

2005 BCSECCOM 154

February 25, 2005

Headnote

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act s. 114(2) Takeover Bids - Exemption from the formal take over bid requirements in Part 13 of the Act - Issuer needs relief from certain disclosure requirements for the takeover bid circular required by Item 15(1) of BC Form 62-902F - the issuer and a company have entered into an acquisition agreement; under the agreement, the issuer will, directly or indirectly, acquire all outstanding shares of the company; as the result of the issuer previously completing a "significant acquisition" of certain properties, the issuer is required to include in the circular audited financial statements for the acquired properties; the circular will contain adequate alternative disclosure to enable investors to evaluate the current and historical financial performance of the issuer and its acquired properties.

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 108(7) and 114(2)
BC Form 62-902F *Takeover Bid Circular*. item 15(1)

In the Matter of
the Securities Legislation
of British Columbia, Alberta, Ontario and Nova Scotia
(the Jurisdictions)

and

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

and

In the Matter of
Avenir Diversified Income Trust

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 the Filer for a decision (the Decision), under the securities legislation of the Jurisdictions (the Legislation), that the Filer be exempt from item 15(a) of Form 31 –

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Take-Over Bid Circular (Form 31) of the ASC Rules (and equivalent take over bid circular rules in each of the other Jurisdictions, respectively), which prescribes that the Filer include, inter alia, certain financial information required by the applicable prospectus disclosure requirements. In the present circumstances the Filer would elect to make use of Alberta Securities Commission Rule 41-501 (ASC Rule 41-501) which permits the use of Ontario Securities Commission Rule 41-501 (specifically, the annual statements of income, retained earnings and cash flows in respect of the Filer and the Properties (as defined herein) (OSC Rule 41-501) for the financial year ended December 31, 2001 and an auditor's report thereon) in a take-over bid circular in which securities of the Filer are to be distributed in connection with a proposed acquisition transaction (the Requested Relief).

2. Under the Mutual Reliance Review System for Exemptive Relief Applications:
 - 2.1 the Alberta Securities Commission is the principal regulator for this application; and
 - 2.2 this MRRS Decision Document evidences the decision of each Decision Maker.

Interpretation

3. Unless otherwise defined, the terms herein have the meanings set out in National Instrument 14-101 – *Definitions*.

Representations

4. The Filer has represented to the Decision Makers that:
 - 4.1 The Filer has been duly formed under the laws of the Province of Alberta and the Filer's head office is located in Calgary, Alberta.
 - 4.2 The Filer is a reporting issuer in each of British Columbia, Alberta, Ontario and Nova Scotia.
 - 4.3 The trust units of the Filer (the Units) are listed and posted for trading on the Toronto Stock Exchange under the trading symbol "AVF.UN".
 - 4.4 To its knowledge, the Filer is not in default of any of the requirements of the applicable securities legislation in any of the provinces in which it is a reporting issuer.

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- 4.5 In December, 2004, the Filer purchased certain properties (the Properties) from an arm's length oil and gas producer for total consideration of \$30.0 million, subject to certain closing adjustments. The acquisition was funded through existing bank facilities.
- 4.6 The acquisition of the Properties by the Filer constitutes a "significant acquisition" under the Legislation.
- 4.7 A take-over bid circular (the Circular) detailing a new proposed acquisition is anticipated to be mailed to securityholders of the Filer in February 2005 for a special meeting to be held on in March or April, 2005. The Circular will include, subject to the relief requested herein, the appropriate financial disclosure on the Filer and for the Properties.
- 4.8 With respect to take-over bids, section 15(a) of Form 31 requires disclosure as prescribed by the appropriate prospectus form in any instance where securities of the issuer are being included as consideration for the take-over bid. Accordingly, the financial statements of the Filer and for the Properties to be included in the Circular must comply with section 15(a) of Form 31 which prescribes that the Circular include the financial information required their applicable form of prospectus. In the present circumstances, the Filer would elect to take advantage of ASC Rule 41-501 which permits the use of OSC Rule 41-501 by the filer and which requires the following:
 - 4.8.1 for the Filer:
 - 4.8.1.1 audited annual statements of income, retained earnings and cash flow for each of the 3 most recently completed financial years;
 - 4.8.1.2 audited annual balance sheets for the two most recently completed financial years;
 - 4.8.1.3 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 Circular); and

