

# 2008 BCSECCOM 45

December 19, 2007

## **Headnote**

### **Mutual Reliance Review System for Exemptive Relief Applications**

*Securities Act* s. 114(2) Issuer Bids - Exemption from Issuer Bid Requirements - An issuer conducting an issuer bid under a modified dutch auction procedure requires relief from the requirement to disclose in its bid circular that it will take up and pay for shares on a pro rata basis and from the requirement to disclose the exact number of shares it intends to purchase under the bid - The issuer is making an issuer bid under a modified Dutch auction; it cannot disclose that it will take up and pay for shares deposited on a pro rata basis or the total number of shares it will acquire under the bid; the issuer is disclosing the maximum amount it will spend under the bid, and the minimum and maximum amount it will pay for shares tendered. As a result, the potential for confusion is minimal

*Securities Rules* s. 162(3) - Exemption from the Valuation Requirements - An issuer wants relief from the requirement to obtain a formal valuation in connection with an issuer bid for its outstanding securities - A liquid market for the issuer's securities exists prior to the bid; after the bid, there will be a market for the issuer's securities that is not materially less liquid than before the bid

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, s. 105(g), 114(2)

*Securities Rules*, ss. 162(2) and 162(3)

Form 62-903F, Item 2 & Item 9

In the Matter of  
the Securities Legislation of  
British Columbia, Alberta, Saskatchewan, Manitoba,  
Ontario, Québec, 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  
ACE Aviation Holdings Inc.

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(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, in connection with the purchase by the Filer of a portion of its outstanding Class A Variable Voting Shares (the Variable Voting Shares) and Class B Voting Shares (the Voting Shares and, collectively, with the Variable Voting Shares, the Shares), by way of an issuer bid (the Issuer Bid), the Filer be exempt from the following requirements in the Legislation:
  - (a) to take up and pay for Shares on a pro rata basis according to the number of securities deposited by each shareholder (the Proportionate Take-Up and Payment Requirement);
  - (b) to provide disclosure in the issuer bid circular (the Circular) of the proportionate take-up and payment (the Associated Disclosure Requirement);
  - (c) to state the number of securities sought under the Issuer Bid (the Number of Securities Requirement); and
  - (d) except in Ontario and Québec, to obtain a valuation of the Variable Voting Shares and Voting Shares and provide disclosure in the Circular of such valuations, or a summary thereof (the Valuation Requirement)(collectively, the Requested Relief).
2. Under the Mutual Reliance Review System for Exemptive Relief Applications:
  - (a) the Alberta Securities Commission is the principal regulator for this application; and
  - (b) this MRRS decision document evidences the decision of each Decision Maker.

### **Interpretation**

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

### **Representations**

4. This decision is based on the following facts presented by the Filer:
- (a) The Filer is a corporation incorporated under the *Canada Business Corporations Act*. Its head office is located in Montreal, Québec.
  - (b) The Filer is a reporting issuer or the equivalent in each of the Jurisdictions.
  - (c) The Filer is not in default of any requirement of the Legislation and is not on the list of defaulting reporting issuers maintained pursuant to such Legislation, where applicable.
  - (d) The authorized share capital of the Filer consists of an unlimited number of Variable Voting Shares, an unlimited number of Voting Shares and 12,500,000 preferred shares (the Preferred Shares). In addition, the Filer has issued debt securities in the form of 4.25% convertible senior notes (the Notes). As of the close of business on November 30, 2007, there were 83,380,961 Variable Voting Shares, 21,350,564 Voting Shares and 12,500,000 Preferred Shares issued and outstanding, as well as approximately \$330,000,000 principal amount of Notes outstanding.
  - (e) The Variable Voting Shares and the Voting Shares have been listed on the Toronto Stock Exchange (TSX) since September 2004 under the symbols "ACE.A" and "ACE.B". On November 30, 2007, the closing prices of the Variable Voting Shares and the Voting Shares on the TSX were \$27.39 per share and \$27.59 per share, respectively. Based upon such closing prices, the Variable Voting Shares and the Voting Shares had an aggregate market value of approximately \$2.87 billion on such date. The Notes have been listed on the TSX since April 2005 under the symbol "ACE.NT.A". The Preferred Shares are not listed for trading on the TSX or any other securities exchange.
  - (f) Pursuant to the Issuer Bid, the Filer proposes to acquire Shares in accordance with the following modified Dutch auction procedure (the Procedure):

