

# 2007 BCSECCOM 261

May 4, 2007

## **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 requires relief from prohibition against certain collateral agreements in s. 107(2) of the Act - The offeror issuer has entered into a collateral agreement with a shareholder of the offeree issuer; the agreement is entered into for valid business reasons, and not for the purpose of providing the shareholder with a benefit beyond what other shareholders of the offeree issuer will receive under the offer

## **Applicable British Columbia Provisions**

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

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

and

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

and

In the Matter of  
Zinifex Limited (Zinifex),  
Zinifex Canadian Enterprises Inc. (the Filer)  
and Wolfden Resources Inc. (Wolfden)

## 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 pursuant to the securities legislation of the Jurisdictions (the Legislation) that the proposed employment arrangements entered into (or to be entered into) with each of Ewan Downie, John Begeman and Steve Filipovic (the Key Executives), who are, respectively, the President and Chief Executive Officer, the Chief Operating Officer, and the Vice-President – Finance of Wolfden, as well as four other

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employees (the Other Key Personnel), may be entered into notwithstanding the provisions of the Legislation that prohibit an offeror who makes or intends to make a take-over bid from entering into any collateral agreement, commitment or understanding with any holder or beneficial owner of securities of the offeree issuer that has the effect of providing to the holder or owner a consideration of greater value than that offered to other holders of the same class of securities (the Requested Relief). The Requested Relief is sought in connection with an offer (the Offer) to be made by Zinifex and the Filer to acquire all of the issued and outstanding common shares (the Shares) of Wolfden, including Shares that may become issued and outstanding after the date of the Offer upon the conversion, exchange or exercise of any securities of Wolfden that are convertible into or exchangeable or exercisable for Shares.

Under the Mutual Reliance Review System (MRRS) for Exemptive Relief Applications:

- (a) the Ontario Securities Commission is the principal regulator for this 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. Zinifex is an Australian Company with headquarters in Melbourne, Australia. Its shares are listed on the Australian Stock Exchange. Zinifex is not a reporting issuer in any of the Jurisdictions.
2. The Filer is a wholly owned subsidiary of Zinifex and is a corporation existing under the laws of British Columbia. The Filer is not a reporting issuer in any of the Jurisdictions.
3. Wolfden is a corporation incorporated under the laws of Ontario. It is a reporting issuer or equivalent in Alberta, British Columbia, Ontario and Quebec and its Shares are listed and posted for trading on the Toronto Stock Exchange.

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4. Pursuant to a support agreement dated March 16, 2007 (the Support Agreement), Zinifex and the Filer agreed to make or cause to be made, and Wolfden agreed to support, the Offer to acquire all of the Shares for \$3.81 per Share in cash, subject to the conditions set forth therein.
5. The Offer has been made by way of take-over bid circular mailed to all holders of Shares on April 2, 2007 and prepared in accordance with the Legislation (the Circular).
6. Neither Zinifex nor the Filer will, as a result of the Offer, become a reporting issuer under the Legislation.
7. The Board of Directors of Wolfden (the Board), upon receiving the recommendation of a special committee of the Board following consultation with independent financial and legal advisors, has unanimously determined that the Offer is in the best interests of Wolfden and its shareholders (other than the Filer and Zinifex) (the Shareholders) and accordingly, the Board is recommending acceptance of the Offer to the Shareholders.
8. The Offer is conditional on, among other things, there being validly deposited under the Offer and not withdrawn at the Expiry Time at least 66 $\frac{2}{3}$ % of the outstanding common shares (calculated on a fully diluted basis).
9. Wolfden has represented to the Filer and Zinifex that its Board has received an opinion from its financial advisor to the effect that the consideration to be received under the Offer is fair from a financial point of view to Shareholders.
10. The Filer and Zinifex have entered into lock-up agreements dated March 16, 2007 with each of the senior officers (including the Key Executives), directors and certain other Shareholders of Wolfden holding, in aggregate, approximately 27% of the Shares on a fully diluted basis (collectively, the Locked-Up Shareholders) pursuant to which the Locked-Up Shareholders have agreed to deposit under the Offer all of the Shares owned or controlled by them, including Shares issuable upon the exercise of outstanding options (Options), subject to certain exceptions.
11. As of April 21, 2007, Wolfden had 90,750,378 Shares issued and outstanding (and 95,210,378 Shares on a fully diluted basis).
12. Mr. Downie holds 1,917,320 Shares and 1,100,000 Options; Mr. Begeman holds no shares and 450,000 Options; and Mr. Filipovic holds no shares and 235,000 Options. The Shares held by Mr. Downie represent slightly less than 2.1% of the outstanding Shares. Collectively, the securities held by the Key

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Executives represent less than 4% of the Shares of Wolfden on a fully diluted basis.

