

Headnote

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* - Takeover Bids - Identical consideration - Offeror requires relief from the requirement in subsection 2.23(1) of National Instrument 62-104 *Take-Over Bids and Issuer Bids* that all holders of the same class of securities must be offered identical consideration - Under the bid, Canadian resident shareholders will receive shares; Non-resident shareholders will receive substantially the same value as Canadian shareholders in the form of cash paid to the non-resident shareholders based on the proceeds from the sale of their shares.

Applicable Legislative Provisions

Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, subsections 2.23(1) and 6.1(1)

Citation: Re Husky Energy Inc., 2018 ABASC 184

Date: 20181213

In the Matter of
the Securities Legislation of
Alberta and Ontario
(the **Jurisdictions**)

and

In the Matter of
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of
Husky Energy Inc. (the **Filer**)

Decision

Background

The securities regulatory authority or regulator in each of the Jurisdictions (**Decision Maker**) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the **Legislation**) exempting the Filer from subsection 2.23(1) of National Instrument 62-104 *Take-Over Bids and Issuer Bids* (the **Identical Consideration Requirement**), which requires the Filer to offer identical consideration to all of the holders of the same class of securities that are subject to a take-over bid in connection with the Filer's offer to acquire all of the outstanding common shares of MEG Energy Corp. (the **Exemption Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

- (a) the Alberta Securities Commission is the principal regulator for this application;

- (b) the Filer has provided notice that subsection 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia, Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Newfoundland and Labrador, Prince Edward Island, Nunavut, Yukon and Northwest Territories; and
- (c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* or MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

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

1. The Filer is a corporation existing under the *Business Corporations Act* (Alberta) (**ABCA**).
2. The Filer's head office is located in Calgary, Alberta.
3. The Filer is a reporting issuer in each province of Canada and is not in default of securities legislation in any jurisdiction of Canada.
4. The authorized capital of the Filer consists of an unlimited number of common shares (the **Husky Shares**) and an unlimited number of preferred shares, issuable in series (**Preferred Shares**). As of November 16, 2018 there were 1,005,121,738 Husky Shares and no Preferred Shares issued and outstanding.
5. The Husky Shares are listed on the Toronto Stock Exchange (the **TSX**) under the symbol "HSE".
6. On September 30, 2018, the Filer issued a press release announcing its intention to make an offer (the **Offer**) to acquire all of the common shares (the **Common Shares**) of MEG Energy Corp. (**MEG**). On October 2, 2018, the Filer formally commenced the Offer to acquire all of the Common Shares, including any Common Shares that may become issued and outstanding upon the exercise, exchange or conversion of securities exercisable, exchangeable or convertible into Common Shares, by publishing an advertisement and filing a take-over bid circular (the **Circular**) on SEDAR.
7. MEG is a corporation existing under the ABCA.
8. MEG's head office is located in Calgary, Alberta.
9. MEG is a reporting issuer in each of the provinces and territories of Canada. To the knowledge of the Filer, MEG is not in default of securities legislation in any jurisdiction of Canada.

10. To the knowledge of the Filer, the authorized capital of MEG consists of an unlimited number of Common Shares, of which, as reported by MEG as of September 30, 2018, there were 296,813,000 Common Shares issued and outstanding, 8,682,000 stock options exercisable into Common Shares outstanding and 6,722,000 equity-settled restricted share units and performance share units outstanding under which Common Shares may be issued.
11. The Common Shares are listed on the TSX under the symbol "MEG".
12. Under the terms of the Offer, holders of Common Shares (**Shareholders**) may choose to receive either: (i) \$11.00 cash (the **Cash Consideration**) for each Common Share held; or (ii) 0.485 of a Husky Share (the **Share Consideration**) for each Common Share held, subject to pro-rata. The total amount of cash available under the Offer is limited to \$1,000,000,000 and the total number of Husky Shares available is limited to 107,215,520.
13. The Offer does not constitute an offer or a solicitation to any person in any jurisdiction in which such offer or solicitation is unlawful. The Offer is not being made to, nor will deposits of Common Shares be accepted from or on behalf of, Shareholders in any jurisdiction in which the making or acceptance of the Offer would not be in compliance with the laws of such jurisdiction. However, the Filer may, in its sole discretion, take such action as it may deem necessary to extend the Offer to Shareholders in any such jurisdiction.
14. The Filer has filed a registration statement on Form F-80 (the **Registration Statement**) with the SEC to register the Offer under the 1933 Act.
15. The Registration Statement does not register the Offer in, or provide an exemption from the securities laws of, any state, district or territory of the United States of America (**U.S.**). As a result, the securities laws of a number of U.S. states could prohibit the distribution of the Husky Shares to Shareholders in the U.S. (the **U.S. Shareholders**) without registration under the securities laws of such states of the Husky Shares to be issued to U.S. Shareholders resident in such states unless such holders are otherwise eligible to be issued Husky Shares in transactions exempt from registration under the securities laws of such states.
16. No offer to sell or solicitation of an offer to buy Husky Shares pursuant to the Offer was made in the U.S. states, districts and territories of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Guam, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wyoming (collectively, the **Restricted States**) except only to a person who qualifies as an 'exempt institutional investor' (as defined in the Circular) in the applicable Restricted State.
17. In addition, no offer to sell or solicitation of an offer to buy Husky Shares pursuant to the Offer was made in the state of New York or to U.S. Shareholders resident in New York. However, the Offer was made in New York and U.S. Shareholders resident in New York,

under the terms of the Offer when it was made, could tender Common Shares to the Offer and receive the Cash Consideration.

