

## 2005 BCSECCOM 230

March 17, 2005

### Headnote

Mutual Reliance Review System for Exemptive Relief Applications - National Instrument 51-102, s. 13.1 - *Continuous Disclosure Obligations* - An exchangeable share issuer wants an exemption from having to file continuous disclosure documents to permit it to rely on the continuous disclosure documents of its parent issuer - The issuer is an exchangeable share issuer that complies with all of the conditions for continuous disclosure relief in section 13.3 of National Instrument 51-102 *Continuous Disclosure Obligations* except that its parent issuer is not an SEC issuer and it has issued securities other than those permitted in s. 13.3(3)(e) of NI 51-102 - the parent issuer is a Canadian reporting issuer that will send copies of all of its documents to the securityholders of the exchangeable share issuer and explain the reasons the information sent to them relates to the parent, rather than the exchangeable share issuer - the exchangeable share issuer will remain a subsidiary of the parent issuer, will not carry on operations that are independent of the parent issuer, and will not issue any securities other than securities that a credit support issuer may issue under s. 13.4(2)(c) of NI 51-102

National Instrument 51-101, s. 8.1 - Exemption from disclosure requirements in NI 51-101 - A reporting issuer wants relief from the requirements contained in Part 2 Annual Filing Requirements and in Part 3 Responsibilities of Reporting Issuers and Directors - The issuer is a wholly owned subsidiary of a trust - the issuer and the trust are both reporting issuers - the issuer is exempt from continuous disclosure obligations on the basis that the trust's disclosure record will be filed and delivered in place of the issuer's disclosure record - the trust is subject to NI 51-101 and will provide all of the disclosure required in Parts 2 and 3 of NI 51-101

### Applicable British Columbia Provisions

*Securities Act*, R.S.B.C. 1996, c. 418, s. 171

National Instrument 51-102, s. 13.1

National Instrument 51-101, parts 2 and 3 and s. 8.1

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

and

In the Matter of

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the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of Harvest Operations Corp. (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) that:
  - 1.1 except in Québec, the Filer be exempted from Part 2 (Annual Filing Requirements) and Part 3 (Responsibilities of Reporting Issuers and Directors) of National Instrument 51-101 Standards of Disclosure for Oil and Gas Activities (NI 51-101)(the NI 51-101 Relief),
  - 1.2 the Filer be exempted from National Instrument 51-102 Continuous Disclosure Obligations (NI 51-102) and from any comparable continuous disclosure requirements under the Legislation that has not yet been repealed or otherwise rendered ineffective as a consequence of the adoption of NI 51-102 (the Comparable Continuous Disclosure Requirements) and in Québec that order 2004-PDG-0020 dated March 26, 2004 (the Québec Order) be revised to provide the same result (collectively, the Continuous Disclosure Relief),
  - 1.3 except in British Columbia and Québec, the Filer be exempted from Multilateral Instrument 52-109 Certification of Disclosure in Issuer's Annual and Interim Filings (MI 52-109)(the MI 52-109 Relief), and
  - 1.4 the exemptive relief regarding the NI 51-101 Relief, the Continuous Disclosure Relief and the MI 52-109 Relief that was previously granted to the Filer pursuant to sections 7.2, 7.3 and 7.4 of an MRRS decision document dated June 30, 2004 (the Previous Decision) be revoked.
2. Under the Mutual Reliance Review System for Exemption Relief Applications:

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- 2.1 the Alberta Securities Commission is the principal regulator for this application, and
- 2.2 this MRRS decision document evidences the decision of each Decision Maker.

### **Interpretation**

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

### **Representations**

- 4. This decision is based on the following facts represented by the Filer:
  - 4.1 The Filer is an operating subsidiary of Harvest Energy Trust (Harvest) and was incorporated pursuant to the Business Corporations Act (Alberta).
  - 4.2 The head and principal office of the Filer is located at Calgary, Alberta.
  - 4.3 The Filer came into existence and became a reporting issuer in each of the Jurisdictions as a result of a plan of arrangement involving Storm Energy Ltd., Harvest, Harvest Operations Corp., Alterna Technologies Group Inc. and Rock Energy Inc. (the Arrangement).
  - 4.4 The Filer does not carry on any operations other than operation of the properties owned by Harvest and Harvest's controlled entities and the management of Harvest's controlled entities.
  - 4.5 The Filer is authorized to issue an unlimited number of common shares (Common Shares), an unlimited number of non-voting common shares issuable in series, an unlimited number of first preferred shares and an unlimited number of non-voting exchangeable shares issuable in series (the Exchangeable Shares) and exchangeable into trust units of Harvest (the Trust Units).
  - 4.6 The Filer has the following securities issued and outstanding:
    - 4.6.1 2 Common Shares, all of which are owned by Harvest,
    - 4.6.2 547,275 Exchangeable Shares, series 1, and