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- (i) the maximum aggregate amount that the Filer will expend pursuant to the Issuer Bid is \$1.5 billion (the Specified Amount);
- (ii) the range of prices (the Range), being a range of prices of not more than \$30.00 (the Maximum Price) per Share and not less than \$27.70 (the Minimum Price) per Share, within which the Filer is prepared to purchase Shares under the Issuer Bid;
- (iii) in respect of the Preferred Shares of the Filer, the Circular will specify the following:
  - A. that in accordance with the terms of the Preferred Shares of the Filer, the holders of Preferred Shares will be permitted to participate in the Issuer Bid by depositing their Preferred Shares on an as-converted basis;
  - B. alternatively, holders of Preferred Shares can also participate in the Issuer Bid by converting, to the extent permitted by the terms of the Preferred Shares, all or part of their Preferred Shares sufficiently in advance of the Expiration Date (as defined below) and subsequently depositing the underlying Variable Voting Shares or Voting Shares under the Issuer Bid;
  - C. in the event that Preferred Shares are deposited on an as-converted basis, the holder of such Preferred Shares will be deemed to have requested that a sufficient number of such holder's Preferred Shares be converted, to the extent permitted by the terms of the Preferred Shares, as of the Expiration Date for the number of underlying Variable Voting Shares and Voting Shares to be purchased under the Issuer Bid, unless a notice of withdrawal in writing is received by the depositary at the place of deposit of the relevant Shares by the dates specified in the Circular;
  - D. in the event that Preferred Shares are deposited on an as-converted basis, the consideration payable to

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the holders of such Preferred Shares will be determined on the basis of the number of underlying Variable Voting Shares or Voting Shares that are issued upon the conversion of the Preferred Shares (in accordance with the terms of the Preferred Shares) as of the Expiration Date of the Issuer Bid;

E. references to Shares in the Circular will include the number of Variable Voting Shares or Voting Shares that are issued upon the conversion (in accordance with the terms of the Preferred Shares) as of the Expiration Date of the Issuer Bid of all the Preferred Shares deposited on an as-converted basis under the Issuer Bid, as well as all other Shares issued upon the conversion of Preferred Shares prior to the Expiration Date and subsequently deposited under the Issuer Bid; and

F. references to Shareholders (as defined below) in the Circular will include holders of Preferred Shares that deposit Preferred Shares on an as-converted basis under the Issuer Bid to the extent of the number of underlying Variable Voting Shares or Voting Shares that are issued upon the conversion of such Preferred Shares as of the Expiration Date of the Issuer Bid, as well as the holders of Shares issued upon the conversion of Preferred Shares prior to the Expiration Date and subsequently deposited under the Issuer Bid.

- (iv) any of the Filer's shareholders (Shareholders) that want to deposit Shares under the Issuer Bid will have the right to either: (i) specify the lowest price within the Range (in increments of a predetermined amount per Share) at which they are willing to sell the deposited Shares (an Auction Tender); or (ii) elect to be deemed to have deposited the Shares at the Purchase Price determined in accordance with paragraph 4(f)(vi) below (a Purchase Price Tender);
- (v) all Shares deposited and not withdrawn by Shareholders who fail to specify a tender price for such deposited Shares will be considered to have been deposited pursuant to a Purchase Price Tender;