13. Wolfden has advised the Filer that the Other Key Personnel hold no Shares and an aggregate of 505,000 Options representing approximately 0.53% of the total Wolfden Shares on a fully diluted basis.
14. None of the Other Key Personnel are directors or officers of Wolfden.
15. Each of the Key Executives has agreed, in principle, to the terms of an amended employment agreement (an Amended Employment Agreement) to be entered into with Wolfden and the Filer which will become effective on completion of the Offer.
16. Under Mr. Downie's current employment arrangement with Wolfden, he is entitled to a base salary of \$275,000 and long term compensation in the form of periodic option grants at the discretion of the Board. Mr. Downie's total compensation is also comprised of a discretionary cash bonus (\$75,000 for 2006) and certain benefits. Under the Amended Employment Agreement, Mr. Downie's base salary will be increased to \$320,000. This increase includes an adjustment of approximately \$14,600 for certain benefits currently offered by Wolfden which will no longer be offered to Mr. Downie as they are not offered by Zinifex to employees of Zinifex or its subsidiaries. He will initially be entitled to an annual bonus opportunity targeted at 30% of base salary, subject to meeting certain annual targets. The annual bonus opportunity could reach 60% of base salary if certain stretch targets are achieved. In addition, Mr. Downie will be entitled to participate in the Zinifex long term incentive plan pursuant to which he will be granted a conditional entitlement (the Long Term Entitlement) to a number of shares of Zinifex determined by dividing 40% of his base salary by the prevailing market price of Zinifex shares at the time of the grant. Depending on certain vesting and performance criteria, all or a portion of the Long Term Entitlement may vest at the end of a three year period whereupon Zinifex shares will be allocated. While Mr. Downie's base salary will be increased, his overall compensation package under the terms of the Amended Employment Agreement will be roughly equal to his compensation package for 2006 (assuming Wolfden achieves its annual targets). If Wolfden achieves stretch targets in excess of the annual targets or fails to achieve its annual targets, Mr. Downie's compensation could be higher or lower, as the case may be, than the compensation he earned in 2006.
17. Under Mr. Begeman's existing employment arrangement with Wolfden, he is entitled to a base salary of \$158,500 plus a \$10,000 bonus, benefits, certain perquisites and long term compensation in the form of periodic option grants

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at the discretion of the Board. Under the Amended Employment Agreement, Mr. Begeman's base salary will be increased to \$210,000. This increase includes an adjustment of approximately \$19,400 for certain benefits currently offered by Wolfden which will no longer be offered to Mr. Begeman as they are not offered by Zinifex to employees of Zinifex or its subsidiaries. He will be entitled to an annual bonus opportunity targeted at 25% of base salary, subject to meeting certain annual targets. The annual bonus opportunity could reach 50% of base salary if certain stretch targets are achieved. In addition, Mr. Begeman will be entitled to participate in the Zinifex long term incentive plan pursuant to which he will be granted a Long Term Entitlement equal to a number of shares of Zinifex determined by dividing 40% of his base salary by the prevailing market price of Zinifex shares at the time of the grant.

Depending on certain vesting and performance criteria, all or a portion of the Long Term Entitlement may vest at the end of a three year period whereupon Zinifex shares will be allocated. While Mr. Begeman's base salary will be increased, his overall compensation package under the Amended Employment Agreement will not be materially different from his aggregate 2006 compensation (assuming Wolfden achieves its annual targets). If Wolfden achieves stretch targets in excess of the annual targets or fails to achieve its annual targets, Mr. Begeman's compensation could be higher or lower, as the case may be, than the compensation he earned in 2006.

18. Under Mr. Filipovic's existing employment terms, he is entitled to a base salary of \$112,000 plus a discretionary bonus, benefits and long term compensation in the form of option grants at the discretion of the Board. Under the Amended Employment Agreement, Mr. Filipovic's base salary will be increased to \$170,000. He will also be entitled to an annual bonus opportunity targeted at 15% of base salary, subject to meeting certain annual targets. The annual bonus opportunity could reach 30% of base salary if annual stretch targets are achieved. At his current position, Mr. Filipovic will not be eligible for any long term incentive opportunity. While Mr. Filipovic's base salary will be increased, the value of his overall compensation package under his Amended Employment Agreement will be approximately the same as his compensation package for 2006 (assuming Wolfden achieves its annual targets). If Wolfden achieves stretch targets in excess of the annual targets or fails to achieve its annual targets, Mr. Filipovic's compensation could be higher or lower, as the case may be, than the compensation he earned in 2006.
19. The existing employment agreement for each the Key Executives provides for the payment of varying amounts of compensation following a change of control of Wolfden (a Change of Control Payment) if the Key Executive elects to terminate his employment for any reason within 90 days following the change of control. These amounts are payable in one lump sum upon notice

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being given by the employee to Wolfden. The Filer and Zinifex understand that the Change of Control Payments payable to each of Messrs. Downie, Begeman and Filipovic under their existing employment agreements would be approximately \$825,000, \$317,000 and \$224,000, respectively. As part of their Amended Employment Agreements, each of the Key Executives will agree to waive his entitlement to his existing Change of Control Payment and, in return, will receive two payments (the Restructured Payments), each equal to 50% of the applicable Key Executive's Change of Control Payment. The first such payment to each of the Key Executives will be payable shortly after the take up of Common Shares under the Offer and the remaining payment will be made up to one year later.

