

# ALBERTA SECURITIES COMMISSION

## ORDER

Citation: Re **NXT Energy Solutions Inc., 2019 ABASC 178**

Date: **20191206**

### **NXT Energy Solutions Inc.**

#### **Background**

1. The Executive Director of the Alberta Securities Commission has received an application from NXT Energy Solutions Inc. (the **Filer**) for an order that the issuer bid requirements contained in Part 2 of National Instrument 62-104 *Take-Over Bids and Issuer Bids* (**NI 62-104**) will not apply to the repurchase of up to 736,630 common shares of the Filer (the **Tranche 3 TIB Shares**) from Alberta Green Ventures Limited Partnership (**AGV**, and together with the Filer, the **Parties**) (the **Requested Relief**).

#### **Interpretation**

2. Terms defined in the *Securities Act* (Alberta), NI 62-104 or NI 14-101 *Definitions* have the same meaning if used in this order, unless otherwise defined herein.

#### **Representations**

3. This order is based on the following facts represented by the Filer:
  - (a) The Filer is a corporation incorporated under the *Business Corporations Act* (Alberta) having its head office in Calgary, Alberta.
  - (b) The Filer is a reporting issuer in the provinces of Alberta, British Columbia and Ontario (the **Jurisdictions**) and is not in default of any of its obligations under the securities legislation of any of the Jurisdictions.
  - (c) There are no undisclosed material facts or material changes with respect to the Filer.
  - (d) The Filer's common shares (the **Common Shares**) are currently listed on the Toronto Stock Exchange (the **TSX**) and the OTCQB Venture Marketplace.
  - (e) Between February 16, 2018 and July 3, 2018, the Filer issued to AGV, by way of private placement, an aggregate of 10,264,936 units (each, a **Unit**, and collectively, the **Units**) at a price of \$0.924 per Unit for total gross proceeds of approximately C\$9,484,810.00 (the **Private Placement**). Each Unit consisted of one Common Share and one-third of one common share purchase warrant (each, a **Warrant**, and collectively, the **Warrants**) such that, upon completion of the Private Placement, AGV acquired ownership of a total of 10,264,946 Common Shares and 3,421,648 Warrants, representing, on a fully diluted basis, approximately 20.0% of the 68,432,746 issued and outstanding Common Shares. Each whole Warrant entitled AGV to acquire one Common Share at a price of C\$1.20. The original expiry date of the Warrants was February 16, 2019.

- (f) On February 18, 2019, the Parties entered into a co-operation agreement (the **Co-operation Agreement**) whereby, among other things, AGV committed to conduct up to three surveys in two years using the Filer's SFD<sup>®</sup> surveying technology and the Filer committed to seek approval from its shareholders with respect to a 12 month extension of the expiry date of the Warrants.
- (g) On February 26, 2019, the Parties entered into a sales representative agreement (the **Sales Representative Agreement**) whereby, among other things, AGV became the Filer's exclusive sales representative in nine jurisdictions in the Middle East and Latin America.
- (h) On June 25, 2019, a resolution was passed at the annual meeting of shareholders of the Filer approving the extension of the expiry date of the Warrants to February 16, 2020.
- (i) On November 15, 2019 (the **Acquisition Date**), the Parties entered into a share purchase agreement for the purchase of up to 4,166,667 Common Shares (the **TIB Shares**) at a price of \$0.30 per TIB Share for total gross proceeds of approximately \$1,250,000.00 (the **Targeted Issuer Bid**) pursuant to which:
  - (i) the Filer acquired from AGV the first tranche of 2,230,000 TIB Shares (the **Tranche 1 TIB Shares**), representing approximately 3.25% of the 68,573,558 Common Shares issued and outstanding as at the Acquisition Date, for total gross proceeds of approximately C\$669,000.00;
  - (ii) the Filer agreed to acquire from AGV the second tranche of 1,200,037 TIB Shares (the **Tranche 2 TIB Shares**), representing, together with the Tranche 1 TIB Shares, approximately 5.00% of the 68,573,558 Common Shares issued and outstanding as at the Acquisition Date, for total gross proceeds of approximately \$360,011.00;
  - (iii) subject to receipt of all necessary regulatory approvals, including the Requested Relief, the Filer agreed to acquire from AGV the Tranche 3 TIB Shares, representing approximately 1.07% of the 68,573,558 Common Shares issued and outstanding as at the Acquisition Date (and together with the Tranche 1 TIB Shares and the Tranche 2 TIB Shares, approximately 6.07% of the Common Shares issued and outstanding as at the Acquisition Date), for total gross proceeds of approximately \$220,989.00;
  - (iv) the Parties agreed that all 3,421,648 Warrants held by AGV and acquired in connection with the Private Placement expired as of October 31, 2019; and
  - (v) the Parties agreed to an extension of certain deadlines applicable to AGV under the Co-operation Agreement.
- (j) On December 3, 2019, the Filer acquired the Tranche 2 TIB Shares from AGV.

