

# **2003 BCSECCOM 143**

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Application – relief from the registration and prospectus requirements to allow an open-ended investment trust to issue units to existing unitholders under a distribution reinvestment plan subject to conditions – first trade relief for additional units not subject to a seasoning period

## **Applicable British Columbia Provisions**

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

Multilateral Instrument 45-102 *Resale of Securities*, ss. 2.6(3) and (4)

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

**AND**

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

**AND**

## **IN THE MATTER OF HARVEST ENERGY TRUST**

## **MRRS DECISION DOCUMENT**

WHEREAS the local securities regulatory authority or regulator (the "Decision Maker") in each of British Columbia, Saskatchewan, Manitoba, Ontario, Québec, Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and Labrador, Yukon, Nunavut and Northwest Territories (the "Jurisdictions") has received an application from Harvest Energy Trust ("Harvest") for a decision, under the securities legislation of the Jurisdictions (the "Legislation"), that the requirements 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 prospectus (the "Registration and Prospectus Requirements") shall not apply to certain trades in units of Harvest issued under a distribution reinvestment plan;

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 Harvest has represented to the Decision Makers that:

1. Harvest is an open-ended investment trust formed under the laws of the province of Alberta under a trust indenture dated September 27, 2002 (the "Trust Indenture");
2. Harvest is a reporting issuer in each of the provinces of Canada other than Quebec. To its knowledge, Harvest is not in default of any requirements under the legislation of any of the Jurisdictions;
3. the trustee of Harvest is Valiant Trust Company. The entire beneficial interest in Harvest is held by the holders of trust units ("Units") issued by Harvest;
4. Harvest Operations Corp. (the "Corporation"), a wholly-owned subsidiary of Harvest, manages and administrates Harvest;
5. the Units are listed and posted for trading on the Toronto Stock Exchange (the "TSX");
6. Harvest currently makes and expects to continue to make monthly distributions of distributable income ("Cash Distributions"), if any, to the holders of Units ("Unitholders"). The distributable income of Harvest for any month is a function of the amounts received by Harvest under certain royalties, other income and certain expenses;
7. Harvest is not a "mutual fund" under the Legislation as the holders of Units 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 Harvest, as contemplated by the definition of "mutual fund" in the Legislation;
8. Harvest has authorized the establishment of a plan (the "Plan") under which eligible Unitholders may, at their option, purchase additional Units ("Additional Units") of Harvest by directing that Cash Distributions be applied to the purchase of Additional Units (the "Distribution Reinvestment Option") or by making optional cash payments (the "Cash Payment Option");
9. except as provided in paragraph 10 below, all Additional Units purchased under the Plan will be purchased by the Valiant Trust Company (the "Plan Agent") directly from Harvest on the relevant distribution payment date at a price determined by reference to the Average Market Price (defined in the Plan as the arithmetic average of the daily volume weighted average trading prices of the Units on the TSX for the trading days from and including the

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second business day following the distribution record date to and including the second business day prior to the distribution payment date on which at least a board lot of Units was traded such period not to exceed 20 trading days). Additional Units purchased under the Distribution Reinvestment Option will be purchased at a 5% discount to the Average Market Price. Additional Units purchased under the Cash Payment Option will be purchased at the Average Market Price;

10. at the discretion of the Corporation, Additional Units purchased under the Plan or under the Distribution Reinvestment Option will either be acquired from treasury at 95% of Average Market Price or will be purchased at prevailing market prices through the facilities of the TSX following the distribution record date. Additional Units which are purchased through the facilities of the TSX will be acquired during the 20 business day period following the relevant distribution record date but will only be acquired at prices that are equal to or less than 115% of the volume weighted trading price of the Units on the TSX for the 10 trading days immediately preceding the date that Units are purchased;
11. the Cash Payment Option is available to eligible Unitholders who elect to reinvest their Cash Distributions under the Distribution Reinvestment Option;
12. under the Distribution Reinvestment Option, Cash Distributions will be paid to the Plan Agent and applied by the Plan Agent to the purchase of Additional Units, which will be held under the Plan for the account of eligible Unitholders who have chosen to participate in the Plan ("Participants");
13. under the Cash Payment Option, a Participant may, through the Plan Agent, purchase Additional Units up to a stipulated maximum dollar amount per month and subject to a minimum amount per remittance. The aggregate number of Additional Units that may be purchased under the Cash Payment Option by all Participants in any financial year of Harvest will be limited to a maximum of 2% of the number of Units issued and outstanding at the start of the financial year;
14. no brokerage fees or service charges will be payable by Participants in connection with the purchase of Additional Units under the Plan;
15. Additional Units purchased and held under the Plan will be registered in the name of the Plan Agent or its nominee as agent for the Participants, and all cash distributions on Units so held for the account of a Participant will be automatically reinvested in Additional Units in accordance with the terms of the Plan and the election of the Participant;

