

# **2004 BCSECCOM 327**

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications – relief from the registration and prospectus requirements in connection with the issuance of units of an investment trust to existing unit holders under a distribution reinvestment plan, subject to certain conditions – first trade in additional units deemed a distribution unless made in compliance with 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,  
QUÉBEC, NOVA SCOTIA NEW BRUNSWICK, PRINCE EDWARD  
ISLAND AND NEWFOUNDLAND AND LABRADOR**

**AND**

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

**AND**

**IN THE MATTER OF FAIRWAY DIVERSIFIED INCOME AND  
GROWTH TRUST**

## **MRRS DECISION DOCUMENT**

WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in each of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador (the “Jurisdictions”) has received an application from Fairway Diversified Income and Growth Trust (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 closed-end investment trust established under the laws of the Province of Ontario by a declaration of trust dated as of February 26, 2004.
2. The Trust is not considered to be a “mutual fund” as defined in the Legislation because the holders of units of the Trust (“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 February 27, 2004 upon obtaining a receipt for its final prospectus dated February 26, 2004.
4. The Units are listed and posted for trading on the Toronto Stock Exchange (the “TSX”) under the symbol “FDT.UN”.
5. Each unit of the Trust (“Unit”) represents an equal, undivided interest in the net assets of the Trust and is redeemable at the net asset value of the Trust (“Net Asset Value”) per Unit on the second last business day in March of each year.
6. Each Unit is entitled to one vote at all meetings of Unitholders and is entitled to participate equally with all other Units with respect to any and all distributions made by the Trust.
7. The Trust intends to make monthly cash distributions to Unitholders. The distribution for the first twelve months following the closing of the offering of Units is expected to be \$0.70 per Unit, representing an annual distribution of 7% based on a subscription price of \$10.00 per Unit. Distributions will be payable to Unitholders of record on the last business day of each calendar month prior to the termination date of the Trust, or such other date determined by the Trustee from time to time (each, a “Record Date”). The Trust intends to pay distributions to Unitholders not more than 15 days after each Record Date (each, a “Distribution Date”). The first distribution will be payable to Unitholders of record on April 30, 2004. The Trust may also make other distributions at any time in addition to monthly distributions, if it considers it

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appropriate, including to ensure that the Trust will not be liable for income tax under the *Income Tax Act* (Canada).

8. 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 a Unitholder, to purchase additional Units (“Plan Units”) pursuant to the Plan and in accordance with the provisions of a distribution reinvestment plan agency agreement entered into by Fairway Advisors Inc., as trustee of the Trust (in such capacity, the “Trustee”) and Computershare Investor Services Inc. (the “Plan Agent”).
9. Pursuant to the terms of the Plan, a Unitholder will be able to elect to become a participant in the Plan by notifying the Plan Agent, via the applicable participant (“CDS Participant”) in the Canadian Depository for Securities Limited (“CDS”) depository service through which such Unitholder holds Units, of its decision to participate in the Plan. Participation in the Plan will not be available to Unitholders who are not residents of Canada for the purposes of the *Income Tax Act* (Canada).
10. Distributions due to Unitholders who have elected to participate in the Plan (the “Plan Participants”) will be automatically reinvested on their behalf by the Plan Agent to purchase Plan Units directly from the Trust at a price equal to the weighted average trading price on the TSX for the five trading days immediately preceding the relevant Distribution Date.
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 amount of distributions that may be reinvested in Plan Units issued from treasury will be small relative to a Unitholder’s equity in the Trust.
13. 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.
14. Since 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.
15. A cash adjustment for any fractional Plan Unit to which a Plan Participant is entitled will be paid by the Plan Agent upon each distribution, provided that

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the Trust has first caused the amount of any such cash adjustment to be paid to the Plan Agent.

16. The Plan Agent's fees for administering the Plan will be paid by the Trust out of the assets of the Trust.
17. A Plan Participant may terminate his or her participation in the Plan by causing to be provided, via the applicable CDS Participant, at least ten business days' prior written notice to the Plan Agent and, such notice, if actually received no later than ten 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.
18. The Trustee may terminate or suspend the Plan in its sole discretion, upon not less than 30 days' prior written notice to the Plan Participants via the applicable CDS Participant and the Plan Agent.
19. The Trustee may amend or modify the Plan at any time, provided that it gives notice of that amendment or modification to (i) CDS Participants through which the Plan Participants hold their Units and (ii) the Plan Agent. Any amendments to the Plan are subject to the approval of the Toronto Stock Exchange. The Trustee 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.
20. 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 and not the reinvestment dividends, interest, capital gains or earnings or surplus;
21. 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 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");

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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:

- (a) except in Alberta, 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) except in Alberta, no sales charge is payable in respect of the distributions of Plan Units from treasury;
- (c) except in Alberta, 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) 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 Section 2.6(3) of Multilateral Instrument 45-102 – Resale of Securities are satisfied; and
- (e) 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;

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- (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
- (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.

Dated this 29<sup>th</sup> day of April, 2004.

Paul M. Moore

Robert W. Davis