

# 2005 BCSECCOM 359

May 24, 2005

## 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, s. 114(2)

In the Matter of  
the Securities Legislation of  
British Columbia and Ontario  
(the Jurisdictions)

and

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

and

In the Matter of  
Sherwood Mining Corporation (the Filer)  
and Minto Explorations Ltd. (Minto)

## 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 the Filer's offer (the Offer) to acquire all of Minto's outstanding common shares (the Minto Shares), the ASARCO Purchase Agreement and Teck Purchase Agreement (as defined below) have been made for reasons other than to increase the value of the consideration paid to the shareholders and may be entered into despite the provision in the Legislation prohibiting an offeror who makes or intends to make a take over bid from entering into any collateral agreement,

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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).

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) the British Columbia Securities Commission is the principal regulator for this application; and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

### **Interpretation and Definitions**

- ¶ 2 Defined terms contained in National Instrument 14-101 *Definitions* have the same meaning in this decision unless they are defined in this decision.

In this decision,

“ASARCO Purchase Agreement” means the purchase and sale agreement dated April 28, 2005 between the Filer, Minto and ASARCO LLC (ASARCO) under which the Filer agrees to acquire

- (a) ASARCO's 0.375% net smelter return royalty in the Minto Project (the ASARCO NSR),
- (b) ASARCO's right (the ASARCO Right) to earn a 70% Working Interest in the Minto Project, and
- (c) a debt owed by Minto to ASARCO (the ASARCO Debt) not to exceed \$680,000;

“Minto Project” means, collectively, all of the mineral claims, related infrastructures, equipment, permits and licenses and other related assets and rights pertaining to the advanced stage copper-gold mining project owned by Minto and located approximately 240 kilometres northwest of Whitehorse in central Yukon Territory;

“Sale Condition” means the completion of the sale by the Filer of the Minto Project, provided the decision to make the sale occurs within the later of

- (a) twelve (12) months from the completion of a bankable feasibility study in respect of the Minto Project, and

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(b) the first anniversary of the closing date of the Offer;

“Teck Purchase Agreement” means the purchase and sale agreement dated May 9, 2005 between the Filer and Teck Cominco Limited (Teck) pursuant to which the Filer agrees to acquire Teck's 0.375% net smelter return royalty in the Minto Project (the Teck NSR); and

“TSXV” means the TSX Venture Exchange.

### **Representations**

¶ 3 This decision is based on the following facts represented by the Filer:

1. the Filer is a corporation existing under the laws of Alberta with its head office in Vancouver, British Columbia;
2. the Filer is a reporting issuer in each of the Jurisdictions and in Alberta and is not in default under the Legislation;
3. the Filer's authorized capital consists of an unlimited number of common shares and an unlimited number of preferred shares issuable in series;
4. the Filer's common shares trade on the TSXV;
5. under to the Offer dated April 29, 2005, the Filer has offered to acquire all of the Minto shares for either
  - (a) \$0.615 cash and one preferred share, or
  - (b) 2.5 common shares and one preferred share,for each Minto Share properly deposited;
6. each preferred share issued under the Offer will be retractable by the Filer and redeemable by the holder following the satisfaction of the Sale Condition for an amount equal to the quotient of one divided by 5,910,501 multiplied by 57.5% of 50% of sale proceeds in excess of \$7,000,000 in respect of the Minto Project;
7. Minto is a corporation existing under the laws of British Columbia and is a reporting issuer in British Columbia and Alberta;
8. the Minto Shares are listed and posted for trading on the TSXV;

