

2005 BCSECCOM 215

February 8, 2005

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 arrangement, reorganization, acquisition or amalgamation - The issuer is required to include historical financial statements for a business it is acquiring; it would be extremely difficult, if not impossible, to prepare certain of the historical financial statements because information to support a stand alone audit cannot be obtained and personnel with the historical information are not available; alternate financial information that is available will be provided about the business; information will be provided about the parties to the transaction sufficient for shareholders to assess the transaction as a whole

Applicable British Columbia Provisions

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

National Instrument 51-102, s. 9.1 and 13.1

Form 51-102F5, section 14.2

In the Matter of
the Securities Legislation of
British Columbia, Alberta and Ontario (the “Jurisdictions”)

and

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

and

In the Matter of Maxim Power Corp.

MRRS Decision Document

Background

1. The local securities regulatory authority or regulator (the “Decision Maker”) in each of the Jurisdictions has received an application from Maxim Power Corp. (“Maxim”) for a decision (the “Decision”), under the securities legislation of the Jurisdictions (the Legislation), that Maxim be exempt from the requirement in the Legislation to include three years of audited financial statements for the Partnership and the Power Plant (as those terms are defined

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below) in an information circular Maxim will send in connection with a restructuring transaction (the “Requested Relief”).

2. Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) the Alberta Securities Commission is the principal regulator for this application; and
- (b) this MRRS Decision Document evidences the decision of each Decision Maker.

Interpretation

3. Unless otherwise defined, the terms herein have their meanings set out in National Instrument 14-102 – *Definitions*.

Representations

4. Maxim has represented to the Decision Makers that:

- 4.1 Maxim has been duly incorporated under the laws of the Province of Alberta and Maxim's head office is located in Calgary, Alberta;
- 4.2 Maxim is a reporting issuer in each of British Columbia, Alberta and Ontario;
- 4.3 The common shares of Maxim (“Maxim Shares”) are listed and posted for trading on the TSX Venture Exchange under the trading symbol “MXG”;
- 4.4 To its knowledge, Maxim is not in default of any of the requirements of the applicable securities legislation in any of the provinces in which it a reporting issuer;
- 4.5 The Milner Power Limited Partnership (the “Partnership”) was formed on October 31, 2003 for the purpose of purchasing the HR Milner power plant (the “Power Plant”) from the Balance Pool of Alberta and ATCO (2000) Ltd. (“Atco”), which acquisition closed on January 29, 2004 with an effective date of January 1, 2004;
- 4.6 The general partner of the Partnership is Milner Power Inc. (the “General Partner”). The General Partner was formed under the laws of Alberta and its head office is located in Alberta;

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- 4.7 At the time of this acquisition, the Partnership was owned as to 20% by Maxim and approximately 80% by 1083517 Alberta Ltd., 1083508 Alberta Ltd., 1022131 Alberta Ltd., 850820 Alberta Ltd., 1083582 Alberta Ltd. and ENTx Capital Corporation (collectively the “Vendors”);
- 4.8 Maxim and each of the Vendors have entered into a letter agreement dated December 23, 2004 pursuant to which Maxim will acquire from each of the Vendors their respective partnership unit (“Unit”) interest in the Partnership (the “Acquisition”) and issue as consideration therefor an aggregate of 220,000,000 Maxim Shares, subject adjustment in certain events, at a deemed price of \$0.32 per share, pro-rata to the Vendors' respective interest in the Units. Upon completion of the Acquisition, Maxim shall own 100% of the issued and outstanding Units.
- 4.9 An information circular (the “Information Circular”) detailing the Acquisition is anticipated to be mailed to securityholders of Maxim in February 2005 for a special meeting to be held on in March or April, 2005. The Information Circular must include prospectus level disclosure on the Partnership and, subject to the relief requested herein, the appropriate financial statement disclosure.
- 4.10 With respect to reverse takeover transactions, section 14.2 of Form 51-102F5 of National Instrument 51-102, *Continuous Disclosure Obligations* (“NI 51-102”) requires disclosure as prescribed by the appropriate prospectus form for the reverse takeover acquirer. Accordingly, the financial statements of Maxim and the Partnership to be included in the Information Circular must comply with the applicable provisions in OSC Rule 41-501 and NI 51-102, respectively, which require the following financial statements:
- (a) audited annual statements of income, retained earnings and cash flow for each of the 3 most recently completed financial years for each of (i) Maxim and, (ii) the Partnership and the Power Plant (as predecessor to the Partnership);
 - (b) audited annual balance sheets for the two most recently completed financial years for each of Maxim and the Partnership;
 - (c) comparative interim statements of income, retained earnings and cash flow for the most recently completed interim period (that ended more than 60 days before the date of the document) for each of Maxim and the Partnership;

