

## **2003 BCSECCOM 432**

### **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications – relief from the requirement to file expert's consent when the use of a report, appraisal or statement by the expert is included in, or accompanying, a take-over bid circular

### **Applicable British Columbia Provisions**

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

National Instrument 44-101 *Short Form Prospectus Distributions*, s. 10.4(1)

**IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH COLUMBIA, ALBERTA, SASKATCHEWAN, MANITOBA, ONTARIO, QUÉBEC, NOVA SCOTIA, AND NEWFOUNDLAND AND LABRADOR**

**AND**

**IN THE MATTER OF THE MUTUAL RELIANCE REVIEW SYSTEM FOR EXEMPTIVE RELIEF APPLICATIONS**

**AND**

**IN THE MATTER OF ENDEV ENERGY INC.**

### **MRRS DECISION DOCUMENT**

1. WHEREAS the local securities regulatory authority or regulator (the "Decision Maker") in each of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, Nova Scotia, and Newfoundland and Labrador (the "Jurisdictions") has received an application from Endev Energy Inc. ("Endev") for a decision under the securities legislation of the Jurisdictions (the "Legislation") that Endev be exempt from the requirement in the Legislation to include a consent (the "Consent Requirement") of Endev's former auditors, Arthur Andersen LLP ("Arthur Andersen") to the incorporation by reference of the auditors' reports of Arthur Andersen on the financial statements of NCE Energy Assets (1993) Fund, NCE Oil and Gas (1993) Fund, NCE Energy Assets (1994) Fund, NCE Oil and Gas (1994) Fund, NCE Energy Assets (1995) Fund, NCE Oil and Gas (1995) Fund, NCE Energy Assts (1996) Fund, NCE Oil and Gas (1996) Fund, and NCE Oil and Gas (1997) Fund (collectively, the "Partnerships") for each of the fiscal years ended in the five year period ended December 1, 2001 in a take-over bid circular dated June 17, 2003 (the "Circular") in connection with a proposed take-over bid (the "Bid") by Endev for all of the outstanding common shares of Moxie Exploration Ltd. ("Moxie");

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2. AND WHEREAS under the Mutual Reliance Review System for Exemptive Relief Applications (the "System"), the Alberta Securities Commission is the principal regulator for this application;
3. AND WHEREAS, unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 *Definitions* or in Québec Commission Notice 14-101;
4. AND WHEREAS Endev has represented to the Decision Makers that:
  - 4.1. Endev is incorporated under the laws of the Province of Alberta and Endev's head office is located in Calgary, Alberta;
  - 4.2. Endev is a reporting issuer in all the provinces of Canada, its common shares are listed on the Toronto Stock Exchange, and it is qualified to file a short-form prospectus in each of the Jurisdictions in accordance with the requirements of the National Instrument 44-101 – Short Form Prospectus Distributions ("NI 44-101");
  - 4.3. Endev is required to include the Partnership's financial statements in the Circular as, in April, 2002, Endev acquired all the assets of the Partnerships, and since that time, Endev has utilized those assets in their continuing oil and gas operations;
  - 4.4. Moxie is a reporting issuer in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, and Québec, its common shares are listed on the TSX Venture Exchange, and its head office is located in Calgary, Alberta;
  - 4.5. on May 27, 2003, Endev and Moxie entered into a pre-acquisition agreement (the "Pre-Acquisition Agreement") under which Endev agreed to purchase all of the issued and outstanding shares (the "Shares") of Moxie on a basis of a combined share and cash consideration of \$0.46 for each Share;
  - 4.6. Endev and Moxie announced the proposed transaction after the close of markets on May 27, 2003;
  - 4.7. under the terms of the Pre-Acquisition Agreement, Endev is required to mail the Circular to all holders of the Shares on or before June 17, 2003;
  - 4.8. the proposed acquisition of the Shares constitutes a "significant probable acquisition" by Endev within the meaning of section 1.4 of NI 44-101.

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Accordingly, Endev is required to include or incorporate by reference in the Circular, among other things:

- 4.8.1. the audited financial statements of Moxie and the notes thereto as at and for the fiscal year ended December 31, 2002, together with the report of the auditors thereon (collectively the "Moxie 2002 Audited Financial Statements"); and
- 4.8.2. the financial information as at and for each of the fiscal years ended in the five year period ended December 1, 2001 as contained in the audited consolidated financial statements of the Partnerships and the notes thereto as at and for the fiscal year then ended, together with the reports of the auditors thereon (collectively, the "Partnerships 2001 Audited Financial Statements");
- 4.9. the audit report in respect of the Moxie 2002 Audited Financial Statements was delivered by Ernst & Young LLP. The consent of Ernst & Young LLP as required by the Legislation and subsection 10.4(1) of NI 44-101 has been filed together with the Circular;
- 4.10. the audit report in respect of the Partnerships 2001 Audited Financial Statements was delivered by Arthur Andersen;
- 4.11. on June 3, 2002 Arthur Andersen ceased practising public accounting. As a result, Arthur Andersen will no longer consent to the use of previously issued auditors' reports for the purposes of securities filings;
- 4.12. the inability of Endev to obtain a consent letter from Arthur Andersen to the inclusion of its auditor's report on the Partnerships 2001 Audited Financial Statements is an exceptional situation that is outside of the control of Endev;
- 4.13. the Canadian Securities Administrators (the "CSA") issued CSA Staff Notices 43-304, 62-302, and 81-308 *Prospectus Filing Matters – Arthur Anderson LLP Consent* (the "Andersen Notice") to provide guidance to issuers with respect to the inclusion in, among other things, securities exchange take-over bid circulars of financial statements previously audited by Arthur Andersen;
- 4.14. the Andersen Notice states that CSA staff will consider applications from issuers to waive the requirement to obtain the consent of Arthur Andersen for audit reports relating to financial statements incorporated by reference

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in a prospectus, provided that the prospectus includes certain prominent disclosure; and

- 4.15. in the absence of a consent from Arthur Andersen, Endev has included in the Circular the disclosure set forth in Appendix A attached hereto and included a cross-reference to such disclosure in the relevant paragraph of the list of documents incorporated by reference in the Circular;
5. AND WHEREAS under the System, this MRRS Decision Document evidences the decision of each Decision Maker (collectively, the "Decision");
6. AND WHEREAS 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;
7. THE DECISION of the Decision Makers under the Legislation is that Endev is exempt from the Consent Requirement in connection with the Bid.

DATED this 18<sup>th</sup> day of June, 2003.

Glenda A. Campbell, Q.C., Vice-Chair

Stephen R. Murison, Vice-Chair

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### APPENDIX A

#### *“Note with Respect to Arthur Andersen LLP*

Arthur Andersen LLP is no longer engaged in the practice of public accounting in Canada. Accordingly, Endev is unable to obtain the consent of Arthur Andersen LLP with respect to the incorporation by reference in the Circular of the auditors' report of Arthur Andersen LLP on the consolidated financial statements of the NCE Partnerships in each case for the years ended December 31, 2001. Because Arthur Andersen LLP has not provided this consent, Shareholders of Moxie will not have the statutory rights of action for damages against Arthur Andersen LLP prescribed by applicable securities legislation. Generally, in accordance with applicable securities legislation, holders of securities may only exercise a statutory right of action against a person or company that has prepared a report, opinion or statement that is included in a take-over bid circular if that person or company has filed a consent in respect of such report, opinion or statement and such right of action may only be exercised in respect of the report opinion or statement that has been made by such person or company. In addition, Arthur Andersen LLP may not have sufficient assets available to satisfy any judgments against it.