18. The Filer has completed state securities filings in California and New York such that Husky Shares may be distributed under the Offer in such states.
19. To the knowledge of the Filer, and based on a registered list of Shareholders delivered to the Filer by MEG, as of October 11, 2018, aside from Common Shares held by CEDE & Co., there were 15,470,723 Common Shares (approximately 5.21% of the issued and outstanding Common Shares) held of record by 15 U.S. Shareholders. Of such 15,470,723 Common Shares, 1,000 Common Shares were held of record by U.S. Shareholders resident in New York, no Common Shares were held of record by U.S. Shareholders resident in California, and 15,393,184 Common Shares (representing approximately 5.19% of the Common Shares) were held of record by U.S. Shareholders in the Restricted States (other than California).
20. To the knowledge of the Filer, and based on analysis prepared for the Filer by D.F. King Canada, its information agent for the Offer, as of October 17, 2018, there were 108,050,038 Common Shares (approximately 36.40% of the issued and outstanding Common Shares) beneficially held by U.S. Shareholders. Of such 108,050,038 Common Shares, 47,745,331 Common Shares were beneficially held by U.S. Shareholders resident in New York, 12,308,615 Common Shares were beneficially held by U.S. Shareholders resident in California, and 40,021,157 Common Shares (representing approximately 13.48% of the Common Shares) were beneficially held by U.S. Shareholders in the Restricted States (other than California).
21. Registration of the Husky Shares deliverable to certain U.S. Shareholders (who are not eligible to be issued Husky Shares in transactions exempt from registration under the securities laws of a number of U.S. states) under the state securities laws of the Restricted States (other than California) and elsewhere under the Offer would be costly and burdensome to the Filer.
22. The Filer intends to vary its Offer by sending a notice of variation to Shareholders (the **Notice of Variation**) such that:
 - (a) Shareholders resident in California and New York may elect to receive the Share Consideration; and
 - (b) certain Shareholders may elect to receive Share Consideration and the Filer will deliver to the depository for the Offer (or such other qualified third party that the Filer determines) (the **Selling Agent**) the total number of Husky Shares Shareholders who are non-residents of Canada, including those U.S. Shareholders residing in a Restricted State (other than California) that are not "exempt institutional investors", would otherwise have been entitled to receive (as partial consideration) under the Offer, but are prohibited from receiving due to applicable

securities laws (such Shareholders being referred to in this document, as the **Non-exempt Shareholders**).

23. The Selling Agent or its nominee will, as agent for the Non-exempt Shareholders, sell, or cause to be sold (through a broker in Canada and on the TSX), those Husky Shares that would otherwise be issuable to Non-exempt Shareholders, after the payment date for the Common Shares taken up or otherwise acquired under the Offer (the **Vendor Placement**).
24. After completion of such sales, the Selling Agent will distribute the aggregate net proceeds of sale, after expenses, commissions and applicable withholding tax, *pro rata*, among the Non-exempt Shareholders. Any sales of such Husky Shares described above will be completed as soon as practicable after the date on which the Filer takes up and pays for the Common Shares of Non-exempt Shareholders under the Offer and will be done in a manner intended to maximize the consideration to be received from the sale of such Husky Shares and to minimize any adverse impact of the sale on the market for the Common Shares.
25. The Notice of Variation will disclose the Filer's intention with respect to the Vendor Placement and the procedure to be followed with respect to Non-exempt Shareholders that deposit their Common Shares under the Offer.
26. The Offer to Non-exempt Shareholders and the sale of Husky Shares for the benefit of Non-exempt Shareholders under the Vendor Placement described in the preceding paragraphs will not constitute a violation of any U.S. federal securities laws or any applicable securities laws in a state or territory of the U.S.
27. There is currently a "liquid market" (as defined in section 1.2 of Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*) for the Husky Shares and the Filer believes that there will continue to be a "liquid market" for the Husky Shares following completion of the Offer, any related second-step transaction and the sale of the Husky Shares on behalf of Non-exempt Shareholders.
28. Based on the exchange ratio under the Offer and the number of Common Shares outstanding that, to the knowledge of the Filer, could be held by Non-exempt Shareholders and assuming the Filer acquires 100% of the Common Shares (on a non-diluted basis), the Husky Shares to be sold would represent not more than approximately 1.75% of the outstanding Husky Shares immediately following completion of the Offer.
29. If the Filer increases the consideration offered pursuant to the Offer to Shareholders resident in Canada, the increase in consideration will also be offered to Non-exempt Shareholders at the same time and on the same basis.
30. Except to the extent that relief from the Identical Consideration Requirement is granted, the Offer will comply with the requirements under the Legislation.

Decision

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted, provided that each Non-exempt Shareholder, who would otherwise receive Husky Shares pursuant to the Offer, instead receive cash proceeds from the sale of the Husky Shares in accordance with the procedures set out in paragraphs 24 and 25 above.

“original signed by”

Tim Robson

Manager, Legal

Corporate Finance

Alberta Securities Commission