

# 2007 BCSECCOM 111

January 30, 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 Securities Act - Identical consideration - Issuer needs relief from the requirement in s. 107(1) of the *Securities Act* (British Columbia) that all holders of the same class of securities must be offered identical consideration (the Identical Consideration Requirement) - Under the bid, Canadian resident shareholders may receive shares, 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 shares; the number of shares held by US residents is de minimis; and 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, Quebec, Nova  
Scotia, New Brunswick 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  
Saskatchewan Wheat Pool Inc.  
(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) for an exemption from the requirement in the Legislation to

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offer identical consideration to all holders of the class of securities subject to a take-over bid (the Identical Consideration Requirement) in connection with the securities exchange take-over bid made by the Filer for all issued and outstanding limited voting common shares (the Common Shares), the Series A convertible preferred Shares (the Preferred Shares) and 9% convertible unsecured subordinated debentures (the Debentures, and, together with the Common Shares and Preferred Shares, the Securities) of United Grain Growers Limited, carrying on business as Agricore United (Agricore) (the Requested Relief).

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

### **Interpretation**

3. Defined terms 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 a corporation continued under the *Canada Business Corporations Act*, with its head office in Regina, Saskatchewan.
  - 4.2 The Filer is a reporting issuer in each of the Jurisdictions and a “foreign private issuer” within the meaning of Rule 405 of Regulation C adopted by the SEC under the 1933 Act.
  - 4.3 The common shares of the Filer (the SWP Shares) are listed and posted for trading on the Toronto Stock Exchange (the TSX).
  - 4.4 Agricore was continued under the *United Grain Growers Act* in 1992 and has its head office in Winnipeg, Manitoba.
  - 4.5 To the knowledge of the Filer, Agricore is a reporting issuer in each of the Jurisdictions.

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- 4.6 The Common Shares, the Preferred Shares, and the Debentures of Agricore are listed and posted for trading on the TSX.
- 4.7 The Filer has made offers to acquire all of the outstanding Securities (the Offers);
- 4.8 Under the terms of the Offers, the consideration offered for each of the Securities is:
- (a) 1.35 SWP Shares per Common Share;
  - (b) \$24.00 in cash per Preferred Share, plus any accrued and unpaid dividends to the date the Preferred Shares are taken up; and
  - (c) 18 SWP Shares per \$100.00 principal amount of Debentures, plus 0.18 SWP Shares per \$1.00 of accrued and unpaid interest to the date the Debentures are taken up.
- 4.9 Securityholder lists delivered to the Filer by Agricore disclosed that residents of the United States comprise 76 holders of Common Shares (collectively holding approximately 3.90% of the outstanding Common Shares on a non-diluted basis and approximately 2.93% on a fully diluted basis). Such securityholder lists did not include any holders of Debentures with non-Canadian addresses.
- 4.10 Agricore's directors' circular dated December 12, 2006 (the Directors' Circular) disclosed that, as of December 7, 2006, Archer Daniels Midland Company (ADM) held 10,634,269 Common Shares and \$45 million of Debentures (representing approximately 28% of the Common Shares on a fully-diluted basis).
- 4.11 According to ADM's most recent 10-Q filed with the SEC, as of September 30, 2006, ADM, headquartered in Decatur, Illinois, had US\$21,972,020,000 in assets. Based on these facts, ADM would qualify as an exempt institutional investor under U.S. federal securities law and the securities laws of the states of the United States (U.S. state securities laws) and would not constitute a U.S. Securityholder (as defined in paragraph 4.13 below). The Directors' Circular stated that ADM does not intend to accept the Offers. However, as an exempt institutional purchaser, ADM would receive SWP Shares if they tendered to the Offers.

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- 4.12 The SWP Shares offered pursuant to the Offers to holders of Securities (the Securityholders) have not been and will not be registered or otherwise qualified for distribution under the 1933 Act or U.S. state securities laws.
- 4.13 The offer, sale and delivery of SWP Shares to Securityholders who are both resident in those states of the United States in which no registration exemption is readily available to the Filer and who are not exempt institutional investors (the U.S. Securityholders) would constitute a violation of such states' securities laws.
- 4.14 Rule 802 under the 1933 Act provides an exemption from registration for offers and sales in any exchange offer for a class of securities of a foreign private issuer or in any exchange of securities for the securities of a foreign private issuer in any business combination if the holders in the United States of the foreign subject company hold no more than 10% of the securities that are the subject of the exchange offer or business combination. Rule 802 provides that for purposes of this calculation, securities held by persons who hold more than 10% of the subject securities are to be excluded. In order for this exemption to apply, holders in the United States must participate in the exchange offer or business combination on terms at least as favourable as the other holders of the subject securities, subject to an exception which allows the offeror to offer cash consideration to securityholders resident in states of the United States which do not have an applicable state "blue sky" exemption.
- 4.15 There is no general exemption from state "blue sky" laws that coordinates with Rule 802 under the 1933 Act. As a result, the securities laws of a significant number of states of the United States would prohibit delivery of the SWP Shares to U.S. Securityholders without registration or qualification of the SWP Shares to be issued to securityholders resident in such states unless such holders are exempt institutional investors. The Multijurisdictional Disclosure System does not provide relief from such U.S. state securities laws.
- 4.16 Registration under certain U.S. state securities laws of the SWP Shares deliverable to U.S. Securityholders would be extremely costly and burdensome to the Filer.

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- 4.17 For U.S. Securityholders or holders of Common Shares and Debentures who are, or who appear to the Filer or to the depositary to be, resident in one of the subject states of the United States with no readily available registration exemption and who are not exempt institutional investors, the Filer proposes to deliver to the depositary the SWP Shares such holders would otherwise be entitled to receive under the relevant Offer. The depositary will then sell such SWP Shares on behalf of such holders through the facilities of the TSX. As soon as possible after the completion of the sale, the depositary will send to each such holder a cheque equal to that holder's pro rata share of the proceeds of the sale, less commissions and applicable withholding taxes. Such procedure has been disclosed in the Offers.
- 4.18 Any sale of SWP Shares described in paragraph 4.17 will be completed as soon as commercially reasonable following the date on which the Filer takes up Securities tendered under the Offers.
- 4.19 Except to the extent that relief from the Identical Consideration Requirement is granted and relief from the valuation requirements for take-over bid has been granted in Manitoba, Nova Scotia and Newfoundland and Labrador, the Offers are otherwise 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 Offers, the Requested Relief is granted so that the Filer is exempt from the Identical Consideration Requirement insofar as U.S. Securityholders who would otherwise receive SWP Shares pursuant to the Offers receive instead cash proceeds from the sale of such SWP Shares in accordance with the procedure set out in paragraph 4.17 hereof.

Barbara Shourounis, Director  
Saskatchewan Securities Commission