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16. the Plan permits full investment of reinvested Cash Distributions and optional cash payments because fractions of Units, as well as whole Units, may be credited to Participants' accounts with the Plan Agent;
17. Harvest reserves the right to determine for any distribution payment date how many Additional Units will be available for purchase under the Plan;
18. if, in respect of any distribution payment date, fulfilling all of the elections under the Plan would result in Harvest exceeding either the limit on Additional Units set by Harvest or the aggregate annual limit on Additional Units issuable under the Cash Payment Option, then elections for the purchase of Additional Units on such distribution payment date will be accepted: (i) first, from Participants electing the Distribution Reinvestment Option; and (ii) second, from Participants electing the Cash Payment Option. If Harvest is not able to accept all elections in a particular category, then purchases of Additional Units on the applicable distribution payment date will be pro rated among all Participants in that category according to the number of Additional Units sought to be purchased;
19. if Harvest determines that no Additional Units will be available for purchase under the Plan for a particular distribution payment date, then all Participants will receive the Cash Distribution announced by Harvest for that distribution payment date;
20. a Participant may terminate its participation in the Plan at any time by submitting a termination form to the Plan Agent. A termination form received between a distribution record date and a distribution payment date will become effective after that distribution payment date;
21. Harvest reserves the right to amend, suspend or terminate the Plan at any time, provided that such action shall not have a retroactive effect which would prejudice the interests of the Participants. All Participants will be sent written notice of any such amendment, suspension or termination; and
22. the Plan will not be available to Unitholders who are residents of the United States and, until such time as Harvest becomes a reporting issuer in Québec, the Plan will not be available to Unitholders who are residents of Québec;

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

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AND WHEREAS 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;

AND WHEREAS the Decision of the Decision Makers under the Legislation is that the trades of Additional Units by Harvest to the Plan Agent for the account of Participants under the Plan shall not be subject to the Registration and Prospectus Requirements of the Legislation provided that:

1. at the time of the trade Harvest is a reporting issuer or the equivalent under the Legislation and is not in default of any requirements of the Legislation;
2. no sales charge is payable in respect of the trade;
3. Harvest has caused to be sent to the person or company to whom the Additional 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 Units on the making of a distribution of income by Harvest, and
  - (ii) instructions on how to exercise the right referred to in paragraph 3(i) above;
4. the aggregate number of Additional Units issued under the Cash Payment Option of the Plan in any financial year of Harvest shall not exceed 2% of the aggregate number of Units outstanding at the start of that financial year;
5. except in Québec, the first trade in Additional Units acquired under this Decision will be a distribution or primary distribution to the public unless the conditions in paragraphs (2) through (5) of subsections 2.6(3) and (4) of Multilateral Instrument 45-102 Resale of Securities are satisfied; and
6. in Québec, the first trade in Additional Units acquired under this Decision will be deemed a distribution unless:
  - (i) the issuer is and has been a reporting issuer in Québec for the 12 months preceding the alienation;
  - (ii) no unusual effort is made to prepare the market or to create a demand for the securities that are the subject of the alienation;

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- (iii) no extraordinary commission or other consideration is paid in respect of the alienation;
  - (iv) if the seller of the securities is an insider of the issuer, the seller has no reasonable grounds to believe that the issuer is in default of any requirement of securities legislation;
7. disclosure of the initial distribution of Additional Units under this Decision is made to the relevant Jurisdictions by providing particulars of the date of the distribution of such Additional Units, the number of such Additional Units and the purchase price paid or to be paid for such Additional 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; and

when Harvest distributes such Additional Units for the first time Harvest will provide disclosure to the relevant Jurisdictions which sets forth the date of such distribution, the number of such Additional Units and the purchase price paid for such Additional Units, and thereafter not less frequently than annually, unless the aggregate number of Additional Units so distributed in any month exceeds 1 % of the aggregate number of Units outstanding at the beginning of the month in which the Additional Units were distributed, in which case the disclosure required under this paragraph shall be made in each relevant Jurisdiction in respect of that month within ten days of the end of such month.

**DATED** this 31st day of January, 2003.

Howard I. Wetston

Robert L. Shirriff