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- 4.8.1.4 a balance sheet for the interim period referred to in 4.8.1.3 above.
- 4.8.2 For the Properties (as a “significant acquisition” of the Filer):
 - 4.8.2.1 audited annual statements of income, retained earnings and cash flow for each of the 3 most recently completed financial years;
 - 4.8.2.2 audited annual balance sheets for the two most recently completed financial years;
 - 4.8.2.3 comparative interim statements of income, retained earnings and cash flows for the most recently completed interim period of the Properties that ended before the date of the acquisition and more than 60 days before the date of the Circular; and
 - 4.8.2.4 a balance sheet for the interim period referred to in 4.8.2.3 above for the Filer.
- 4.8.3 pro forma financial statements for the Filer and the Properties in accordance with sections 6.2 and 6.5 of OSC Rule 41-501.
- 4.9 A combination of the following factors render the audit of operating statements relating to the Properties for the 2001 year impracticable to conduct:
 - 4.9.1 in 2001 the Properties were purchased by Calpine Resources Inc. (Calpine); prior thereto they were owned by a separate third party vendor;
 - 4.9.2 in September, 2004 Prime West Energy Inc. (PrimeWest) purchased the properties from Calpine and at such time obtained sufficient information to prepare audited financial statements relating to the Properties for the periods ending December 31, 2002 and 2003 but not for any periods prior thereto;

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- 4.9.3 since the purchase of the Properties by PrimeWest in September 2004, Calpine has ceased to exist;
 - 4.9.4 PrimeWest was able to obtain basic source documentation relating to the Properties for the periods ending December 31, 2002 and 2003, however, it would be extremely difficult if not impossible to locate the necessary source documentation for the financial period ending December 31, 2001 in sufficient detail to prepare audited financial statements, relating to the Properties for the financial period ending December 31, 2001, nor would it be possible to obtain any detailed supporting analysis; and
 - 4.9.5 management and staff of Calpine who would have been involved with the Properties for the 2001 financial year and would be sufficiently familiar with the Properties are not available to answer auditor's questions or help reconstruct related supporting information.
- 4.10 The Filer proposes to include in the Circular the following financial statements:
- 4.10.1 the Filer's financial statements and the pro forma financial statements for the Filer and the Properties all in accordance with sections OSC Rule 41-501 as follows:
 - 4.10.1.1 audited annual statements of income, retained earnings and cash flow for each of the 3 most recently completed financial years;
 - 4.10.1.2 audited annual balance sheets for the two most recently completed financial years;
 - 4.10.1.3 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 Circular);
 - 4.10.1.4 a balance sheet for the interim period referred to in 4.10.1.3 above; and

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- 4.10.1.5 pro forma financial statements for the Filer and the Properties.
- 4.10.2 the following alternative financial statements for the Properties (the Alternate Financial Statements):
 - 4.10.2.1 audited annual statements of income, retained earnings and cash flow for the periods ending December 31, 2002 and 2003;
 - 4.10.2.2 audited annual balance sheets for the two most recently completed financial years;
 - 4.10.2.3 comparative interim statements of income, retained earnings and cash flows for the most recently completed interim period of the Properties that ended before the date of the acquisition and more than 60 days before the date of the Circular; and
 - 4.10.2.4 a balance sheet for the interim period referred to in 4.10.2.3 above for the Filer.
- 5. 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.
- 6. The Decision of the Decision Makers under the Legislation is that the Requested Relief is granted provided that the Filer shall include in the Circular the Alternate Financial Statements.

Glenda A. Campbell, Q.C., Vice-Chair
Alberta Securities Commission

Stephen P. Sibold, Q.C., Chair
Alberta Securities Commission