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- (vi) the purchase price (the Purchase Price) of the Shares deposited under the Issuer Bid and not withdrawn will be the lowest price that will enable the Filer to purchase the maximum number of Shares that may be purchased for an aggregate purchase price not exceeding the Specified Amount, and it will be determined based upon the number of Shares deposited and not withdrawn pursuant to an Auction Tender at each price within the Range and deposited and not withdrawn pursuant to a Purchase Price Tender, with each Purchase Price Tender being considered a tender at the Minimum Price for the purpose of calculating the Purchase Price;
- (vii) the aggregate number of Shares that the Filer will purchase pursuant to the Issuer Bid will remain variable until the Purchase Price is determined and the proration is calculated in accordance with the procedure outlined in paragraph 4(f)(x) below;
- (viii) all Shares deposited pursuant to an Auction Tender at prices within the Range but above the Purchase Price will not be purchased by the Filer and will be returned to the appropriate depositing Shareholders;
- (ix) if the aggregate Purchase Price for Shares validly deposited under the Issuer Bid and not withdrawn is less than or equal to the Specified Amount, the Filer will purchase all Shares so deposited;
- (x) if the aggregate Purchase Price for Shares validly deposited under the Issuer Bid and not withdrawn exceeds the Specified Amount, the Filer will take up and pay for deposited Shares on a pro rata basis according to the number of Shares deposited by each Shareholder, calculated by combining the two classes of Shares (i.e., the proration will be determined on a combined basis by combining the number of Variable Voting Shares and Voting Shares deposited, including the Variable Voting Shares or Voting Shares underlying any Preferred Shares deposited on an as-converted basis, and then applying the same resulting proration factor to such Shares). Odd lot deposits (Odd Lots) will not be subject to proration. For the purposes of

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the foregoing, an Odd Lot deposit is a deposit by a Shareholder who (i) owns in aggregate less than 100 Shares as of the close of business on the expiration date of the Issuer Bid (the Expiration Date), (ii) deposits all such Shares pursuant to an Auction Tender at or below the Purchase Price or pursuant to a Purchase Price Tender prior to the Expiration Date and (iii) checks the Odd Lots box in either the letter of transmittal or the notice of guaranteed delivery accompanying the Circular. Odd Lot deposits will be accepted for purchase before any proration. Any Shares deposited but not taken up and paid for by the Filer in accordance with this procedure will be returned to the appropriate depositing Shareholders. In respect of Preferred Shares that are deposited under the Issuer Bid on an as-converted basis, the Filer will return all Preferred Shares in respect of which underlying Shares (that would have been issued upon the conversion, in accordance with the terms of the Preferred Shares, as of the Expiration Date of the Issuer Bid) are not purchased under the Issuer Bid, including Shares deposited pursuant to Auction Tenders at prices greater than the Purchase Price and Shares not purchased because of proration;

- (xi) in the event that the Issuer Bid is under-subscribed by the Expiration Date but all of the terms and conditions thereof have been complied with, with the exception of those waived by the Filer, the Filer may extend the Issuer Bid for at least 10 days, in which case the Filer must first take up and pay for all Shares deposited under the Issuer Bid and not withdrawn in accordance with the Legislation;
- (xii) all Shares deposited and not withdrawn by Shareholders who specify a deposit price for such deposited Shares that falls outside the Range will be considered to have been improperly deposited, will be excluded from the determination of the Purchase Price, will not be purchased by the Filer and will be returned to the depositing Shareholders; and
- (xiii) depositing Shareholders who make either an Auction Tender or a Purchase Price Tender but fail to specify the number of Shares that they intend to deposit to the Issuer

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Bid will be considered to have deposited all Shares held by such Shareholder.

