

**IN THE MATTER OF EVOLUTION POTASH INC.**

-and-

**IN THE MATTER OF AVANTI INNOVATIONS IN HOUSING AND AGRICULTURE, LLC**

**APPLICATION OF EVOLUTION POTASH INC.**

(In connection with an application for a Temporary or Interim Cease Trade Order pursuant to Section 134 of *The Securities Act, 1988*, S.S. 1988-1989, c. S-42.2 (the “**Saskatchewan Act**”) and Section 127 the *Securities Act*, RSO 1990, c. S.5 (the “**Ontario Act**”) and a transactional proceeding pursuant to Sections 101 and 104 of the Saskatchewan Act and Ontario Act, respectively

**I. ORDER SOUGHT**

1. The Applicant, Evolution Potash Inc. (“**Evolution**”), requests that the Financial and Consumer Affairs Authority of Saskatchewan (the “**FCAAS**”) and the Ontario Securities Commission (the “**OSC**”) and, together with the FCAAS, the “**Commissions**”) make an immediate Order pursuant to sections 134 of the Saskatchewan Act and 127 of the Ontario Act, for an order directing that the unsolicited offers by Avanti Innovations in Housing and Agriculture, LLC (“**Avanti**”) to acquire the issued and outstanding common shares of Evolution as set out in Avanti’s March 2, 2023 offer letters and the accompanying Share Purchase Agreements mailed or otherwise sent to each of Evolution’s shareholders (collectively, the “**Offer**”) be cease-traded until otherwise directed by the Commissions.
2. Evolution also requests such further and other relief as necessary to give effect to this Order as the Commissions may order.

**II. GROUNDS**

3. With respect to the Temporary or Interim Order, Evolution submits that the time required for a hearing will be prejudicial to the public interest such that an immediate Order, without a hearing is required.

4. As is detailed below, there is a significant risk that Shareholders will accept the Offer, which is provided without adequate safeguards for their interests and which will prejudice them and Evolution should it attempt to unwind these transactions at a later date.
5. The breaches outlined below are serious and flagrant and justify immediate intervention.
6. The grounds for the Application are set out as follows.

**A. The Parties**

**(a) Evolution Potash Inc.**

7. Evolution is a corporation incorporated pursuant to the laws of the Province of Saskatchewan with its head office in Saskatoon. Evolution is a potash production company that uses innovative proprietary extraction and milling technologies in its operations. Evolution's primary mining activities are located in Saskatchewan.
8. At present, Evolution has 66 common shareholders, 28 of which are individuals, with the remaining 38 being corporations (the "**Shareholders**"). None of the Shareholders are employees, former employees, or subsidiaries of Evolution, nor do any of the Shareholders, directly or indirectly, own or control sufficient voting shares to elect a majority of the Board of Directors. The Shareholders are located in Saskatchewan, Alberta, British Columbia, Manitoba, Ontario and New York.
9. Evolution is not a reporting issuer and does not trade its securities on published markets.

**(b) Avanti Innovations in Housing and Agriculture, LLC**

10. The Respondent, Avanti, is as far as Evolution is aware, based on a corporate search obtained from the Government of the State of Connecticut and documents provided in connection with the Offer, a United States of America limited liability company registered in the State of Connecticut, with a registered address located in Groton, Connecticut. In the Offer packages sent by Avanti (as described in paragraph 9 above), Avanti describes itself as "a private investment, development, and operating company is focused on owning, developing, and operating potash mines, and other agricultural assets in North America."

11. Evolution only became aware of Avanti following receipt by one of Evolution's directors of email correspondence sent March 5, 2023, on behalf of Avanti, attached to which were copies of the Offer documents addressed, individually, to each of the registered Evolution shareholders. As far as Evolution is aware, Avanti is not a known entity in the potash industry in Canada or the United States.

