

## **2002 BCSECCOM 508**

### **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications – relief from the registration and prospectus requirements to allow a closed-end 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. 34(1)(a), 48, 61 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, ALBERTA, SASKATCHEWAN, MANITOBA, ONTARIO, QUEBEC, 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 CASURINA PERFORMANCE 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 and Newfoundland and Labrador (the “Jurisdictions”) has received an application from Casurina Performance Fund (the “Fund”) 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 final prospectus (the “Registration and Prospectus Requirements”) shall not apply to the distribution or resale of Units (as defined below) of the Fund issued pursuant to an automatic reinvestment plan (as described below);

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 the Fund has represented to the Decision Makers that:

1. The Fund is a closed-end investment trust established under the laws of the Province of Ontario on April 16, 2002. The Units will be listed on the Toronto Stock Exchange (the "TSE"). The Fund is not a mutual fund for securities law purposes.
2. As a result of filing a final prospectus (the "Prospectus") on April 25, 2002, the Fund became a reporting issuer in each of the Jurisdictions.
3. The Fund is authorized to issue an unlimited number of transferable units (the "Units") of the Fund, each of which represents an equal, undivided interest in the net assets of the Fund and entitles the holder (the "Unitholder") to one vote at meetings of Unitholders and to participate equally with respect to any and all distributions made by the Fund, including distributions of net income and net realized capital gains.
4. The business of the Fund is to invest in debt and equity securities. The Fund's portfolio will consist primarily of investments which generate capital gains, but will also include investments which generate income. The Fund's investment objective is to provide Unitholders with long-term capital growth through selection and management of long and short positions in equity and debt securities and through strategic trading.
5. The Fund intends to make annual distributions to Unitholders of all of its income for tax purposes. Distributions over the life of the Fund will be derived primarily from net realized capital gains and income from the Fund's portfolio. Distributions will be payable to Unitholders of record at the close of business on or about the last business day of December in each year with the first such distribution to be made in December 2002.
6. The Fund proposes to establish, subject to regulatory approval, an automatic reinvestment plan (the "Plan") pursuant to which distributions by the Fund will be automatically reinvested in additional Units of the Fund.
7. Distributions payable to participants in the Plan ("Plan Participants") will be paid to CIBC Mellon Trust Company in its capacity as agent under the Plan (the "Plan Agent") and applied to purchase Units. Such purchases will either be made through the purchase of new Units from the Fund or in the market.
8. No commissions or service charges will be payable by Plan Participants in connection with the Plan.

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9. If the closing market price plus applicable commissions or brokerage charges (the “Market Price”) of the Units on the date that the distribution is declared (the “Declaration Date”) is less than the net asset value (the “NAV”) per Unit as at that date, the Plan Agent will apply the distribution to purchase Units in the market. If the Market Price of the Units on the applicable Declaration Date is greater than the NAV per Unit, the Plan Agent will apply the distribution to purchase Units from the Fund through the issue of whole new Units at a price per Unit equal to the greater of (a) NAV per Unit on the Declaration Date; and (b) the weighted average of the trading prices of the Units for the five trading days preceding the Declaration Date.
10. If the Market Price of the Units on the Declaration Date is less than the NAV per Unit as at that date, the Plan Agent will purchase Units in the market during the 15 business day period next following the Declaration Date at such times as the Market Price of the Units is less than the NAV per Unit as at the Declaration Date. Upon the expiration of such period, the unused part, if any, of the distribution attributable to Plan Participants will be used to purchase Units from the Fund on the basis set forth above.
11. The Units purchased in the market or from the Fund under the Plan will be allocated to Plan Participants in proportion to their share of the distribution. Since registrations and transfers of Units are only made through the book-based system operated by the Canadian Depository for Securities Limited (“CDS”) and, therefore, through participants in the CDS system (individually, a “CDS Participant” and, collectively, “CDS Participants”), Unitholders will receive confirmation of the number of Units issued to them under the Plan and the issue price per Unit from their CDS Participant.
12. The Plan Agent will be purchasing Units only in accordance with the mechanism described in the Plan and, accordingly, there is no opportunity for a Plan Participant or the Plan Agent to speculate on changes in the NAV per Unit.
13. In light of the nature of the Fund and the terms of the Plan, the Fund believes that the potential for dilution arising from the issuance of Units by the Fund at the NAV per Unit on a Declaration Date is not significant.
14. Unitholders can ensure against potential dilution, albeit insignificant, by participating in the Plan. Under the Plan, distributions by the Fund are automatically reinvested in additional Units, unless a Unitholder elects not to participate in the Plan. Since the Fund is designed for long-term capital growth rather than short-term income generation, it is expected that most Unitholders will not elect to opt out of the Plan.

