

2008 BCSECCOM 558

January 8, 2008

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 - An offeror wants relief from all take over bid requirements so it can treat exchangeable securities as having been exchanged into the underlying securities - Target has, through a subsidiary, exchangeable securities outstanding that are exchangeable for securities of the target at the option of the holders; the exchangeable securities are the voting equivalent of the target's securities; the exchangeable securities are exchangeable at an increased ratio in certain circumstances; however, the holders of the exchangeable securities have not objected to the application and the fact that, as a result of the relief being granted, the increased ratio will not be triggered; the offeror will comply with the take over bid requirements if it offers to acquire 20% or more of the target's outstanding securities, treating the exchangeable securities as having been exchanged; the target issuer was provided with a copy of the application

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 105-110, and 114(2)

In the Matter of
the Securities Legislation of
British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick,
Nova Scotia and Newfoundland and Labrador
(the "Jurisdictions")

and

In the Matter of
the Mutual Reliance Review Systems for Exemptive Relief Applications
("MRRS")

and

In the Matter of
Clarke Inc.
(the "Filer")

MRRS Decision Document

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Background

The local securities regulatory authority or regulator (the “Decision Maker”) in each of the Jurisdictions has received an application (the “Application”) from the Filer for a decision under the securities legislation of the Jurisdictions (the “Legislation”) that the take-over bid requirements contained in the Legislation, including the provisions relating to restrictions on purchases before, during and after a take-over bid, delivery of an offer and take-over bid circular and any notices of change or variation thereto, delivery of a directors’ circular and any notices of change or variation thereto, minimum deposit periods and withdrawal rights, take-up of and payment for securities tendered to a take-over bid, disclosure, financing, restrictions upon purchases of securities, identical consideration, and collateral benefits (collectively, the “Take-over Bid Requirements”) not apply to an offer to acquire trust units (“Units”) of Clearwater Seafoods Income Fund (the “Fund”) by the Filer (the “Requested Relief”).

Under the MRRS:

- (a) the Nova Scotia 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. The Filer is a corporation governed by the *Canada Business Corporations Act* whose registered and head office is located at 6009 Quinpool Road, 8th Floor, Halifax, Nova Scotia B3K 5J7.
2. The Filer is a reporting issuer in each of the Jurisdictions that recognizes the concept of reporting issuer status. The Filer’s common shares are listed on the Toronto Stock Exchange.
3. The Filer is an investment company with interests in freight transportation services, international shipping, warehouse operations, real property and marketable securities.

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4. The Fund is an unincorporated open-ended trust established under the laws of the Province of Ontario whose principal and head office is located at 757 Bedford Highway, Bedford, Nova Scotia B4A 3Z7.
5. The Fund indirectly holds a 55.32% interest in Clearwater Seafoods Limited Partnership (“CSLP”), which carries on the seafood business (the “Clearwater Business”) that was carried on by Clearwater Fine Foods Incorporated (“CFFI”) and its subsidiaries and joint ventures immediately prior to July 2002, the date of completion of the Fund’s initial public offering (the “IPO”). The remaining 44.68% interest in CSLP is held by CFFI through its ownership of Class B general partnership units (“CSLP Exchangeable Units”) of CSLP.
6. CSLP is a limited partnership established under the laws of the Province of Nova Scotia to carry on, directly or indirectly, the business of, and the ownership, operation and lease of assets and property in connection with, the harvesting, processing, distribution and marketing of seafood, including the Clearwater Business, and such other businesses as its managing general partner may determine, and all activities ancillary and incidental thereto.
7. The Fund is a reporting issuer in each of the Jurisdictions that recognizes the concept of reporting issuer status.
8. The authorized capital of the Fund consists of an unlimited number of trust units (“Units”) and special trust units (“Special Trust Units”).
9. Each Unit entitles the holder thereof to one vote at all meetings of unitholders of the Fund (“Unitholders”). Each Unit represents an equal undivided beneficial interest in any distribution from the Fund and in any net assets of the Fund in the event of termination or winding-up of the Fund. All outstanding Units are entitled to equal shares in any distributions by the Fund and, in the event of termination or winding-up of the Fund, in the net assets of the Fund. All Units rank among themselves equally and rateably without discrimination, preference or priority. The Units are listed on the Toronto Stock Exchange.
10. The Special Trust Units are used solely for providing voting rights to persons holding CSLP Exchangeable Units or other securities that are, directly or indirectly, exchangeable for Units and that, by their terms, have voting rights in the Fund. Special Trust Units were issued in conjunction with, and are not transferable separately from, the CSLP Exchangeable Units to which they relate. Each Special Trust Unit will entitle the holder thereof to a number of votes at any meeting of Unitholders equal to the number of Units which may be obtained upon the exchange of the CSLP Exchangeable Units to which the

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Special Trust Units relate, but do not otherwise entitle the holder to any rights with respect to the Fund's property or income. The Special Trust Units and the CSLP Exchangeable Units are not publicly traded.

