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December 21, 2007

Headnote

Mutual Reliance Review System for Exemptive Relief Applications - National Instrument 51-102 Continuous Disclosure Obligations, section 13.1 – relief from BAR requirements - BAR - An issuer requires relief from the requirement to file a business acquisition report - The acquisition is insignificant applying the asset and investment tests; applying the income test, the acquisition is significant only because the filer is including transactions between the filer and the acquired business (the Intercompany Transactions) in the calculation of the filer's and the acquired business's income for the purposes of the income test in Part 8 of NI 51-102; the filer will apply an alternative income test which excludes the Intercompany Transactions; the alternative income test yields approximately the same result as the asset and investment tests

Applicable British Columbia Provisions

NI 51-102, ss. 8.2 and 13.1

In the Matter of
the Securities Legislation of
British Columbia, Alberta, Saskatchewan, Manitoba,
Ontario, Quebec, 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
FNX Mining Company Inc.
(the Filer)

MRRS Decision Document

Background

The local securities regulatory authority or regulator (the Decision Makers) 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 the Filer be permitted to exclude transactions between the Filer and Dynatec Mining

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Services Business (as defined below) from the calculation of the Filer's and Dynatec Mining Services Business's income from continuing operations for the purposes of the income test used to determine whether an acquisition of a business is a significant acquisition requiring the filing of a business acquisition report (a BAR) under the Legislation (the Requested Relief).

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

- (a) the Ontario Securities Commission (the OSC) is the principal regulator for the 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. The Filer is a corporation incorporated under the *Business Corporations Act* (Ontario).
2. The Filer's head office is located at 55 University Avenue, Suite 700, Toronto, Ontario.
3. The Filer became a reporting issuer in the Province of Ontario following the filing of a prospectus dated November 26, 1984. The Filer is also a reporting issuer in each of the other Provinces of Canada. To the best of its knowledge, the Filer is currently not in default of any applicable requirements under the Legislation.
4. The Filer's common shares are listed and posted for trading on the Toronto Stock Exchange.
5. The Filer is a growing explorer, developer and producer of nickel, copper, platinum, palladium, gold and cobalt, with operations based primarily in Canada's Sudbury Basin mining camp.

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6. The Filer has one material subsidiary, Aurora Platinum Corp. (Aurora Platinum). Aurora Platinum was continued under the *Business Corporations Act* (Ontario) and is wholly-owned by the Filer.
7. On November 29, 2001 the Filer entered into an agreement (the Option to Purchase Agreement) with Inco Limited (now CVRD Inco Limited) to acquire a 100% interest in the mineral rights to five mineral properties located in the Sudbury Basin (collectively, the Properties), and the right to use such part of the surface rights and on-site facilities as are required to permit exploration, development and mining operations on the Properties.
8. Concurrently, the Filer entered into an agreement (the Dynatec Joint Venture Agreement) with Dynatec Corporation (Dynatec), pursuant to which Dynatec acquired 25% of the Filer's interest, rights and obligation in the Option to Purchase Agreement, and through which Dynatec and the Filer formed a joint venture known as the "Sudbury Joint Venture" (the SJV).
9. All requirements to exercise the option to acquire the mineral rights to the Properties in the Option to Purchase Agreement were met and the option was exercised by the Filer and Dynatec on December 1, 2003, resulting in the acquisition by the Filer and Dynatec of a 100% interest in the mineral rights to the Properties, as well as certain related rights.
10. On July 1, 2005, the Filer acquired all of the issued and outstanding common shares of Aurora Platinum, which was a publicly-traded company, following which, the Filer transferred all of the common shares of Aurora Platinum to its wholly-owned subsidiary, Aurora Holdings Limited, which was incorporated to hold such common shares, and sold 50% of the common shares of Aurora Holdings Limited and, accordingly, a 50% indirect interest in Aurora Platinum, to Dynatec, in exchange for common shares of Dynatec and cash.
11. On October 21, 2005, the Filer purchased Dynatec's 50% indirect interest in Aurora Platinum by acquiring all of the common shares of Aurora Holdings Limited held by Dynatec and acquired Dynatec's 25% interest in the Properties and its interest in the SJV (the Dynatec Take-out Transaction).
12. As part of the Dynatec Take-Out Transaction:
 - (a) the Filer and Dynatec entered into certain agreements, including a mining services agreement (the Mining Services Agreement) pursuant to which Dynatec provides contract mining services at the Properties until December 31, 2007, subject to the Filer having approval, control and direction over the services provided by Dynatec. Under the Mining

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Services Agreement, Dynatec is being paid a fee of 7% on a cost reimbursement basis (the Mining Services Income);

(b) Dynatec is to be paid \$7,500,000 on each of December 31, 2006 and 2007 (the Lump-Sum Payments); and

(c) the Filer issued to Dynatec 20,500,000 common shares (the FNX Shares).

