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March 29, 2007

Headnote

Mutual Reliance Review System for Exemptive Relief Applications – Securities Act s. 130 – Relief from certain self-dealing restrictions in Part 15 of the Act – If the funds were public mutual funds, they would be able to rely on the exemption provided in National Instrument 81-102 – Mutual Funds; the self-dealing provisions only apply at the time of the merger; the merger is required to be approved by securityholders of both the terminating fund and the continuing fund; securityholders of the funds will receive an information circular for the holders meetings to approve the merger, which will be prepared in accordance with National Instrument 81-106 – Investment Fund Continuous Disclosure

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 121(2)(a), 126(a), 127(1)(b), 130

In the Matter of
the Securities Legislation of
British Columbia and Alberta
(the Jurisdictions)

and

In the Matter of
the Mutual Reliance Review System for Exemptive Applications

and

In the Matter of
McElvaine Investment Management Ltd.
(the Manager)

and

The McElvaine Investment Trust
(the Continuing Fund)

and

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The McElvaine Limited Partnership
(the Terminating Fund)

and

a proposed mutual fund corporation
(the MFC)

(collectively, the Filers)

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 Filers for a decision under the securities legislation of the Jurisdictions (the Legislation) that for the purpose of the merger transaction described below:

- (a) the Manager and the Terminating Fund are exempt from the restriction prohibiting a mutual fund from knowingly making or holding an investment to or in an issuer in which a person who is a substantial security holder of the mutual fund, its mutual fund manager or its mutual fund distributor has a significant interest (the Investment Restriction); and
- (b) the Manager, the Continuing Fund, the Terminating Fund and the MFC are exempt from the restriction against a mutual fund or responsible person knowingly causing the mutual fund to invest in any issuer in which a responsible person is a partner, officer or director, unless that fact is disclosed to the mutual fund security holders, and, if applicable, their written consent is obtained before the purchase, and to purchase or sell the securities of any issuer from or to the account of a responsible person (the Consent Restriction); and
- (c) the Manager is exempt from the requirement to file a report of every transaction of purchase or sale of securities between a mutual fund it manages and any related person or company for transactions between the Continuing Fund, the Terminating Fund and the MFC (the Reporting Requirement).

(collectively, the Requested Relief)

Under the Mutual Reliance Review System for Exemptive Relief Applications:

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- (a) the British Columbia Securities Commission is the principal regulator for this application and
- (b) this MRRS decision documents evidences the decision of each Decision Maker.

Interpretation

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

Representations

- ¶ 3 This decision is based on the following facts represented by the Filers:
1. the Manager is a corporation continued under the *Canada Business Corporations Act*;
 2. the Manager's head office is located in British Columbia;
 3. the Manager is the manager, promoter and portfolio adviser of the Continuing Fund and the promoter and portfolio adviser of the Terminating Fund; the Manager provides investment advice to the Terminating Fund and the Continuing Fund under management contracts;
 4. the Continuing Fund is an open-end investment fund established under the laws of British Columbia as a trust; the Terminating Fund is an open-end investment fund established under the laws of British Columbia as a limited partnership; the head office of each of the Continuing Fund and the Terminating Fund is in British Columbia;
 5. neither the Continuing Fund nor the Terminating Fund is a reporting issuer under the Legislation; securities of the Continuing Fund and Terminating Fund are distributed in reliance on prospectus exemptions; each investor in the Continuing Fund and Terminating Fund receives an offering memorandum for that fund prepared in accordance with Form 45-106F2 – Offering Memorandum for Non-Qualifying Issuers;
 6. the Manager will be the manager and promoter of a newly formed mutual fund corporation organized solely for the purpose of facilitating the merger of the Continuing Fund and the Terminating Fund; the securities of the MFC will be distributed in reliance on prospectus exemptions; the head office of the MFC will be located in British Columbia;