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15. A Plan Participant may terminate his or her participation in the Plan at any time by written notice to the Plan Agent through his or her CDS Participant following which distributions payable to such Plan Participant will be made in cash.
16. Plan Participants do not have the option of making cash payments to purchase additional Units under the Plan.
17. To the extent that the Fund distributes additional Units to Unitholders pursuant to the Plan, such distributions are subject to the Registration and Prospectus Requirements under the Legislation unless appropriate exemptions are available.
18. The distribution of additional Units pursuant to the Plan cannot be made in reliance on certain prospectus exemptions contained in the Legislation because they are available in respect of the reinvestment of dividends, interest or distributions of capital gains out of earnings or surplus and not the reinvestment of income and net realized capital gains as contemplated by the Plan.
19. The distribution of additional Units pursuant to the Plan cannot be made in reliance on prospectus exemptions contained in the Legislation for reinvestment plans of mutual funds because the Fund is not a “mutual fund” as defined in the Legislation.
20. The first trade of additional Units acquired under the Plan cannot be made under section 2.6(4) of Multilateral Instrument 45-102: Resale of Securities (“45-102”) until such time as the Fund has been a reporting issuer for the 12 months immediately preceding such a first trade. The Fund will not have been a reporting issuer for 12 months at the time of the first distribution of additional Units pursuant to the Plan.

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

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;

THE DECISION of the Decision Makers under the Legislation is that the distribution of Units of the Fund issued pursuant to the Plan shall not be subject to the Registration and Prospectus Requirements provided that:

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1. at the time of the distribution, the Fund 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 distribution;
3. the Prospectus contains a statement describing:

- (i) the right of the Plan Participants to withdraw from the Plan and to elect to receive cash instead of Units upon a distribution by the Fund; and
- (ii) instructions on how to exercise the right referred to under (i) above;

and, in addition, similar disclosure will be contained in the Fund's annual financial statements;

4. disclosure of the distribution of Units is made to the relevant Jurisdictions by providing:

- (i) the particulars of the date of the distribution of such Units;
- (ii) the number of such Units; and
- (iii) the purchase price paid or to be paid for such Units;

in a letter filed with the Decision Maker in each of the relevant Jurisdictions, by a person or company certifying that the person or company has knowledge of the facts contained in the letter, when the Fund distributes such Units for the first time and thereafter, not less frequently than annually, unless the aggregate number of Units so traded in any month exceeds one percent of the Units outstanding at the beginning of that month, in which case a separate report shall be filed in each relevant Jurisdiction (other than Quebec) in respect of that month within ten days of the end of such month;

5. except in Quebec, the first trade of Units acquired pursuant to this Decision will be deemed a distribution or primary distribution to the public under the Legislation unless the conditions in paragraphs 2 through 5 of subsection 2.6(4) of MI 45-102 are satisfied; and

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6. in Quebec, the alienation of Units acquired pursuant to this Decision will be deemed a distribution unless:
- (i) at the time of the alienation, the Fund is a reporting issuer in Quebec;
  - (ii) no unusual effort is made to prepare the market or to create a demand for the Units;
  - (iii) no extraordinary commission or consideration is paid to a person or company in respect of the alienation;
  - (iv) if the seller of Units is an insider of the Fund, the seller has no reasonable grounds to believe that the Fund is in default of any requirement of the Legislation.

DATED June 6, 2002

Paul Moore

Robert L. Shirriff