13. As part of the Dynatec Take-Out Transaction, the Filer was, among other things, entitled in certain circumstances to designate a purchaser for the FNX Shares held by Dynatec if Dynatec decided to sell such shares (the Share Rights). If FNX did not exercise such right, Dynatec was entitled to sell the FNX Shares through a broad public distribution in Canada.
14. On April 20, 2007, Sherritt International Corporation (Sherritt) and Dynatec announced that an agreement (the Merger Agreement) had been reached whereby all of the shares of Dynatec would be acquired by Sherritt under a plan of arrangement (the Arrangement) under the *Canada Business Corporations Act*.
15. Under the Arrangement, Sherritt would acquire the mining services division (the Division) of Dynatec, which provides, among other things, the services under the Mining Services Agreement and, indirectly, all the shares (the DMC Shares) of Dynatec Mining Corporation (DMC), which provides mining services in the United States (DMC, together with the Division, the Dynatec Mining Services Business).
16. As it was uncertain whether the Arrangement would trigger the Filer's Share Rights under the Dynatec Take-Out Transaction, negotiations were undertaken prior to entering into the Merger Agreement, which negotiations led to Sherritt, Dynatec and the Filer reaching an agreement pursuant to which, in consideration of the Filer agreeing to facilitate the transfer of the FNX Shares by Sherritt to the shareholders of Dynatec under the Arrangement, Dynatec would grant to the Filer a right to purchase the Dynatec Mining Services Division (the FNX Call Right) after the effective time of the Arrangement.
17. On June 14, 2007, the Arrangement became effective, and Sherritt acquired Dynatec.
18. On September 28, 2007, the Filer announced that it had exercised the FNX Call Right to purchase the Dynatec Mining Services Business from Sherritt (the Dynatec Acquisition) and had entered into an agreement relating thereto.

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19. When the Filer applies the asset test and investment test in section 8.3(2)(a) and section 8.3(2)(b) of National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102), the Dynatec Acquisition is not significant.
20. However, when the Filer applies the income test in section 8.3(2)(c) NI 51-102 (the Income Test), the Dynatec Acquisition is a "significant acquisition" of the Filer requiring the Filer to file a BAR within 75 days of the completion of the Dynatec Acquisition pursuant to Part 8 of NI 51-102 (the BAR Requirement).
21. Under the Mining Services Agreement, Dynatec earned revenue which contributed \$3,663,000 to income from continuing operations (before tax) of the Dynatec Mining Services Business for the last completed financial year, being the profit that the Dynatec Mining Services Business earned under the Mining Services Agreement for mining services rendered. In turn, the Filer incurred expenses related to the Dynatec Mining Services Business under the Mining Services Agreement, which expenses reduced income from continuing operations (before tax) of the Filer for the last completed financial year by \$3,663,000.
22. As a result of the Lump-Sum Payments, Dynatec recorded revenue which contributed \$7,500,000 to the income from continuing operations (before tax) of the Dynatec Mining Services Business for the last completed financial year (as there were no related expenses). The Filer capitalized the discounted value of the Lump-Sum Payments in October 2005 and, therefore, the Filer is also expensing the interest accretion component of these payments, totalling \$514,000, and is not expensing the principal component of these periodic cash payments.
23. The transactions pursuant to the Mining Services Agreement and the Lump-Sum Payments should be excluded from the calculation of the Income Test.
24. Under Canadian GAAP, consolidated financial statements present the financial position and results of operations of a parent and one or more subsidiaries as if they were combined as a single economic entity. The consolidated financial statements should report only transactions with entities outside of the combined entity. If the Filer were to prepare consolidated *pro forma* financial statements in respect of the Dynatec Acquisition in satisfaction of the *pro forma* financial statement requirements of the BAR Requirement, these financial statements would include adjustments that would remove the transactions pursuant to the Mining Services Agreement and the Lump-Sum Payments, on the basis that these transactions were not with entities outside of the combined entity. Therefore, the Filer should also be able to exclude these transactions when calculating the Filer's and the Dynatec Mining Services

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Business's income from continuing operations for purposes of the Income Test.

25. When the Filer excludes Dynatec's revenue and the Filer's expenses from the Mining Services Agreement and the Lump-Sum Payments from the calculation of the Income Test, the Dynatec Acquisition is not significant

Decision

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.

Erez Blumberger
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Ontario Securities Commission