- (k) The Targeted Issuer Bid constitutes an "issuer bid" as defined in section 1.1 of NI 62-104 by virtue of the fact that an offer is being made by an issuer to a person in the local jurisdiction to acquire or redeem securities of the issuer (i) for valuable consideration, (ii) not as part of an amalgamation, merger, reorganization or arrangement that requires approval in a vote of security holders, and (iii) the securities being acquired are not debt securities, and the Targeted Issuer Bid would therefore be subject to the requirements applicable to issuer bids pursuant to Part 2 of NI 62-104 unless one or more exemptions are available.
- (l) Pursuant to section 4.7 of NI 62-104, an issuer bid is exempt from Part 2 of NI 62-104 if the issuer acquires the securities from a consultant of the issuer and, if there is a published market in respect of the securities, (i) the value of the consideration paid is not greater than the market price, and (ii) the aggregate number of securities acquired by the issuer within any 12 month period in reliance on the exemption in section 4.7 does not exceed 5% of the securities of that class outstanding at the beginning of the 12-month period.
- (m) AGV is a "consultant" of the Filer as defined in section 1.1 of NI 62-104 (incorporating by reference the definition of "consultant" in section 2.22 of National Instrument 45-106 *Prospectus Exemptions*) by virtue of the relationship established between the Parties under the Sales Representative Agreement.
- (n) The purchase price of C\$0.30 per TIB Share represents a discount of approximately 22.88% relative to the market price of approximately C\$0.389 per Common Share (the **TIB Share Market Price**) calculated in accordance with section 1.11(1)(a) of NI 62-104 as of the Acquisition Date.
- (o) Pursuant to the exemption in section 4.7 of NI 62-104, the acquisitions by the Filer of the Tranche 1 TIB Shares and the Tranche 2 TIB Shares are exempt from the requirements typically applicable to issuer bids pursuant to Part 2 of NI 62-104.
- (p) Absent the Requested Relief, the acquisition by the Filer of the Tranche 3 TIB Shares will be subject to Part 2 of NI 62-104.
- (q) The Targeted Issuer Bid is:
  - (i) exempt pursuant to sections 5.5(a) and 5.7(a) of MI 61-101 from the formal valuation and disinterested shareholder approval requirements typically applicable to related party transactions under sections 5.4 and 5.6 of MI 61-101, respectively, as the fair market value of, and consideration to be received by AGV for the TIB Shares does not exceed 25% of the Filer's market capitalization;

- (ii) exempt from the disinterested shareholder approval requirements typically applicable to related party transactions involving TSX listed issuers pursuant to section 501(c) of the TSX Company Manual, as the consideration to be received by AGV for the TIB Shares does not exceed 10% of the Filer's market capitalization;
- (iii) with respect to the acquisition of the Tranche 1 TIB Shares and Tranche 2 TIB Shares, exempt pursuant to section 4.7 of NI 61-204 from the requirements generally applicable to issuer bids under Part 2 of NI 62-104, as: (i) the TIB Shares are being acquired from a "consultant" to the Filer; (ii) the value of consideration received by AGV for the TIB Shares is not greater than the market price; and (iii) the aggregate number of Common Shares acquired by the Filer within a 12 month period in reliance on such exemption does not exceed 5% of the Common Shares outstanding at the beginning of the applicable 12-month period; and
- (iv) with respect to the Tranche 3 TIB Shares, not exempt from the requirements generally applicable to issuer bids under Part 2 of NI 62-104.
- (r) The purchase price of \$0.30 per TIB Share represents a discount of approximately 22.88% relative to the TIB Share Market Price.
- (s) The Filer has not repurchased, or committed to repurchase, any Common Shares other than the TIB Shares in the 12 months preceding the date of this order.
- (t) The Filer has provided notice of the Targeted Issuer Bid to the market by way of a press release disseminated on November 18, 2019, which release specifically disclosed the Filer's acquisition of the Tranche 1 TIB Shares and its intention to acquire the Tranche 2 TIB Shares and, subject to the granting of the Requested Relief, the Tranche 3 TIB Shares.
- (u) There was no material market reaction to the news release.
- (v) The purpose of the Targeted Issuer Bid is to further the common objectives of the Parties, and to avoid the substantial decrease in the market price and liquidity of the Common Shares reasonably expected if AGV were to sell a substantial portion of its Common Shares into the open market.
- (w) The purpose of the Targeted Issuer Bid is not to provide preferential treatment to AGV over the Filer's other shareholders.
- (x) The cancellation of the purchased TIB Shares is reasonably expected to improve, and not adversely affect, the equity position of the Filer's other shareholders to whom an offer was not extended.

- (y) The board of directors of the Filer has, upon receiving confirmation that there are no reasonable grounds to believe that (a) the Filer would, after accounting for the payment for the TIB Shares, be unable to pay its liabilities as they became due, or (b) the realizable value of the Filer's assets would after the payment be less than the aggregate of its liabilities and stated capital of all classes, approved the Targeted Issuer Bid.
- (z) The Filer's other shareholders to whom an offer was not extended are otherwise entitled to sell their Common Shares into the open market for cash proceeds.

**Decision**

4. Under section 6.1 of NI 62-104, the Requested Relief is granted.

*“original signed by”*

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Timothy Robson

Manager, Legal

Corporate Finance

Alberta Securities Commission