

2003 BCSECCOM 859

Headnote

Mutual Reliance Review System for Exemptive Relief Applications – relief from registration and prospectus requirement in connection with the distribution and resale of units under a distribution reinvestment plan, subject to conditions – first trade relief granted subject to conditions in MI 45-102

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 48 and 76

Multilateral Instrument 45-102 *Resale of Securities*

**IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH
COLUMBIA, ALBERTA, SASKATCHEWAN, MANITOBA, ONTARIO,
QUEBEC, NOVA SCOTIA, NEW BRUNSWICK, PRINCE EDWARD
ISLAND, NEWFOUNDLAND AND LABRADOR, YUKON, NUNAVUT
AND NORTHWEST TERRITORIES**

AND

**IN THE MATTER OF THE MUTUAL RELIANCE REVIEW SYSTEM
FOR EXEMPTIVE RELIEF APPLICATIONS**

AND

IN THE MATTER OF DIVERSITRUST STABLE INCOME FUND

MRRS DECISION DOCUMENT

WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in each of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and Labrador, Yukon, Nunavut and Northwest Territories (the “Jurisdictions”) has received an application from diversiTrust *Stable Income Fund* (the “Trust”) for a decision, pursuant to the securities legislation of the Jurisdictions (the “Legislation”), that the requirement contained in the Legislation to be registered to trade in a security and to file and obtain a receipt for a preliminary prospectus and a final prospectus (the “Registration and Prospectus Requirements”) shall not apply to the distribution or resale of units of the Trust pursuant to a distribution reinvestment plan (the “Plan”), subject to certain conditions;

AND WHEREAS under the Mutual Reliance Review System for Exemptive Relief Applications (the “System”), the Ontario Securities Commission is the principal regulator for this application;

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AND WHEREAS, unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 *Definitions* or in Québec Commission Notice 14-101;

AND WHEREAS the Trust has represented to the Decision Makers that:

1. The Trust is an unincorporated closed-end investment trust established under the laws of the Province of Ontario by a declaration of trust dated as of August 22, 2003.
2. The Trust is not considered to be a “mutual fund” as defined in the Legislation because the holders of Units (“Unitholders”) are not entitled to receive on demand an amount computed by reference to the value of a proportionate interest in the whole or in part of the net assets of the Trust as contemplated in the definition of “mutual fund” in the Legislation.
3. The Trust became a reporting issuer or the equivalent thereof in the Jurisdictions on August 25, 2003 upon obtaining a receipt for its final prospectus dated August 22, 2003 (the “Prospectus”).
4. The beneficial interests in the Trust are divided into a single class of voting units (the “Units”). The Trust is authorized to issue an unlimited number of Units. Each Unit represents a Unitholder’s proportionate undivided beneficial interest in the Trust. As of the date hereof, 19,212,721 Units are presently issued and outstanding.
5. The Units are listed and posted for trading on the Toronto Stock Exchange (the “TSX”) under the symbol “DTS.UN”.
6. The Trust currently intends to make cash distributions (“distributions”) of distributable income to Unitholders of record on the day on which the Trust declares a distribution to be payable (each a “Record Date”), and such distributions will be payable on a day which is on or about the tenth business day of the month following a Record Date (each a “Distribution Date”).
7. The Trust has adopted the Plan which, subject to obtaining all necessary regulatory approvals, will permit distributions to be automatically reinvested, at the election of each Unitholder, to purchase additional Units (“Plan Units”) pursuant to the Plan and in accordance with a distribution reinvestment plan services agreement entered into by the Trust, Dynamic Mutual Funds Ltd. in its capacity as manager of the Trust (in such capacity, the “Manager”) and Computershare Trust Company in its capacity as agent under the Plan (in such capacity, the “Plan Agent”).

