

# 2004 BCSECCOM 551

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act s. 76 - Exemption from s. 61 requirement to file a prospectus in connection with a distribution - An issuer wants to resell its own securities that it purchased in the secondary market - The securities will be sold through an exchange; the issuer will comply with the insider continuous disclosure requirements

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, s. 76

## **IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH COLUMBIA, ALBERTA, SASKATCHEWAN, ONTARIO, 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 MINT INCOME FUND**

## **MRRS Decision Document**

WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in each of British Columbia, Alberta, Saskatchewan, Ontario, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador (the “Jurisdictions”) has received an application from MINT *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 file and obtain a receipt for a preliminary prospectus and a final prospectus (the “Prospectus Requirements”) shall not apply to the distribution of units of the Trust (the “Units”) which have been repurchased by the Trust pursuant to the mandatory market purchase program, the discretionary market purchase program, or by way of redemption of Units at the request of holders thereof, nor to the first trade or resale of such repurchased Units (the “Repurchased Units”) which have been distributed by the Trust;

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;

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

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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 an Amended and Restated Trust Agreement (the “Trust Agreement”).
2. The Trust became a reporting issuer or the equivalent thereof in the Jurisdictions in February 1997. As of the date hereof, the Trust is not in default of any requirements under the Legislation.
3. The Trust is not considered to be a “mutual fund” as defined in the Legislation because the holders of the 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.
4. The Units are listed and posted for trading on the Toronto Stock Exchange (the “TSX”) under the trading symbol “MID.UN”. As at September 8, 2004, 4,485,358 Units are issued and outstanding.
5. Each Unit represents an equal, undivided beneficial 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 January 31 of each year commencing in 2005.
6. MINT Management Limited (the “Manager”) is the manager and trustee of the Trust.
7. In order to enhance liquidity and to provide market support for the Units, pursuant to the Trust Agreement and the terms and conditions that attach to the Units, the Trust is obligated, subject to compliance with any applicable regulatory requirements, to purchase (the “Mandatory Purchase Program”) any Units offered in the market on a business day at the then prevailing market price if at any time the price at which Units are then offered for sale is less than 95% of the Net Asset Value per Unit as at the close of business in Toronto, Ontario on the immediately preceding business day, provided that:
  - (a) the maximum number of Units that the Trust shall purchase in any calendar quarter will be 1.25% of the number of Units outstanding at the beginning of each such calendar quarter; and
  - (b) the Trust shall not be required to purchase Units pursuant to the Mandatory Purchase Program if:

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- (i) in the opinion of the Manager such transactions, if consummated, could result in the marketability of the Units being severely impaired to the detriment of the Unitholders;
  - (ii) in order to fund the purchase the Trust is not able to liquidate portfolio securities in an orderly manner consistent with the Trust's investment guidelines and objectives or, alternatively, it is not in the best interests of the Unitholders to do so; or
  - (iii) there is, in the judgment of the Manager,
    - (A) any material legal action or proceeding instituted or threatened, challenging such transactions or otherwise materially adversely affecting the Trust, or
    - (B) a suspension of or limitation on prices for trading securities generally on any exchange on which portfolio securities of the Trust are traded.
8. In addition, the Trust may in its sole discretion purchase Units (the "Discretionary Purchase Program") offered in the market, up to a maximum amount during the twelve month period of the issuer bid equal to 10% of the number of Units in the public float at the beginning of such period through the facilities of the Toronto Stock Exchange (the "TSX"), pursuant to the normal course issuer bid exemption contained in the Legislation.
9. Commencing in 2005, pursuant to the Trust Agreement and subject to the Trust's right to suspend redemptions, a Unit may be surrendered for redemption (the "Redemption Program" and, together with the Mandatory Purchase Program and the Discretionary Purchase Program, the "Programs") by a Unitholder in the month of January on any day that is at least 10 business days prior to the last day of such month but will be redeemed only on January 31 of such year (the "Redemption Valuation Date"). A Unitholder who surrenders a Unit for redemption on the Redemption Valuation Date of any year commencing in 2005 will receive an amount calculated with reference to the net asset value per Unit of the Trust less the reasonable expenses incurred by the Trust in funding such redemption (the amount to be received by a Unitholder being referred to as the "Redemption Price"). Any such Units so surrendered will, subject to an investment dealer finding purchasers for Units properly surrendered for redemption be redeemed by the Trust pursuant to the Redemption Program for the applicable Redemption Price.

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10. A Unitholder who has surrendered Units for redemption will be paid the Redemption Price for such Units on or before the last business day of the month following the applicable Redemption Valuation Date.
11. Purchases of Units made by the Trust under the Programs are exempt from the issuer bid requirements of the Legislation pursuant to exemptions contained therein.
12. At a special meeting of Unitholders held on May 25, 2004 (the “Meeting”), the Unitholders approved by way of an extraordinary resolution amending the Trust Agreement to permit the Trust to implement the the Redemption Program.
13. At the Meeting, the Unitholders also approved by extraordinary resolution the amendment to the Trust Agreement permitting the Trust to arrange for one or more securities dealers to find purchasers for any Repurchased Units, subject to receiving all necessary approvals.
14. It is the intention of the Trust to resell, in its sole discretion and at its option, any Repurchased Units primarily through one or more securities dealers and through the facilities of the TSX (or such other exchange on which the Units are then listed).
15. All Repurchased Units will be held by the Trust for a period of 4 months after the repurchase thereof by the Trust (the “Holding Period”), prior to the resale thereof.
16. Repurchased Units that the Trust does not resell within 12 months after the Holding Period (or 16 months after the date of repurchase) will be cancelled by the Trust.
17. Prospective Purchasers who subsequently acquire Repurchased Units will have equal access to all of the continuous disclosure documents of the Trust, which are filed on SEDAR.
18. Legislation in some of the Jurisdictions provides that a trade by or on behalf of an issuer in previously issued securities of that issuer that have been purchased by that issuer is a distribution subject to the Prospectus Requirements.
19. Legislation in some of the Jurisdictions provides that the first trade or resale of Repurchased Units acquired by a purchaser will be a distribution subject to the Prospectus Requirements unless such first trade is made in reliance on an exemption therefrom.

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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 Repurchased Units pursuant to the Programs shall not be subject to the Prospectus Requirements of the Legislation provided that:

- (a) the Repurchased Units are sold by the Trust through the facilities of and in accordance with the regulations and policies of the TSX or the market on which the Units are then listed;
- (b) the Trust complies with the insider trading restrictions imposed by securities legislation with respect to the trades of Repurchased Units;
- (c) the Trust complies with the conditions of paragraphs 1 through 5 of subsection 2.8(2) of Multilateral Instrument 45-102 with respect to the sale of the Repurchased Units; and
- (d) the first trade or resale of Repurchased Units acquired by a purchaser from the Trust in a Jurisdiction shall be deemed a distribution or primary distribution to the public under the Legislation unless the conditions of paragraphs 1 through 5 of subsection 2.6(3) of Multilateral Instrument 45-102 are satisfied.

DATED September 27, 2004.

Susan Wolburgh Jenah

H. Lorne Morphy