- (g) The Circular:
  - (i) will disclose the Specified Amount that the Filer intends to expend pursuant to the Issuer Bid for the purchase of Shares;
  - (ii) will disclose the mechanics for the take-up and payment for, or return of, Shares as described in paragraph 4(f)(x) above;
  - (iii) will explain that, by depositing the Shares at the Minimum Price in the Range or pursuant to a Purchase Price Tender, a Shareholder can reasonably expect that Shares so deposited will be purchased at the Purchase Price, subject to proration as described in paragraph 4(f)(x) above;
  - (iv) will disclose the facts supporting the Filer's reliance on the Presumption of Liquid Market Exemptions (as defined below) as updated to the date of the announcement of the Issuer Bid;
  - (vi) except to the extent exemptive relief is granted by this decision, will contain the disclosure prescribed by the Legislation for issuer bids; and
  - (vi) will contain a reference to the effect that the Filer has applied for an MRRS decision document from the Decision Makers of certain Jurisdictions granting the Requested Relief.
- (h) Prior to the Expiration Date of the Issuer Bid, all information regarding the number of Shares deposited and the prices at which such Shares are deposited will be kept confidential, and the selected depositary under the Issuer Bid will be directed by the Filer to maintain such confidentiality until the Purchase Price is determined.
- (i) Since the Issuer Bid would be for less than all of the Shares, if the number of Shares deposited under the Issuer Bid exceeds the



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Specified Amount worth of Shares, the Legislation would require the Filer to:

- (i) take up and pay for deposited Shares proportionately, according to the number of Shares deposited by each Shareholder; and
  - (ii) disclose in the Circular that the Filer would, if Shares deposited under the Issuer Bid exceeded the Specified Amount worth of Shares, take up the Shares proportionately according to the number of Shares deposited by each Shareholder.
- (j) During the 12-month period before December 3, 2007 (determined on a per class basis):
  - (i) the number of issued and outstanding Variable Voting Shares and Voting Shares was at all times at least 5,000,000, excluding Variable Voting Shares and Voting Shares beneficially owned, directly or indirectly, or over which control or direction was exercised, by related parties of the Filer and Variable Voting Shares and Voting Shares that were not freely tradeable;
  - (ii) the aggregate trading volume of the Variable Voting Shares and Voting Shares on the TSX was at least 1,000,000 Variable Voting Shares and Voting Shares;
  - (iii) there were at least 1,000 trades in Variable Voting Shares and Voting Shares on the TSX;
  - (iv) the aggregate trading value based on the price of the trades referred to in clause (iii) was at least \$15,000,000 of Variable Voting Shares and Voting Shares; and
  - (v) the market value of the Variable Voting Shares and Voting Shares on the TSX was at least \$75,000,000 for the month of November 2007.
- (k) It is reasonable to conclude that following completion of the Issuer Bid, there will be a market for the beneficial owners of Variable Voting Shares and Voting Shares who do not deposit under the Issuer Bid that is not materially less liquid than the market that

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exists at the time the Issuer Bid is made and the Filer intends to rely on the exemptions from the Valuation Requirement in section 3.4(3) of Ontario Securities Commission Rule 61-501 and Québec Policy Statement Q-27 (the Presumption of Liquid Market Exemptions). The Filer intends to seek a formal liquidity opinion from an investment firm.

- (l) The Filer cannot comply with the Number of Securities Requirement because it cannot specify the number of Shares it will acquire pursuant to the Procedure described in paragraph 4(f) above.
- (m) The Circular will disclose the review and approval process adopted by the board of directors of the Filer and that the board of directors of the Filer has determined that the purchase of Shares pursuant to the Issuer Bid represents an effective use of the Filer's available capital and is in the best interests of its Shareholders.

### **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 the Requested Relief is granted provided that:
  - (a) Shares deposited under the Issuer Bid and not withdrawn are taken up and paid for, or returned to Shareholders, in the manner described in paragraph 4(f) above; and
  - (b) for the Valuation Requirement, the Filer can rely on the Presumption of Liquid Market Exemptions.

Glenda A. Campbell, QC  
Alberta Securities Commission

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