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7. Hakuna Matata Holdings Ltd. is a substantial security holder of the Manager, as it holds all of the outstanding voting securities of the Manager;
8. Hakuna Matata Holdings Ltd. will hold a significant interest in the MFC indirectly through the Manager; following incorporation of the MFC, the Manager will own all of the outstanding securities of the MFC;
9. subject to the approval of unitholders of the Continuing Fund and the Terminating Fund, the Manager intends to complete the following steps to effect a merger of the Continuing Fund and the Terminating Fund:
 - (a) the Terminating Fund will transfer all of its assets to the MFC for fair market value consideration, the purchase price for which will be satisfied by the MFC by issuing redeemable shares of the MFC (MFC Redeemable Shares) with an aggregate subscription price equal to the excess of the aggregate fair market value of the Terminating Fund's assets over the principal amount of the Terminating Fund's liabilities (the Phase 1 Transaction); the MFC Redeemable Shares will be redeemable for an amount equal to their stated capital, which will be the fair market value of any consideration paid to acquire the shares on issuance;
 - (b) within 60 days after the Phase 1 Transaction, the Terminating Fund will be wound up and its assets, comprised solely of the MFC Redeemable Shares, will be distributed to the partners of the Terminating Fund in proportion to their partnership units in the Terminating Fund;
 - (c) the Continuing Fund will subscribe, with cash, for a number of MFC Redeemable Shares in an equal number to the number of trust units of the Continuing Fund then outstanding (the Phase 2 Transaction); the MFC Redeemable Shares will have a nominal aggregate subscription price;
 - (d) the Continuing Fund will distribute to its unitholders, as a return of capital, the MFC Redeemable Shares; each unitholder of the Continuing Fund will receive one MFC Redeemable Share for each trust unit held by the unitholder immediately before this distribution;
 - (e) the MFC and the Continuing Fund will enter into an agreement of purchase and sale pursuant to which the MFC will transfer all or substantially all of its property, comprised of the Terminating Fund's assets and the proceeds from the Continuing Fund's subscription for the MFC Redeemable Shares, to the Continuing Fund in consideration for units of the Continuing Fund equal to the quotient that is obtained when the sum of the cash plus the fair market value of the Terminating Fund's

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assets is divided by the net asset value of the Continuing Fund's units immediately before that point (the Phase 3 Transaction);

- (f) within 60 days after the Phase 3 Transaction, the MFC will redeem the MFC Redeemable Shares held by the former partners of the Terminating Fund and unitholders of the Continuing Fund in exchange for units of the Continuing Fund on a pro rata basis;
 - (g) the number of trust units held by the persons who held units of the Continuing Fund immediately before the merger (the Original Trust Unitholders) will have increased as a result of the merger although the fair market value of the Original Trust Unitholders' interest in the Continuing Fund should not have changed; the units of the Continuing Fund will be consolidated so that there will be no change in the total number of trust units held by the Original Trust Unitholders; and
 - (h) the MFC will be dissolved;
- 10. completion of the merger transaction will be subject to, among other things, the approval of a majority of the votes cast by unitholders of the Continuing Fund and a majority of the partners of the Terminating Fund at meetings held for that purpose; in connection with those meetings, the Manager will provide an information circular to the unitholders of the Continuing Fund and partners of the Terminating Fund prepared in accordance with National Instrument 81-106 – *Investment Fund Continuous Disclosure*, which will include, among other things, a description of the proposed transaction and a summary of the principal Canadian federal income tax considerations for the Terminating Fund and for partners in the Terminating Fund;
 - 11. the investment objectives of the Terminating fund are substantially similar to those of the Continuing Fund;
 - 12. the proposed merger of the Continuing Fund and the Terminating Fund will be effected on a qualifying exchange basis that provides a tax-deferred rollover for unitholders of the Terminating Fund;
 - 13. no sales charges will be payable in connection with the Continuing Fund acquiring the investment portfolio of the Terminating Fund; the Manager will bear all costs related to effecting the merger;
 - 14. partners of the Terminating fund will have the right to redeem their investment in the Terminating Fund before the completion of the merger;

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15. in the absence of this decision, the Terminating Fund and the Continuing Fund would be prohibited from purchasing MFC Redeemable Shares and the MFC would be prohibited from selling the MFC Redeemable Shares to the Continuing Fund and purchasing units of the Continuing Fund;
16. in the opinion of the Manager, the proposed merger of the Terminating Fund and the Continuing Fund is in the best interests of the Continuing Fund and the Terminating Fund and represents the business judgment of responsible persons uninfluenced by considerations other than the best interests of the Continuing Fund and the Terminating Fund.

Decision

- ¶ 4 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.

The decision of the Decision Makers is that the Requested Relief is granted.

Martin Eady, CA
Director, Corporate Finance
British Columbia Securities Commission