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9. Minto is the owner, subject to the following other interests (the Ancillary Interests), of the Minto Project:
  - (a) the ASARCO NSR and ASARCO Right;
  - (b) a 0.75% net smelter return royalty (the Falconbridge NSR) and a right in favour of Falconbridge Limited (Falconbridge) to repurchase certain of the claims forming part of the Minto Project for \$500,000; and
  - (c) the Teck NSR;
10. Minto entered into a letter agreement with ASARCO dated October 27, 2004 that specified that, upon the closing of any take over bid transaction or upon demand should no closing occur by June 30, 2005, ASARCO would be reimbursed for its funding of Minto's ongoing general and administrative costs and for any additional costs incurred by Minto and paid by ASARCO in respect of the bid process;
11. Minto has held the Minto Project for sometime but, in the opinion of management of Filer, has been unsuccessful bringing the project into production due, in part, to the existence of the Ancillary Interests;
12. Minto hired a financial advisor to assist it in soliciting offers for the Minto Project and ASARCO's interests in the Minto Project in the fall of 2004;
13. the Filer was able to enter into a letter agreement with Falconbridge, ASARCO and Minto dated March 24, 2005 which formed the basis upon which the Filer would make its take over bid and specified the salient terms under which the ASARCO Right, ASARCO NSR, the Repurchase Right, the Falconbridge NSR and the ASARCO Debt would be dealt with;
14. for the Filer to consolidate all of the interests in the Minto Project, the Filer entered into the following agreements:
  - (a) the ASARCO Purchase Agreement under which the Filer agrees to purchase
    - (i) the ASARCO NSR for \$350,000, payable at the Filer's option in cash or, subject to the approval of the TSXV, common shares,
    - (ii) the ASARCO Debt for a cash purchase price equal to the amount of the ASARCO Debt, not to exceed \$680,000, and

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- (iii) the ASARCO Right for \$10.00;
  - (b) the Falconbridge Purchase Agreement under which
    - (i) the Filer agrees to purchase the Falconbridge NSR for \$700,000 payable at the Filer's option in cash or, subject to the approval of the TSXV, common shares,
    - (ii) the Filer agrees to purchase the Falconbridge Repurchase Right for \$2,686,000, and
    - (iii) Falconbridge is granted the right to participate in 21.25% of any consideration received in excess of \$7,000,000 should the Sale Condition occur; and
  - (c) the Teck Purchase Agreement under which the Filer agrees to purchase the Teck NSR for \$350,000 payable, subject to the approval of the TSXV, in common shares, provided that Teck is not obligated to accept the common shares if the issue price is more than \$0.40 per common share;
15. the number of common shares issued to satisfy the payments under the agreements described in paragraph 14 will be calculated based on the 10 day weighted average closing price for the 10 trading days immediately prior to the closing date;
  16. ASARCO owns approximately 57.5% (3,397,500) and Teck owns approximately 7% (415,500) of the 5,912,501 outstanding shares of Minto;
  17. ASARCO and Teck have each entered into pre-tender agreements with the Filer under which they have agreed to tender their Minto Shares to the Offer;
  18. as a result of the letter agreement between Minto and ASARCO relating to the ASARCO Debt, the Filer would have assumed that obligation, even if it had not been dealt with in the ASARCO Purchase Agreement;
  19. the pre-render agreements provide that the consideration to be paid to ASARCO and Teck under the Offer for their respective Minto Shares is the same as the consideration to be paid to all other holders of Minto Shares who deposit their Minto Shares under the Offer;
  20. the Filer's obligation to complete the Offer, and take up and pay for the Minto Shares deposited, is subject to certain conditions including the following:

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- (a) at the time of expiry of the Offer, and at the time the Filer first takes up and pays for Minto Shares, there has been at least  $66\frac{2}{3}\%$  of the outstanding Minto Shares validly deposited and not withdrawn;
  - (b) the transactions contemplated by the Falconbridge Purchase Agreement have been completed; and
  - (c) the transactions contemplated by the ASARCO Purchase Agreement have been completed;
21. Falconbridge does not own any securities of Minto;
22. Minto has received a fairness opinion from Ross Glanville & Associates dated April 21, 2005 addressed to its special committee and its board of directors that the Offer is fair from a financial point of view to the shareholders of Minto; and
23. the Teck Purchase Agreement and the ASARCO Purchase Agreement were not entered into for the purposes of increasing the consideration payable to Teck or ASARCO, as the case may be, for their Minto Shares, but to permit the Filer to secure greater control and ownership over the Minto Project consistent with its goal of developing the Minto Project.

### **Decision**

- ¶ 4 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 under the Legislation is that the Requested Relief is granted.

Martin Eady, CA  
Director, Corporate Finance  
British Columbia Securities Commission