

2006 BCSECCOM 447

July 26, 2006

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 - Identical consideration - Issuer needs relief from the requirement in s. 107 (1) of the Act that all holders of the same class of securities must be offered identical consideration - Under the bid, Canadian resident shareholders may receive securities, cash, or a combination of both; US resident shareholders will receive substantially the same value as Canadian shareholders, in the form of cash paid to the US shareholders based on the proceeds from the sale of their securities; the number of shares held by US residents is de minimis; the US does not have an identical consideration requirement

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 107(1), 114(2)

In the Matter of
the Securities Legislation of
British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Quebec
(the Jurisdictions)

and

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

and

In the Matter of
Shiningbank Energy Income Fund
(the Filer)

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 under the securities legislation of the Jurisdictions (the Legislation) that, in connection with a proposed securities exchange take-over bid (the Take-Over Bid) to be made for all common shares (the Shares) of Find Energy Ltd. (the Target), the Filer be exempt from the requirement in the Legislation

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to offer identical consideration to all holders of the class of securities subject to a take-over bid (the Identical Consideration Requirement), specifically including securityholders of the Target resident in the United States (the US Securityholders).

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. Terms defined in National Instrument 14-101 *Definitions* have the same meaning in this decision unless they are defined differently in this decision.

Representations

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

- 4.1 The Filer is an unincorporated open-ended investment trust created under the laws of Alberta and formed and governed by a trust indenture dated May 16, 1996, as amended and restated from time to time including most recently on September 6, 2005, with its head office in Calgary, Alberta.
- 4.2 The Filer is a reporting issuer in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Newfoundland and Labrador and Prince Edward Island and its trust units (the Trust Units) are listed on the Toronto Stock Exchange.
- 4.3 The Target is a public company incorporated under the laws of Alberta with its head office in Calgary, Alberta.
- 4.4 The Target is a reporting issuer in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec and Nova Scotia and the Shares are listed on the Toronto Stock Exchange.
- 4.5 Effective July 13, 2006 the Filer and the Target entered into a pre-acquisition agreement under which the Filer agreed, through its indirect wholly-owned subsidiary, Shiningbank Energy Ltd., to make the Take-over Bid, under which holders of Shares will receive 0.465 of one Trust Unit for each Share, on or about July 31, 2006.

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- 4.6 Approximately 6.9% of the issued and outstanding Shares on a non-diluted basis (approximately 6.3% on a fully diluted basis) are currently beneficially held by US Securityholders.
- 4.7 Because the Trust Units issuable under the Take-over Bid to the US Securityholders have not been registered under the United States Securities Act of 1933 (the 1933 Act) or the securities laws of any state of the United States, the offer, sale and delivery of Trust Units to US Securityholders without further action by the Filer would constitute a violation of US securities laws.
- 4.8 Registration under the 1933 Act of the Trust Units deliverable to US Securityholders would be costly and burdensome to the Filer.
- 4.9 Rule 802 under the 1933 Act (Rule 802) would provide an exemption from the requirement that the Trust Units be registered under the 1933 Act if US Securityholders are offered terms at least as favourable as those offered to other holders. However, it specifies that an offer need not be made to securityholders in those states of the United States (States) that require offered securities to be registered or qualified, provided that such securityholders are offered a cash alternative not less favourable than that offered to securityholders in other jurisdictions.
- 4.10 Notwithstanding Rule 802, the securities laws of most States would prohibit delivery of the Trust Units to US Securityholders without registration or qualification or an exemption from registration or qualification. Such exemption might require that the transferability of the Trust Units be restricted such that US Securityholders in those States would not receive Trust Units on terms as favourable as those offered to Canadian holders of Shares. One State would require registration of the Filer as a "dealer" in securities.
- 4.11 For US Securityholders or holders of Shares who appear to the Filer or to the depositary designated under the Take-Over Bid to be US Securityholders, the Filer proposes to deliver to the depositary the Trust Units such US Securityholders would otherwise be entitled to receive under the Take-over Bid, who will then sell the Trust Units on behalf of the US Securityholders and deliver to them their respective pro rata share of the proceeds of the sale, less commissions and applicable withholding taxes, unless such US Securityholders can demonstrate to the Filer that such Trust Units may be issued to them in a transaction exempt from registration under applicable securities laws and in a

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manner that requires no regulatory filings by the Filer. All Trust Units that may not be delivered to holders of Shares in accordance with the foregoing (including pursuant to any compulsory acquisition thereof under the provisions of the *Business Corporations Act* (Alberta)) will be issued and delivered to the depositary for sale by the depositary on behalf of such shareholders.

- 4.12 Any sale of Trust Units described in paragraph 4.11 will be completed within five trading days of the date on which the Filer takes up the Shares tendered by the US Securityholders under the Take-Over Bid.
- 4.13 Any sale of Trust Units described in paragraph 4.11 will be effected in a manner intended to maximize the consideration to be received from the sale by US Securityholders and minimize any adverse impact of the sale on the market for the Trust Units.
- 4.14 Except to the extent that relief from the Identical Consideration Requirement is granted, the Take-Over Bid will otherwise be made in compliance with the requirements under the Legislation governing take-over bids.

Decision

- 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, in connection with the Take-Over Bid, the Filer is exempt from the Identical Consideration Requirement insofar as US Securityholders who would otherwise receive Trust Units under the Take-over Bid receive instead cash proceeds from the sale of those Trust Units in accordance with the procedure set out in section 4.11.

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

Stephen R. Murison, Vice-Chair
Alberta Securities Commission