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8. Optional Cash Payments, along with a Plan Participant's notice of his or her intention to make an Optional Cash Payment, must be received by the Plan Agent via the applicable CDS Participant on or before 5:00 p.m. (Toronto time) on the day which is at least five business days prior to a Distribution Date, in order to be invested in Plan Units immediately following such Distribution Date. Optional Cash Payments and/or notices received less than five business days prior to a Distribution Date will result in the Plan Agent holding (without interest) the Optional Cash Payment and using the same to purchase Plan Units after the second Distribution Date following the date of receipt of the Optional Cash Payment.
9. Distributions due to participants in the Plan ("Plan Participants") will be paid to the Plan Agent and applied to purchase Plan Units. Plan Units purchased under the Plan will be purchased by the Plan Agent in the market or directly from the Trust in the following manner:
 - (a) if the weighted average trading price on the Toronto Stock Exchange (or such other stock exchange on which the Units are listed, if the Units are not listed on the Toronto Stock Exchange) for the 10 trading days immediately preceding the relevant Distribution Date, (the "Market Price") is less than the net asset value of the Trust per Unit (the "Net Asset Value per Unit") on the Distribution Date, the Plan Agent shall apply the distributions either to purchase Units in the market or from treasury as follows: purchases in the market will be made by the Plan Agent during the 10 trading day period following the Distribution Date and the price paid for those Plan Units will not exceed 115% of the Market Price of the Units. On the expiry of that period, the unused part, if any, of the distributions attributable to the Plan Participants will be used to purchase Plan Units from the Trust at the higher of (i) the Net Asset Value per Unit on the relevant Distribution Date and (ii) 95% of the Market Price;
 - (b) if the Market Price is equal to or greater than the Net Asset Value per Unit on the Distribution Date, the Plan Agent shall apply the distributions to purchase Plan Units from the Trust through the issue of new Plan Units at the higher of (i) the Net Asset Value per Unit on the relevant Distribution Date and (ii) 95% of the Market Price on the relevant Distribution Date; and
 - (c) the Plan Units purchased in the market or from the Trust's treasury will be allocated by the Plan Agent on a *pro rata* basis to the Plan Participants.

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10. The Plan also allows Plan Participants to make optional cash payments (“Optional Cash Payments”) which will be used by the Plan Agent to purchase Plan Units. A Plan Participant must invest a minimum of \$100 per Optional Cash Payment. Optional Cash Payments will be used by the Plan Agent to purchase Plan Units on the same basis as distributions as described above. The aggregate number of Plan Units that may be purchased with Optional Cash Payments in a calendar year will be limited to 2% of the outstanding Units at the commencement of that calendar year.
11. The Plan Agent will purchase Plan Units only in accordance with mechanics described in the Plan and, accordingly, there is no opportunity for a Plan Participant or the Plan Agent to speculate on Net Asset Value per Unit.
12. The Trust will invest in the assets with the objective of providing Unitholders with a stable stream of monthly cash distributions as well as a cost-effective method of reducing the risk of investing in such securities through broad diversification. Accordingly, the Net Asset Value per Unit should be less volatile than that of a typical equity fund, and the potential for significant changes in the Net Asset Value per Unit over short periods of time is moderate.
13. The amount of distributions that may be reinvested in Plan Units issued from treasury is small relative to the Unitholder’s equity in the Trust.
14. The Plan is open for participation by all Unitholders (other than non-residents of Canada), so that such Unitholders can reduce potential dilution by electing to participate in the Plan.
15. As all Units, including those issued pursuant to the Plan, are issued in book-entry only form and are held by, and registered in the name of CDS, Plan Participants will not be entitled to receive certificates representing Plan Units purchased or issued under the Plan.
16. A Plan Participant may terminate his or her participation in the Plan by providing the Plan Agent via the applicable CDS Participant, at least five business days’ prior written notice to the manager and, such notice, if actually received no later than five business days prior to the next Record Date, will have effect beginning with the distribution to be made with respect to such Record Date. Thereafter, distributions payable to such Unitholder will be in cash.