11. Pursuant to the IPO, the Fund distributed Units to the public. Concurrently with the IPO, and as partial consideration for the acquisition of the Clearwater Business, the Fund issued Special Trust Units to CFFI and CSLP issued CSLP Exchangeable Units to CFFI. Once CSLP has achieved a certain level of earnings and distributions, the CSLP Exchangeable Units become exchangeable for Units on a one-for-one basis (subject to certain adjustments pursuant to the exchange agreement entered into by CFFI, the Trust and CSLP, among others, concurrently with the IPO) (the "Exchange Ratio") and the holders thereof become entitled to receive distributions from CSLP, where practicable, *pro rata* with distributions made to holders of CSLP ordinary units. Prior to CSLP reaching the required distribution levels, the distribution payments on the CSLP Exchangeable Units are subject to certain subordination provisions in favour of the CSLP ordinary units. Once the required earnings and distribution levels are achieved by CSLP, the CSLP Exchangeable Units, together with the Special Trust Units, have economic and voting rights equivalent in all material respects to the Units.
12. According to the annual reports of the Fund for its fiscal years ended December 31, 2003 and December 31, 2005, the Fund has achieved the required level of distributions to the public Unitholders and, accordingly,
 - (a) the CSLP Exchangeable Units are no longer subordinated in respect of distributions to the Units;
 - (b) monthly distributions could be made to the holders of Units and CSLP Exchangeable Units; and
 - (c) the CSLP Exchangeable Units became exchangeable into Units.
13. As at September 30, 2007:
 - (a) 28,949,895 Units were issued and outstanding representing a 55.32% voting and economic interest in the Fund;
 - (b) 23,381,217 Special Trust Units were issued and outstanding, all of which were held by CFFI, representing a 44.68% voting interest in the Fund;

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(c) 28,949,895 Class A units of CSLP were issued and outstanding, all of which were held indirectly by the Fund, representing a 55.32% interest in CSLP; and

(d) 23,381,217 CSLP Exchangeable Units were issued and outstanding, all of which were held by CFFI, representing a 44.68% interest in CSLP.

14. The declaration of trust of the Fund provides that if:

(a) a person acting at arm's length to holders of the CSLP Exchangeable Units makes a non-exempt take-over bid, and

(b) not less than 25% of the Units are taken up under the bid,

the CSLP Exchangeable Units will become immediately exchangeable at an Exchange Ratio equal to 110% of the exchange ratio then in effect.

15. The Filer has made both CFFI and the Fund aware of the Application.

16. As of December 12, 2007, the Filer held, directly and indirectly, an aggregate of 4,602,375 Units and no Special Trust Units or CSLP Exchangeable Units. The Filer also owned \$2,125,000 principal amount of Series A Debentures of the Fund, which are immediately convertible into Units. In the aggregate, the debentures held by the Filer are convertible into 360,169 Units, which, combined with the 4,602,375 Units held by the Filer, total 4,962,544 Units. Such aggregate holdings (assuming the debentures held by the Filer are converted into 360,169 Units) represent approximately 17.05% of the currently outstanding Units and 9.45% of the outstanding Units if all of the outstanding CSLP Exchangeable Units were exchanged for Units at the Exchange Ratio.

17. The Filer is considering the acquisition, directly or indirectly, of up to 5,534,851 additional Units (or convertible debentures convertible into that number of Units) through the facilities of the Toronto Stock Exchange, which, together with the 4,602,375 Units already held by the Filer and the 360,169 Units issuable upon conversion of the debentures held by the Filer, would represent just under 20% of the outstanding Units if all of the outstanding CSLP Exchangeable Units were exchanged for Units at the Exchange Ratio.

18. The Filer is not aware of any undisclosed material fact regarding the Fund or CFFI, including any undisclosed material fact regarding the Fund's on-going strategic review process.

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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.

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

- (a) unless otherwise exempt, the Filer complies with the Take-over Bid Requirements, as if the Units and the CSLP Exchangeable Units are securities of the same class, upon the Filer making an offer to acquire outstanding Units or CSLP Exchangeable Units to any person or company who is in a Jurisdiction or to any security holder of the Fund or CSLP whose last address as shown on the books of the Fund or CSLP is in a Jurisdiction, where the securities subject to the offer to acquire, together with the offeror's securities, constitute in the aggregate 20 per cent or more of the outstanding Units (calculated as if all of the CSLP Exchangeable Units were exchanged for Units at the Exchange Ratio) at the date of the offer; for the purpose of this subparagraph (a), "offeror's securities" means securities of the Fund or CSLP beneficially owned, or over which control or direction is exercised, on the date of the offer to acquire, by the Filer or any person or company acting jointly or in concert with the Filer;
- (b) the Filer complies with the early warning requirements under the Legislation;
- (c) the Filer further provides disclosure in accordance with the early warning requirements as if the Units and the CSLP Exchangeable Units are securities of the same class and that the number of outstanding securities of such class is the number of outstanding Units if all of the outstanding CSLP Exchangeable Units were exchanged for Units at the Exchange Ratio;
- (d) the Filer has issued and filed forthwith a news release describing the nature and effect of this decision; and
- (e) this decision does not come into effect until 48 hours after the news release described in condition (d) has been issued and filed.

H. Leslie O'Brien
Chair
Nova Scotia Securities Commission

R. Daren Baxter
Vice-Chair
Nova Scotia Securities Commission