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- 4.6.3 USD \$250 million of 7 $\frac{7}{8}$ % senior notes due October 15, 2011 (the Notes) that were issued pursuant to a private placement that was completed on October 14, 2004 (the Private Placement).
- 4.7 The Notes are unconditionally guaranteed by Harvest as well as by Harvest Sask. Energy Trust, Harvest Breeze Trust No. 1, Harvest Breeze Trust No. 2, Breeze Resources Partnership, Redearth Energy Inc., 1115638 Alberta Ltd. and 1115650 Alberta Ltd., all of the which are subsidiaries of Harvest (collectively, the Subsidiary Guarantors). The Notes have been assigned a rating of B- by Standard & Poor's and B3 by Moody's Investor Services.
- 4.8 No securities of the Filer, including the Exchangeable Shares and the Notes, are listed or quoted on any exchange or marketplace.
- 4.9 Harvest is an open-end, unincorporated trust governed by the laws of the province of Alberta and created pursuant to an amended and restated trust indenture dated September 27, 2002 between Harvest and Valiant Trust Company, as trustee, as amended.
- 4.10 The head and principal office of Harvest is located at Calgary, Alberta.
- 4.11 Harvest is authorized to issue an unlimited number of Trust Units and an unlimited number of special voting rights (Special Voting Units). As at November 9, 2004, approximately 40,812,859 Trust Units were issued and outstanding and one (1) Special Voting Unit was outstanding (which Special Voting Unit relates to the Exchangeable Shares issued pursuant to the Arrangement).
- 4.12 The Trust Units are listed and posted for trading on the TSX.
- 4.13 Harvest is a reporting issuer in all of the Jurisdictions.
- 4.14 Harvest is not in default of the Legislation in any of the Jurisdictions.
- 4.15 The Previous Decision provided, among other relief granted in connection with the Arrangement, the 51-101 Relief, the Continuous Disclosure Relief and the MI 52-109 Relief on the conditions set forth in the Previous Decision which included that the Filer not issue any securities, other than Exchangeable Shares,

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securities issued to its affiliates, or debt securities issued to banks, loan corporations, trust corporations, treasury branches, credit unions, insurance companies or other financial institutions.

- 4.16 The Notes were initially issued under the Private Placement pursuant to a confidential offering memorandum dated October 7, 2004 to Morgan Stanley & Co. Incorporated, TD Securities (USA) Inc., NBF Securities (USA) Corp. and WestLB AG London Branch (the Initial Purchasers) who then resold all or a portion of the Notes to third parties.
- 4.17 Because not all of the Initial Purchasers or their clients constitute “banks, loan corporations, trust corporations, treasury branches, credit unions, insurance companies or other financial institutions” as set forth in the Previous Decision, the Filer has been unable to rely on the Previous Decision for the 51-101 Relief, the Continuous Disclosure Relief and the 52-109 Relief since the date the Notes were issued. As such, the Filer became subject to the requirements of the Legislation unmodified by the Previous Decision.
- 4.18 The Filer is in default of the Legislation because it has not complied with the requirement to file:
- 4.18.1 interim financial statements as at and for the nine months ended September 30, 2004, on or before November 14, 2004, pursuant to the requirements of NI 51-102, the Comparable Continuous Disclosure Requirements and the Québec Order (collectively, the Continuous Disclosure Requirements),
  - 4.18.2 management's discussion and analysis in respect of the financial statements referred to in section 4.8.1 of this decision pursuant to the Continuous Disclosure Requirements, and
  - 4.18.3 an interim certificate in respect of the financial statements referred to in section 4.8.1 of this decision pursuant to MI 52-109.
- 4.19 Since the completion of the Private Placement on October 14, 2004 the Filer has complied with sections 7.2, 7.3 and 7.4 of the Previous Decision as if the Filer was able to rely on the relief

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provided by such sections of the Previous Decision. In particular, the Filer has filed under its SEDAR profile:

- 4.19.1 the interim financial statements of Harvest as at and for the nine months ended September 30, 2004,
- 4.19.2 management's discussion and analysis in respect of the financial statements referred to in section 4.18.1 of this decision,
- 4.19.3 interim certificates in respect of the financial statements referred to in section 4.18.1 of this decision, and
- 4.19.4 a letter dated November 29, 2004, advising the Decision Maker in each of the Jurisdictions that a press release of Harvest dated October 14, 2004, a material change report of Harvest dated October 22, 2004, the note indenture dated October 14, 2004, in respect of the Notes and the registration rights agreement dated October 14, 2004, all of which relate to the Notes, the Private Placement or both, can be accessed under Harvest's SEDAR profile.