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- (d) a balance sheet for the interim period referred to in (c) above for each of Maxim and the Partnership;
- (e) pro forma financial statements, including a pro forma balance sheet as at the date of Maxim's most recent balance sheet (September 30, 2004) included in the Information Circular as if the Acquisition had taken place at that date; and
- (f) pro forma income statement (including on a per share basis):
 - (i) as at December 31, 2003; and
 - (ii) as at the most recent interim period (September 30, 2004),
as if the Acquisition had taken place January 1, 2003.

4.11 A combination of the following factors render the audit of operating statements of the Power Plant for the 2001 and 2002 year extremely difficult if not impossible to conduct:

- (a) in 2001, 2002, and 2003, the Power Plant was owned and operated by Atco, a business having operating revenues in excess of \$617.3 million for the three-month period ended September 30, 2004. The Power Plant operations were relatively immaterial to Atco for consolidated audit purposes and typical audit procedures were not completed to the extent needed to satisfy a "stand alone audit", resulting in a scope limitation;
- (b) for 2001 and 2002 Atco's auditors have confirmed that although basic source documents relating to the Power Plant for this period may exist, it would be extremely difficult if not impossible to locate such in the degree necessary to conduct a "stand alone audit", and is not possible to obtain detailed supporting analysis; and
- (c) many of the management and staff of Atco involved in 2001 and 2002 and sufficiently familiar with the Power Plant are not available to answer auditor questions or help reconstruct related supporting information.

4.12 Maxim will include in the Information Circular:

- (a) pro forma balance sheet as at September 30, 2004;

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- (b) pro forma income statement for the year ended December 31, 2003 and the period ended September 30, 2004;
- (c) audited financial statements for the Partnership for the period commencing January 1, 2004 and ending September 30, 2004; and
- (d) audited operating statement of the Power Plant for the year ended December 31, 2003.

Decision

- 5. Each of the Decision Makers is satisfied that the Decision maker has the jurisdiction to make the Decision;
- 6. The Decision of the Decision Makers under the Legislation for the purposes of the Information Circular, is that:
 - 6.1 the requirement contained in the Legislation to include in the Information Circular annual statements of income, retained earnings and cash flows in respect of the Partnership for the financial years ended December 31, 2003, 2002 and 2001 and an auditor's report thereon, a balance sheet in respect of the Partnership as at December 31, 2003 and 2002 and an auditor's report thereon, comparative interim statements of income, retained earnings and cash flow for the most recently completed interim period for the Partnership and a balance sheet for this interim period, shall not apply to Maxim, provided that Maxim shall include in the Information Circular: (i) pro forma balance sheet as at September 30, 2004; (ii) pro forma income statement for the year ended December 31, 2003 and the period ended September 30, 2004; (iii) audited financial statements for the Partnership for the period commencing January 1, 2004 and ending September 30, 2004; and (iv) audited operating statement of the Power Plant for the year ended December 31, 2003.

DATED at Calgary, Alberta on this 8th day of February, 2005.

Agnes Lau, CA
Deputy Director, Capital Markets