**B. The Unsolicited Bid**

12. The Offer completely neglects almost all of the in-force NI 62-104 requirements. Avanti has demonstrated a disregard to the legislation in a blatant attempt to sidestep the shareholder protections that ought to otherwise be afforded to the Shareholders. The Offer is illegal, does not allow the Shareholders to make an informed decision on the Offer, and has the potential to expose the Shareholders to substantial risk that cannot be properly assessed with the available information.
13. Avanti made the unsolicited Offer dated March 2, 2023, being the above-described Offer, to acquire all of the common shares Evolution at a price of US\$15,041,118.56 or US\$1.46 per common share. However, the Offer was not submitted to the Board until March 5, 2023, and was submitted through Wayne Hovdestad. Not all Shareholders received the Offer, and the Shareholders that did receive the Offer, received it on various dates. Some Shareholders received the Offer as late as March 14, 2023.
14. On March 7, 2023, Evolution corresponded with Tim Galbreath, who was referenced in the March 5, 2023 correspondence. Tim Galbreath advised Evolution that:
  - (a) He had no material information as to the financial status of Avanti, and could not confirm that Avanti had sufficient capital to close the Offer;
  - (b) Avanti was associated with another U.S. company, Crystal Impact Investments Inc. ("**Crystal**") and Deadra Bastarache, a principal of Crystal; and
  - (c) Avanti instructed Mr. Hovdestad and Mr. Galbreath to send the Offers to Shareholders without any consultation with the Board.

15. Evolution is not aware of any advertisement or other public notice published in Saskatchewan with respect to the commencement of the Offer, or the provision by Avanti of any other form of notice that would allow Shareholders to obtain further information regarding the Offer beyond the offer letters and SPAs that they may receive.
16. On March 10, 2023, the Board wrote to Avanti, advising that the Offer has been made in violation of Canadian securities laws and initiated without discussion with the Board, and demanding that the Offer be terminated immediately.
17. On March 13, 2023, Avanti advised it intended to continue with its proposed purchase of Evolution pursuant to the Offer, and disregarded Evolution's assertion that the Offer was illegal for non-compliance with Canadian securities law.

### **C. The Terms of the Offer**

18. The Offer consisted of a letter addressed to individual Shareholders of Evolution accompanied by copies of the Share Purchase Agreements already prepared for each Shareholder (i.e., a separate share purchase agreement addressed to each registered Shareholder for the specified number of shares held by such Shareholder) and signed by Avanti (the "**SPAs**"). Evolution is aware of Avanti having mailed offers to some of the 66 Shareholders of Evolution but has not confirmed how many of the Shareholders have in fact received the Offer package.
19. The Offer raises serious concerns for the Board of Directors of Evolution as it contains non-market terms and has been sent to Shareholders without Avanti having first approached the Evolution's board of directors (the "**Board**"). Among other things:
  - (a) the recitals of the SPAs include a term that states: "[t]he Buyer reserves the right to terminate this offer upon receiving contractual acceptance of not less than fifty-one Percent (51%) of all outstanding shares and/or majority voting rights is not in effect in the governing agreements of the Company and the Shareholders, Executive Officers and Board of Directors of the Company";
  - (b) the recitals of the SPAs describe Evolution as holding lands, but Evolution does not own any lands;

- (c) the SPAs stipulate that, if accepted by a Shareholder, the agreement would have an effective date of March 2, 2023, which precedes the date that Offer packages (including the SPAs) were sent to Shareholders;
- (d) each SPA, as presented by Avanti, is unique for the Shareholder to whom it is addressed, and there is no requirement that the terms and conditions of all SPAs be identical, nor is there any preclusion to Avanti and such Shareholder agreeing to modifications to the applicable SPA that are not reflected in the other SPAs;
- (e) the Offer having been sent directly to the Shareholders on or about March 8, 2023, and received by the Shareholders on various dates as late as March 14, 2023, and being open for acceptance until only March 24, 2023, a total of 10 days, does not afford Shareholders sufficient opportunity to review the Offer, consult with legal counsel or other advisors, or provide any advice or recommendations to shareholders. This compromised the Shareholders' ability to make fully informed investment decisions, particularly in view of provisions in the SPAs that are not customary for take-over bid transactions. For example:
  - (i) clause 4(d) of the SPAs includes as a seller's representation and warranty that the Shares are free and clear of liens and encumbrances, and clause 1 contemplates the sale of the shares free and clear of liens and encumbrances. Without legal counsel's involvement, the Shareholders are left to determine on their own accord whether the representations and warranties set out in the SPAs are in fact accurate;
  - (ii) clause 7(b) of the SPAs contemplates the delivery of documents by the Shareholders at closing, mechanics for which are not specified. Without legal counsel's involvement, Shareholders have no assurance that they would in fact receive any consideration after their delivery of the closing documents to Avanti;