20. In addition, the existing employment agreements of the Key Executives provide for between three and six months of severance in the event of termination by Wolfden other than for cause. The Amended Employment Agreements will all provide for one month of severance per year of service, retroactive to the original date of employment, with a minimum severance period of 12 months and a maximum of 24 months if the Key Executive is terminated without cause or resigns for good reason.
21. The total compensation (excluding the Change of Control Payments) for the Key Executives is consistent with the total compensation of employees holding comparable positions within the Zinifex group of companies.
22. The Filer intends to make new offers of employment (the Other Employment Agreements) to the Other Key Personnel with compensation terms consistent with the terms typically offered to employees holding similar positions within the Zinifex group of companies, including a right to participate in the annual bonus opportunity. The entitlements of the Other Key Personnel under the annual bonus opportunity will be commensurate with the entitlements of similarly situated employees within the Zinifex group of companies. It is not expected that the overall compensation levels for the Other Key Personnel will be materially different from current compensation levels (net of signing bonuses or special incentive option grants received in 2006).
23. Each of the Other Key Personnel is entitled to a Change of Control Payment if he resigns in certain circumstances following a change of control. In return for the agreement by each of the Other Key Personnel to waive his right to his Change of Control Payment, he will receive two equal payments the aggregate amount of which will not exceed the Change of Control Payment to which he would have been entitled. The first such payment will be payable shortly after the take up of Common Shares under the Offer and the remaining payment will be made one year later.

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24. The Other Key Personnel have agreed, in principle, to the proposed terms of the Other Employment Agreements.
25. Zinifex has engaged the services of Mercer Human Resource Consulting (Mercer) to (a) advise it with respect to the appropriate terms of employment for the Key Executives and Other Key Personnel and (b) assist with the valuation of the new proposed employment terms as compared to existing employment terms. Mercer has confirmed that the agreed upon terms to be reflected in the Amended Employment Agreements and Other Employment Agreements are within the competitive range of employment terms and conditions for comparable senior executives and employees in the same industry.
26. Zinifex and the Filer have no operations or employees in Canada. As a result, they would be unable to make the Offer without the certainty that they could continue to rely on the Key Executives to grow and support the business and assist with the transition of the business to new ownership. For this reason, the Support Agreement makes it a condition of the Offer that the Key Executives shall have entered into the Amended Employment Agreements.
27. Zinifex believes that the Key Executives and Other Key Personnel have been instrumental in building Wolfden's business and considers their continued role in the company following completion of the Offer as critical to the continued success of the business.
28. The purpose of the Amended Employment Agreements and Other Employment Agreements is to (a) provide an incentive to the Key Executives and Other Key Personnel to continue in the employ of Wolfden and increase its performance and (b) align the bonus plans applicable to the Key Executives and Other Key Personnel with comparable employees of Zinifex.
29. Under the terms of the existing employment agreements of the Key Executives, the Change of Control Payments were payable in the event that the Key Executive terminated his employment for any reason within 90 days following a change of control. By waiving the Change of Control Payments in consideration for the Restructured Payments, the incentive for the Key Executives to tender their resignations within the 90 day period following a change of control has been eliminated.
30. Similarly, if the Filer did not restructure the Change of Control Payments of the Other Key Personnel, they would have an incentive to terminate their employment with Wolfden in order to collect their entitlements.

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31. The terms of the Amended Employment Agreements and Other Employment Agreements were negotiated at arm's length on terms and conditions that the Filer and Zinifex consider to be commercially reasonable in light of: (a) the Change of Control Payments to which the Key Executives and Other Key Personnel are entitled under their current employment agreements; (b) the importance to the Filer and Zinifex that the Key Executives provide continuity and continue to grow the business; (c) the unique knowledge and experience of the Key Executives and other Key Personnel; and (d) the consistency of the employment terms with the manner in which Zinifex compensates its own employees.
32. The particulars of the Amended Employment Agreements and the Restructured Payments are disclosed in the Circular.
33. The receipt by each of the Key Executives and the Other Key Personnel of Amended Employment Agreements or Other Employment Agreements, as applicable, is not conditional upon their support of the Offer.
34. The Amended Employment Agreements and the Other Employment Agreements: (a) have been or will be entered into for valid business reasons unrelated to the shareholdings of the Key Executives and Other Key Personnel; (b) are not being conferred for the purpose, in whole or in part, of increasing the amount of the consideration paid to the Key Executives and Other Key Personnel for their Shares pursuant to the Offer or providing an incentive to deposit to the Offer; (c) are being made to assist in the completion of a transaction that is fair to all Shareholders; and (d) do not increase the value of the consideration to be paid to the Key Executives and Other Key Personnel for Shares pursuant to the Offer.

### **Decision**

Each of the relevant 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 under the Legislation is that the Requested Relief is granted.

Wendell S. Wigle  
Commissioner  
Ontario Securities Commission

David L. Knight  
Commissioner  
Ontario Securities Commission