### **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 to the Legislation is that:
  - 6.1 Sections 7.2, 7.3 and 7.4 of the Previous Decision are revoked,
  - 6.2 The Continuous Disclosure Relief is granted for so long as:
    - 6.2.1 Harvest is a reporting issuer in Québec and at least one of the jurisdictions listed in Appendix B of MI 45-102 and is an electronic filer under National Instrument 13-101 System for Electronic Data Analysis and Retrieval (SEDAR),
    - 6.2.2 Harvest sends concurrently to all holders of Exchangeable Shares resident in the Jurisdictions all disclosure material furnished to holders of Trust Units pursuant to the Continuous Disclosure Requirements,

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- 6.2.3 Harvest sends concurrently to all holders of the Notes resident in the Jurisdictions all disclosure material furnished to holders of non-convertible debt of Harvest that has an approved rating pursuant to the Continuous Disclosure Requirements,
- 6.2.4 Harvest files with each Decision Maker copies of all documents required to be filed pursuant to the Continuous Disclosure Requirements,
- 6.2.5 Harvest files, at the same time as such documents are required to be filed pursuant to the Continuous Disclosure Requirements by Harvest, a notice in electronic format under the SEDAR profile of the Filer indicating that the:
  - 6.2.5.1 interim filings,
  - 6.2.5.2 annual filings,
  - 6.2.5.3 interim certificates, and
  - 6.2.5.4 annual certificates,of Harvest have been filed on the SEDAR profile of Harvest,
- 6.2.6 Harvest is in compliance with the requirements of any marketplace on which the securities of Harvest are listed or quoted in respect of making public disclosure of material information on a timely basis, and immediately issues and files any news release that discloses a material change in its affairs,
- 6.2.7 The Filer issues a news release and files a material change report in accordance with Part 7 of NI 51-102 for all material changes in respect of the affairs of the Filer that are not also material changes in the affairs of Harvest,
- 6.2.8 Harvest includes in all mailings of proxy solicitation materials to holders of Exchangeable Shares a clear and concise statement that explains the reason the mailed material relates solely to Harvest, indicates the Exchangeable Shares are the economic equivalent to the

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Trust Units, and describes the voting rights associated with the Exchangeable Shares,

- 6.2.9 Harvest remains the direct or indirect beneficial owner of all of the issued and outstanding voting securities of the Filer,
- 6.2.10 The Filer does not carry on any operations other than operation of the properties owned by Harvest and Harvest's controlled entities and the management of Harvest's controlled entities, and
- 6.2.11 The Filer does not issue any securities other than:
  - 6.2.11.1 non-convertible debt that has an approved rating in respect of which Harvest has provided a full and unconditional guarantee of the payments to be made by the Filer on the securities, as stipulated in the terms of the securities agreement governing the rights of holders of the securities, that results in the holder of such securities being entitled to receive payment from Harvest in the event of any failure by the Filer to make a payment,
  - 6.2.11.2 non-convertible preferred shares that have an approved rating in respect of which Harvest has provided a full and unconditional guarantee of the payments to be made by the Filer on the securities, as stipulated in the terms of the securities agreement governing the rights of holders of the securities, that results in the holder of such securities being entitled to receive payment from Harvest in the event of any failure by the Filer to make a payment,
  - 6.2.11.3 securities issued to its affiliates, or
  - 6.2.11.4 debt securities issued to banks, loan corporations, trust corporations, treasury branches, credit unions, insurance companies or other financial institutions.



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- 6.3 The NI 51-101 Relief is granted for so long as:
  - 6.3.1 Harvest files with each Decision Maker copies of all documents required to be filed by under NI 51-101, and
  - 6.3.2 The Filer is exempt from or otherwise not subject to the Continuous Disclosure Requirements other than the requirement contained in section 6.2.7 of this decision.
- 6.4 The MI 52-109 Relief is granted for so long as:
  - 6.4.1 the Filer is not required to, and does not, file its own interim and annual filings (as those terms are defined under MI 52-109), and
  - 6.4.2 the Filer is exempt from or otherwise not subject to the Continuous Disclosure Requirements other than the requirement contained in section 6.2.7 of this decision.

Glenda A. Campbell, Q.C., Vice-Chair  
Alberta Securities Commission

Stephen R. Murison, Vice-Chair  
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