- (iii) clause 10 of the SPAs includes a limitation of liability provision that purports to limit claims against Avanti to the breach of representations and warranties or confidentiality provisions. This provision does not provide Shareholders with sufficient recourse against Avanti given the lack of counsel involvement and due diligence with respect to Avanti; and
- (iv) clause 17(j) of the SPAs includes a provision that purports to deem each SPA as having been jointly prepared by Avanti and the particular Shareholder. Given the means by which the Offer is being presented to Shareholders and the expiry date of March 24, 2023, the Shareholders do not have the opportunity to consult counsel about the contents of the SPA, and particularly the impact of its unusual terms on potential post-closing disputes.
- (f) Avanti has not provided the Shareholders with any information to enable the Shareholders to conduct any form of due diligence; and
- (g) the Shareholders and the Board of Directors do not have any information regarding Avanti's financial wherewithal and ability to complete all or any of the proposed share purchase transactions.

**D. NI 62-104 Applies to the Offer**

20. The Offer is a “take-over bid” and Avanti is an “offeror” within the meaning of National Instrument 62-104 – Take-Over Bids and Issuer Bids (“**NI 62-104**”). The Offer by Avanti is required to comply with the formal take-over bid requirements set forth in Part 2 of NI 62-104 (the “**Take-Over Bid Rules**”) because the Offer does not satisfy the requirements of any of the exemptions from the Take-Over Bid Rules set forth in sections 4.1 to 4.5 of NI 62-104.

**E. The Offer Fails to Comply with the Take-Over Bid Rules**

21. Sections 2.23 and 2.8 of NI 62-104 requires that an offeror make a take-over bid to all holders of the class of securities that is subject to the bid and that all shareholders be offered identical consideration.

22. Contrary to sections 2.23 and 2.8:
- (a) there can be no certainty that Avanti has sent the Offer to all Shareholders and, since there has not been either any public advertisement or announcement of the Offer, nor any public filing of the Offer documents, it is unknown whether all Shareholders had actually received the Offer; and
  - (b) there can be no certainty that all Shareholders would complete the share purchase and sale transaction contemplated in the SPAs on identical terms and for identical consideration since each Shareholder is asked to enter into a separate SPA with Avanti, which may be amended or modified by any one Shareholder and Avanti without such amendment or modification being reflected in the other SPAs.
23. Section 2.10 of NI 62-104 requires that an offeror prepare a take-over bid circular in Form 62-104F1 and that the take-over bid circular be delivered to shareholders and the offeree issuer and be filed with applicable securities commissions on SEDAR (the “**Circular Requirement**”). The prescribed form of take-over bid circular would include, among other things, information regarding the terms and conditions of the Offer, the source of funds to be used for payment of the purchase price and whether any securities of Evolution are beneficially owned or controlled by Avanti or any person acting jointly or in concert with Avanti.
24. Contrary to the Circular Requirement, Avanti has not submitted a take-over bid circular in relation to the Offer and, consequently, Evolution and its Shareholders are not able to fully evaluate the Offer.
25. Section 2.28.1 of NI 62-104 requires that a take-over bid allow securities to be deposited under a take-over bid for an initial deposit period of 105 days (the “**Minimum Deposit Period**”).
26. Contrary section 2.28.1 of NI 62-104, the SPAs contain a recital indicating that the offer to acquire the particular Shareholder's Evolution shares must be accepted by the Shareholder by March 24, 2023. In particular:
- (a) the offer letters were not sent on the date that was included in the offer letters and were believed to be sent on March 8, 2023; and

- (b) the SPAs presented to Shareholders are only open for acceptance until March 24, 2023, and do not contemplate the deposit or withdrawal of the particular Shareholder's Evolution shares during any period.

Accordingly, the Offer does not comply with the Minimum Deposit Period.

