate headquarters are located at 1240 Phillips Square, Montreal, Québec H3B 3H4. It is a well-known North American luxury jeweler that designs, develops, makes and retails fine jewelry, timepieces, sterling silver and gifts. The Filer currently operates over 60 jewelry stores, including over 35 stores under the Filer's name located in major cities across Canada, and over 25 stores under the Mayor's Jewelers, Inc. name located primarily in South and Central Florida and in metropolitan Atlanta, Georgia.
2. The Filer is not now, nor does it intend following the Merger Transaction (as such term is defined below), to become a reporting issuer in any Province or Territory of Canada.
3. Mayor's Jewelers, Inc. ("Mayor's") is a Delaware corporation incorporated in 1983 and its corporate headquarters are currently located at 5870 Hiatus Road, Tamarac, Florida 33321. Mayor's is a well-known luxury retail jeweler of fine quality jewelry, watches and giftware.
4. Prior to the Merger Transaction (as such term is defined below), Mayor's was a public company in the United States and shares of Mayor's common stock ("Mayor's Common Stock") had been registered for trading to the public with the United States Securities Exchange Commission (the "SEC"). Further, the shares of Mayor's Common Stock were listed on the American Stock Exchange ("AMEX") under the symbol MYR. Mayor's is not a reporting issuer in any Province or Territory of Canada.
5. Prior to the Merger Transaction (as such term is defined below), the Filer was the largest shareholder of Mayor's and owned approximately 42.0% of Mayor's Common Stock and all of the series A-1 convertible voting preferred shares of Mayor's ("Mayor's Preferred Stock"). Based on its ownership of the foregoing securities of Mayor's, prior to the Merger Transaction (as such term is defined below), the Filer held approximately 76.2% of the voting power in Mayor's.

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6. On April 18, 2005, Mayor's, the Filer and Birks Merger Corporation ("Merger Sub"), a wholly-owned subsidiary of the Filer incorporated under Delaware law, entered into an Agreement and Plan of Merger and Reorganization, as amended (the "Merger Agreement"). Pursuant to the Merger Agreement, the parties agreed to effect a merger and reorganization transaction, the details of which are further set out herein (the "Merger Transaction").
7. The board of directors of Mayor's, based upon the unanimous recommendation of a special committee of its independent directors, unanimously approved the Merger Transaction, as did the board of directors of the Filer.
8. On or around October 14, 2005, the shareholders of record of Mayor's were mailed a Form F-4 Registration Statement (the "Registration Statement") and same was filed with the SEC under the United States Securities Act of 1933, as amended (the "U.S. Securities Act").
9. Amongst various other conditions that were to be satisfied in order for the Merger Transaction to be effected, it was required that the affirmative vote of (i) the holders of at least a majority of Mayor's outstanding stock entitled to vote thereon, and (ii) the majority of Mayor's disinterested stockholders (which excludes the Filer and each person that is an affiliate or associate of the Filer) that cast a vote in person or by proxy, at a special meeting of the shareholders of Mayor's, be obtained. The special meeting of Mayor's shareholders (the "Special Meeting") occurred in Florida on November 14, 2005. At the Special Meeting, the necessary votes were obtained (and the other conditions precedent to the Merger Transaction had been satisfied). As such, on November 15, 2005, the successful completion of the merger was announced.
10. As a consequence of the Merger Transaction:
  - (a) Merger Sub, a wholly owned subsidiary of the Filer, merged with and into Mayor's (the "Merger"). As a consequence thereof, the separate corporate existence of Merger Sub ceased and Mayor's continued as the surviving corporation of the Merger, and all the property, rights, privileges, powers and franchises of Merger Sub and Mayor's vested in the surviving corporation (Mayor's), and all debts, liabilities, obligations, restrictions, disabilities and duties of each of Merger Sub and Mayor's became the debts, liabilities, obligations, restrictions, disabilities and duties of the surviving corporation (Mayor's).

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- (b) Each share of common stock of Merger Sub, all of which were owned by the Filer, that were issued and outstanding immediately prior to the Effective Time (as such term is defined below) were cancelled and converted automatically into the right for the Filer to receive one share of the surviving corporation's (Mayor's) common stock.
- (c) Each share of Mayor's Common Stock held in the treasury of Mayor's and each share of Mayor's Common Stock held by any direct or indirect subsidiary of Mayor's immediately prior to the Effective Time (as such term is defined below) were canceled without any conversion thereof.
- (d) Each of the other shares of Mayor's Common Stock that were issued and outstanding (being those shares of Mayor's Common Stock that were held by the public (approximately 19,435,285 shares) and by management of the Filer and Mayor's (approximately 1,923,025 shares), but excluding any of Mayor's Common Stock held directly by the Filer) immediately prior to the time (the "Effective Time") the Merger was consummated were cancelled and converted automatically, at the Effective Time by virtue of the Merger, into the right to receive 0.08695 Class A Shares of the Filer (the "Birks Share Rights").
- (e) Each Birks Share Right entitles the holder thereof to receive 0.08695 Birks Class A Shares upon such holder's delivery (in accordance with the terms of the Merger Agreement) to SunTrust Bank (the Exchange Agent) of an executed letter of transmittal (and such other documents as may be required) along with his or her certificates representing the Mayor's Common Stock that such holder had owned at the Effective Time (fractional shares will not be issued, but a cash payment will be made for those fractional shares, such cash payment to be calculated on the average closing price of Birks Class A Shares as reported by AMEX in the 20 consecutive trading days beginning on and including the trading day immediately following the date of the Effective Time).
- (f) The outstanding options and warrants that were granted by Mayor's to its directors, management and employees (each such option and warrant which may be exercised, at its respective exercise price for one share of Mayor's Common Stock), were assumed by the Filer and converted, as the case may be, into an option or warrant to acquire the number of Birks Class A Shares obtained by multiplying (x) the number of shares of Mayor's Common Stock subject to such option or warrant by (y) 0.08695, the whole rounded downward to the nearest whole share.

