

2004 BCSECCOM 623

October 27, 2004

Headnote

Mutual Reliance Review System for Exemptive Relief Applications - National Instrument 51-102, s. 13.1 - Continuous Disclosure Obligations - Securities Act s. 119 - Proxies/Information Circular Requirements - An issuer wants relief from the requirement to include prospectus-level disclosure in an information circular to be circulated in connection with an amalgamation - The securities that are being issued will only be outstanding for a short period of time before they are redeemed for cash; finances have been secured to fund the redemption of the securities; other securities will be securities in an issuer that is substantially identical to the pre-amalgamation issuer, with identical terms and conditions as the pre-amalgamation securities

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 117 and 119

National Instrument 51-102 *Continuous Disclosure Obligations*, ss. 9.1 and 13.1

Form 51-102F5 *Information Circular*, Part 14

In the Matter of
the Securities Legislation of
British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec,
New Brunswick, Nova Scotia, Newfoundland and Labrador, Nunavut,
and Yukon Territory
(The Jurisdictions)

and

In the Matter of
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of EMJ Data Systems Ltd. (The Filer)

MRRS Decision Document

Background

The local securities regulatory authority 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 a decision that the Filer be exempt from the requirement in the Legislation to include prospectus level disclosure in a management proxy circular of the Filer relating to the

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meeting of its shareholders to consider, and if deemed advisable to approve, among other things, the amalgamation of the Filer with another company in accordance with the Legislation (the Requested Relief).

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) the Ontario Securities Commission is the principal regulator for the Application; and
- (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.

Representations

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

1. Synnex Canada Acquisition Limited (SCAL) is a corporation incorporated under the laws of the Province of Ontario and is a wholly-owned subsidiary of Synnex Canada Limited.
2. SCAL owns 8,232,834 common shares in the capital of the Filer (Common Shares), all of such shares having been acquired by SCAL on September 18, 2004 pursuant to the offer to purchase all Common Shares for \$6.60 cash per Common Share made by SCAL and dated August 9, 2004 (the SCAL Offer). Such shares represent approximately 87.7% of all issued and outstanding Common Shares calculated on a fully-diluted basis.
3. SCAL conducts no business other than its holding of Common Shares.
4. Synnex Canada Limited is a corporation incorporated under the laws of the Province of Ontario and owns all of the common shares in the capital of SCAL. Synnex Canada Limited is not a reporting issuer in any of the provinces or territories of Canada where such status exists.
5. The Filer is a corporation existing under the laws of the Province of Ontario and is a reporting issuer in all provinces and territories of Canada where such status exists. To the knowledge of the Filer, it is not in default of any of the requirements of the Legislation.

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6. As of September 23, 2004, the authorized share capital of the Filer consisted of an unlimited number of Common Shares, an unlimited number of first preference shares and an unlimited number of second preference shares; and as of the close of business on September 23, 2004 there were issued and outstanding 8,801,547 Common Shares, 1,056,500 First Preference Shares Series A of the Filer (the Series A Shares) (each convertible into one Common Share), 109,500 warrants (each exercisable to purchase, at the election of the holder, one Series A Share or \$8.00 principal amount of Convertible Debentures (defined below)), and \$11,148,000 aggregate principal amount of convertible unsecured subordinated debentures of the Filer (the Convertible Debentures) convertible into Common Shares at a conversion price of \$8.00 per share.
7. The Common Shares are listed on the Toronto Stock Exchange and trade under the symbol, "EMJ".
8. The Filer proposes to hold its annual and special meeting (the Meeting) of shareholders on or about November 17, 2004. At the Meeting, the Filer will seek the requisite approval of the shareholders of the Filer in respect of a special resolution to approve the amalgamation (the Amalgamation) of the Filer with SCAL under the *Business Corporations Act* (Ontario) (the OBCA) to form a company called EMJ Data Systems Limited (Amalco).
9. In connection with the Meeting, the Filer expects to mail, on or about October 18, 2004, to each shareholder of the Filer (i) a notice of the Meeting; (ii) a form of proxy; and (iii) a management proxy circular prepared in accordance with the OBCA and applicable securities laws.
10. Under the Amalgamation, among other things, the Filer and SCAL will amalgamate to form Amalco, holders of Common Shares (other than SCAL) will receive one redeemable preferred share in the capital of Amalco (the Preferred Shares) for each Common Share held immediately prior to the Amalgamation, holders of Series A Shares will receive one First Preference Share Series A in the capital of Amalco (the Amalco Series A Shares) for each Series A Share held immediately prior to the Amalgamation, and Synnex Canada Limited or an affiliate will receive 8,801,547 common shares in the capital of Amalco.
11. The Amalgamation will be a business combination within the meaning of Ontario Securities Commission Rule 61-501 *Insider Bids, Issuer Bids, Going Private Transactions and Related Party Transactions* (Rule 61-501) and will be a subsequent acquisition transaction following the completion of the SCAL

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Offer, as Synnex Canada Limited or an affiliate will be the sole holder of common shares of Amalco following completion of the Amalgamation.

12. The terms and conditions of the Amalco Series A Shares will be identical to those of the Series A Shares.
13. On the second business day following completion of the Amalgamation, each Preferred Share will be redeemed for Cdn. \$6.60 in cash, which is the same consideration paid by SCAL for EMJ Shares under the SCAL Offer.
14. The consideration paid by Amalco on redemption of the Preferred Shares will be funded directly or indirectly by Synnex Canada Limited and/or Synnex Corporation, the sole shareholder of Synnex Canada Limited.
15. Synnex Canada Limited has advised that it intends to ensure that Amalco will have sufficient funds to pay in full the aggregate redemption price on the redemption of the Preferred Shares.
16. Under the OBCA and the articles of the Filer, the special resolution authorizing the Amalgamation (the Special Resolution) will require the approval of at least two thirds of the votes cast by holders of Common Shares and Series A Shares, voting together. Holders of Common Shares and Series A Shares are entitled to dissent and be paid the fair value of their shares.
17. In the circumstances and because the Amalco Series A Shares will be identical to the Series A Shares, the OBCA does not provide for a separate class vote for holders of Series A Shares in respect of the Special Resolution.
18. Under Rule 61-501, the Special Resolution will also require minority approval of the holders of Common Shares, voting separately as a class (Minority Approval).
19. Because of the number of Common Shares deposited under the SCAL Offer and by virtue of the MRRS Decision dated September 13, 2004 *In the Matter of Synnex Canada Limited and Synnex Canada Acquisition Limited*, the Common Shares held by SCAL will be sufficient to pass the Special Resolution and obtain Minority Approval.

Decision

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 the Requested Relief is granted provided that the Filers comply with all other provisions of the Legislation applicable to the management proxy circular in respect of the Meeting.

Charlie MacCready
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Ontario Securities Commission