27. Section 2.31.1 of NI 62-104 requires that if an offeror is obligated to take up securities deposited under a take-over bid at the expiry of the initial deposit period, the offeror must extend the deposit period for at least 10 days to provide shareholders with an additional opportunity to tender to the bid (the “**Mandatory Extension Requirement**”).
28. Contrary to Section 2.31.1 of NI 62-104, the SPAs sent to Shareholders do not, and, accordingly, the Offer does not, appear to contemplate compliance with the Mandatory Extension Requirement.
29. Section 2.29.1 of NI 62-104 provides that an offeror must not take up securities deposited under a take-over bid unless, among other things, more than 50% of the outstanding securities of the class that are subject to the bid, excluding securities owned by the offeror and any person acting jointly or in concert with the offeror, have been deposited under the bid and not withdrawn (the “**Statutory Minimum Tender Condition**”).
30. Contrary to the Statutory Minimum Tender Condition, the SPAs sent to Shareholders do not, and accordingly the Offer does not, indicate that the completion of the transaction is subject to compliance with the Statutory Minimum Tender Condition or provide a Shareholder with any ability to terminate the share purchase agreement if this condition is not satisfied. The SPAs contain a 51% minimum tender condition, which can be waived at any time by Avanti. Therefore this term is coercive to the Shareholders, and does not provide any actual protections.
31. Section 2.30 of NI 62-104 provides that a security holder may withdraw securities deposited under a take-over bid at any time before the securities have been taken up by the offeror (the “**Withdrawal Right Requirement**”).
32. Contrary to section 2.30 of NI 62-104, the SPAs sent to Shareholders do not, and accordingly the Offer does not, provide Shareholders with a Withdrawal Right.



33. The Offer tendered by Avanti is seriously deficient. Accordingly, the Board is not able to fully evaluate the terms of the Offer for purposes of making a recommendation to Shareholders and complying with its obligation under the Take-over Bid Rules to send a directors' circular to Shareholders.
34. Avanti's conduct is contrary to NI 62-104 and undermines the protection and fair dealing accorded by the Take-Over Bid Rules. The Offer is deficient in respect of essentially all of the Take-Over Bid Rules; significantly, the Offer lacks sufficient disclosure or transparency to enable the Shareholders to assess the merits of the Offer and for the Board of Directors to make a recommendation. It is unfair and improper for the Shareholders to be deprived of the protections provided by the Take-Over Bid Rules.
35. The cease trade order sought in this Application would prevent the Shareholders from accepting the Offer and any portion of the Shares being sold to Avanti until such time as the FCAAS directs.

#### **F. Joint Hearing**

36. Evolution respectfully submits that a joint hearing is appropriate so as to avoid the potential for inconsistent findings if Evolution is forced to apply separately to the OSC. In addition, this would involve a considerable duplication of expense and evidence, which would be to the detriment of the public interest and the efficiency of the capital markets. The Commissions governing statutes emphasize consistency and efficiency which would be achieved with a joint hearing.
37. Finally, to the extent that a separate hearing before the OSC will cause delay, there is the risk that Evolution shareholders will accept the Offer. This transaction would then need to be undone at a later date, resulting in still greater expense and potential confusion.
38. Evolution relies on the following statutes, rules and instruments:
  - (a) *Financial and Consumer Affairs Authority of Saskatchewan Act*, SS 2012 C f-13.5;
  - (b) National Instrument 62-104 – Take-Over Bids and Issuer Bids;

- (c) *Ontario Securities Commission Rules of Procedure and Forms*, (2019) 42 OSCB 9714.
- (d) Saskatchewan, Financial and Consumer Affairs Authority of Saskatchewan, *Procedure on Hearings and Reviews Before the Commission (local policy)*, 12-602;
- (e) Saskatchewan, Financial and Consumer Affairs Authority of Saskatchewan, *Saskatchewan Policy Statement 12-602 – Procedure for Hearings and Reviews*;
- (f) *Securities Act*, 1988, SS 1988-89, c S-42.2;
- (g) *Securities Act*, RSO 1990, c. S.5; and
- (h) *Securities Commission Act 2021*, SO 2021 c-8 sch 9.

### III. EVIDENCE

39. The Applicant intends to rely on affidavit evidence, sworn, and submissions (memorandum of fact and law) to be delivered in advance of the hearing.

March 16, 2023

**BORDEN LADNER GERVAIS LLP**  
Barristers & Solicitors  
1900, 520 – 3<sup>rd</sup> Avenue SW  
Calgary, AB T2P 0R3

**Matthew Epp**

Tel: (403) 232-9712

Fax: (403) 266-1395

Email: MEpp@blg.com

**Tiffany Bennett**

Tel: (403) 232-9199

Fax: (403) 266-1395

Email: TiBennett@blg.com