Further, at the same time as the Merger Transaction was effected:

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- (a) Birks Class A Shares were registered for sale to the public in the United States further to the declared effectiveness of the Registration Statement by the SEC.
  - (b) Birks' Class A Shares were listed on AMEX. Such listing has occurred and such shares began trading on AMEX on November 15, 2005 under the symbol "BMJ".
  - (c) The Filer filed articles of amendment with the Director under the *Canada Business Corporations Act* to, *inter alia*, change its name to "Birks & Mayors Inc."
11. The Merger Transaction constituted a merger and reorganization further to a statutory procedure that was effected under the Delaware General Corporation Law. As such, in Canada, the distribution of Birks Class A Shares further to the Merger Transaction occurred on a prospectus and dealer registration exempt basis pursuant to Section 2.11 of National Instrument 45-106 Prospectus and Registration Exemptions ("NI 45-106"). Further, the conversion of outstanding Mayor's options and warrants to Birks' options and warrants (as described in paragraph (f) on the foregoing page), also occurred on a prospectus and dealer registration exempt basis pursuant to either Section 2.11 or Section 2.24 of NI 45-106.
12. As concerns the Birks Class A Shares that were issued and outstanding prior to the Merger Transaction, including those Birks Class A Shares of the Filer that underlie options of the Filer that had been granted prior to the Merger Transaction (collectively, the "Pre-Merger Transaction Birks Class A Shares"), the holders of such securities are not able to rely on the exemption provided for at Section 2.14 of National Instrument 45-102 Resale of Securities ("NI 45-102"), given that the criteria set out at Section 2.14(b) of NI 45-102 is not met in that at the time of certain of the distributions of such securities, residents of Canada did own, directly or indirectly, more than 10 percent of such securities, and did represent in number more than 10 percent of the total number of owners directly or indirectly of such securities.
13. However as concerns the Filer's securities that were distributed in connection with the Merger Transaction, including the Birks Class A Shares that were distributed in connection with the Merger Transaction, given that (a) the Filer was not a reporting issuer at the time the Birks Class A Shares were distributed further to the Merger Transaction, and (b) at the time of such distribution, residents of Canada did not own, directly or indirectly, more than 10 percent of the outstanding Birks Class A Shares, and did not represent in

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number more than 10 percent of the total number of owners directly or indirectly of Birks Class A Shares, pursuant to Section 2.14 of NI 45-102, the Birks Class A Shares issued and distributed further to the Merger Transaction, as well as the Birks Class A Shares that underlie the stock options and warrants of the Filer that were distributed in connection with the Merger Transaction, can be resold on an exempt basis through an exchange, or a market, outside of Canada, or to a person or company, outside of Canada.

14. It would not be prejudicial to the public interest to allow the holders of Pre-Merger Transaction Birks Class A Shares of the Filer to rely on the exemption set forth at Section 2.14(1) of NI 45-102 given that the criteria for relying on such exemption was satisfied at the time of the Merger Transaction.
15. The Merger Transaction will result in Birks becoming a reporting issuer in the United States. As such, Birks will be obligated to comply with U.S. securities laws, including U.S. continuous disclosure requirements. Birks will file those continuous disclosure documents required to be filed by it under U.S. securities laws on EDGAR and will mail to its shareholders, whether same are resident in the U.S. or in Canada, those continuous disclosure documents required to be mailed by it under U.S. securities laws.

### **Decision**

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Makers the jurisdiction to make the decision has been met.

The decision of the Decision Makers under the Legislation is that the Requested Relief is granted provided that:

- (a) the Filer
  - (i) was not a reporting issuer in any jurisdiction of Canada at the time of the distribution dates of the Pre-Merger Transaction Birks Class A Shares;
  - (b) at the time of the Merger Transaction, after giving effect to the issue of the security and any other securities of the same class or series that were issued at the same time as or as part of the same distribution as the security, residents of Canada
    - (i) did not own directly or indirectly more than 10 percent of the outstanding securities of the class or series; and

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- (ii) did not represent in number more than 10 percent of the total number of owners directly or indirectly of securities of the class or series; and

(c) the trade is made

- (i) through an exchange, or a market, outside of Canada, or
- (ii) to a person or company outside of Canada.

Jean St-Gelais  
Président-Directeur général  
Autorité des marchés financiers