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17. The Manager reserves the right to suspend or terminate the Plan at any time in its sole discretion, in which case Plan Participants and the Plan Agent will be sent written notice thereof. In particular, the Manager may, on behalf of the Trust, terminate the Plan in its sole discretion, upon not less than 30 days' prior written notice to the Plan Participants and the Plan Agent.
18. The Manager may amend, modify or suspend the Plan at any time in its sole discretion, provided that it gives notice of that amendment, modification or suspension to (i) CDS Participants through which the Plan Participants hold their Trust Units and (ii) the Plan Agent. Any amendments to the Plan are subject to prior approval by the Toronto Stock Exchange. The Manager may adopt additional rules and regulations to facilitate the administration of the Plan subject to the approval of any applicable securities regulatory authority or stock exchange.
19. The distribution of the Plan Units by the Trust pursuant to the Plan cannot be made in reliance on certain registration and prospectus exemptions contained in the Legislation as the Plan involves the reinvestment of distributable income distributed by the Trust and not the reinvestment of dividends or interest of the Trust, capital gains or distributions out of earnings or surplus.
20. The distribution of the Plan Units by the Trust pursuant to the Plan cannot be made in reliance on registration and prospectus exemptions contained in the Legislation for distribution reinvestment plans of mutual funds, as the Trust is not considered to be a "mutual fund" as defined in the Legislation because the Unitholders are not entitled to receive on demand an amount computed by reference to the value of a proportionate interest in the whole or in a portion of the net assets of the Trust.

AND WHEREAS under the System, this MRRS Decision Document evidences the decision of each of the Decision Makers (collectively, the "Decision");

AND WHEREAS each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Makers with the jurisdiction to make the Decision has been met;

THE DECISION of the Decision Makers pursuant to the Legislation is that the trades of Plan Units to the Plan Participants pursuant to the Plan shall not be subject to the Registration and Prospectus Requirements of the Legislation provided that:

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- (a) at the time of the trade the Trust is a reporting issuer or the equivalent under the Legislation and is not in default of any requirements of the Legislation;
- (b) no sales charge is payable in respect of the distributions of Plan Units from treasury;
- (c) the Trust has caused to be sent to the person or company to whom the Plan Units are traded, not more than 12 months before the trade, a statement describing:
 - (i) their right to withdraw from the Plan and to make an election to receive cash instead of Plan Units on the making of a distribution by the Trust; and
 - (ii) instructions on how to exercise the right referred to in (i);
- (d) in the calendar year during which the trade takes place, the aggregate number of Plan Units issued pursuant to the Optional Cash Payments shall not exceed 2% of the aggregate number of Units outstanding at the commencement of that calendar year; and
- (e) except in Québec, the first trade or resale of Plan Units acquired pursuant to the Plan in a Jurisdiction shall be deemed a distribution or primary distribution to the public under the Legislation unless the conditions of paragraphs 2 through 5 of subsection 2.6(3) or (4) of Multilateral Instrument 45-102 are satisfied;
- (f) in Québec, the first trade (alienation) of Plan Units acquired pursuant to the Plan in a Jurisdiction shall be deemed to be a distribution or primary distribution to the public unless:
 - (i) at the time of the first trade, the Trust is a reporting issuer in Québec and is not in default on any of the requirements of securities legislation in Québec;
 - (ii) no unusual effort is made to prepare the market or to create a demand for the Plan Units;
 - (iii) no extraordinary commission or consideration is paid to a person or company other than the vendor of the Plan Units in respect of the first trade; and

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- (iv) the vendor of the Plan Units, if in a special relationship with the Trust, has no reasonable grounds to believe that the Trust is in default of any requirement of the Legislation of Québec; and
- (g) disclosure of the initial distribution of the Plan Units is made to the relevant Jurisdictions by providing the particulars of the date of the distribution of such Plan Units, the number of such Plan Units and the purchase price paid or to be paid for such Plan Units in:
 - (i) an information circular or take-over bid circular filed in accordance with the Legislation; or
 - (ii) a letter filed with the Decision Maker in the relevant Jurisdiction by a person or company certifying that the person or company has knowledge of the facts contained in the letter,

when the Trust distributes such Plan Units for the first time and thereafter, not less frequently than annually, unless the aggregate number of Plan Units so traded in any month exceeds 1% of the Units outstanding at the beginning of a month in which the Plan Units were traded, in which case a separate report shall be filed in each relevant Jurisdiction in respect of that month within ten days of the end of such month.

Dated this 9th day of December, 2003.

Paul M. Moore

Theresa McLeod