

# **2003 BCSECCOM 205**

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications - relief from requirement to file a “current AIF” to be a qualifying issuer under MI 45-102

## **Applicable British Columbia Provisions**

Multilateral Instrument 45-102 – *Resale of Securities*, ss. 1.1 and 4.1

**IN THE MATTER OF THE SECURITIES LEGISLATION OF ALBERTA,  
BRITISH COLUMBIA, ONTARIO, SASKATCHEWAN, MANITOBA,  
QUÉBEC, NEW BRUNSWICK, NOVA SCOTIA, 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 KEYWEST ENERGY CORPORATION, LUKE  
ENERGY LTD., VIKING ENERGY ROYALTY TRUST, VIKING  
HOLDINGS INC. AND VIKING KEYWEST INC.**

## **MRRS DECISION DOCUMENT**

1. WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in each of Alberta, British Columbia, Ontario, Saskatchewan, Manitoba, Québec, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland (the “Jurisdictions”) has received an application from KeyWest Energy Corporation (“KeyWest”), Viking Energy Royalty Trust (“Viking”), Luke Energy Ltd. (“Luke”), Viking Holdings Inc. (“VHI”) and Viking KeyWest Inc. (“AcquisitionCo”) (Viking, VHI and AcquisitionCo collectively referred to as the “Viking Entities”) (collectively, the “Filers”) for a decision pursuant to the securities legislation of the Jurisdictions (the “Legislation”) that:
  - 1.1 the registration and prospectus requirements of the Legislation (the “Applicable Legislation”) in the Provinces of Alberta, Manitoba, Québec, New Brunswick and Newfoundland (the “Applicable Jurisdictions”) shall not apply to certain trades made by the Viking Entities in connection with a proposed plan of arrangement (the “Arrangement”) involving KeyWest, Viking, Luke and the Viking Entities; and

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- 1.2 (i) the registration and prospectus requirements of the Legislation of Alberta, Saskatchewan, Manitoba, Québec, New Brunswick, Prince Edward Island and Newfoundland shall not apply to certain trades made in securities of Luke; (ii) the immediate resale of the common shares of Luke ("Luke Shares") be allowed; (iii) Luke be declared to be a reporting issuer in each of Alberta, Ontario and Québec from the time the Arrangement becomes effective; and (iv) the requirement of Luke to have a current annual information form filed upon SEDAR under Multi-lateral Instrument 45-102 ("MI 45-102") would not apply;
2. AND WHEREAS pursuant to the Mutual Reliance Review System for Exemptive Relief Applications (the "System"), the Alberta Securities Commission is the principal regulator for this application;
3. AND WHEREAS the Filers have represented to the Decision Makers that:
  - 3.1 KeyWest is a corporation continued under the CBCA and is headquartered in Calgary, Alberta;
  - 3.2 KeyWest's business is the acquisition, development, production and marketing of petroleum and natural gas in Western Canada;
  - 3.3 the authorized capital of KeyWest consists of an unlimited number of Shares and an unlimited number of preferred shares, issuable in series, of which, as at January 15, 2003, 65,813,608 KeyWest Shares and 5,105,834 Options were issued and outstanding;
  - 3.4 KeyWest is, and has been for a period of time in excess of 12 months, a reporting issuer (where such concept exists) under the Securities Laws of British Columbia, Alberta, Ontario and Québec. To the best of its knowledge, information and belief, KeyWest is not in default of the requirements under the Securities Laws or the regulations made thereunder;
  - 3.5 the KeyWest Shares are listed and posted for trading on the Toronto Stock Exchange (the "TSX") under the trading symbol "KWE";
  - 3.6 Viking is a trust formed under the laws of Alberta and is headquartered in Calgary, Alberta;

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- 3.7 Viking's business is the acquisition of interests in crude oil and natural gas rights and the development, production, marketing and sale of crude oil and natural gas;
- 3.8 the authorized capital of Viking consists of an unlimited number of Trust Units, of which, as at January 23, 2003, 55,364,931 Trust Units were issued and outstanding;
- 3.9 Viking is, and has been for a period of time in excess of 12 months, a reporting issuer (where such concept exists) under the Securities Laws of each of the Jurisdictions. To the best of KeyWest's knowledge, information and belief, Viking is not in default of the requirements under the Securities Laws or the regulations made thereunder;
- 3.10 the Trust Units are listed and posted for trading on the TSX under the trading symbol "VKR.UN";
- 3.11 Luke is a wholly-owned subsidiary of KeyWest and is incorporated under the CBCA and headquartered in Calgary, Alberta;
- 3.12 Luke has not carried on any active business to date;
- 3.13 as part of the Arrangement, Luke will acquire certain assets (the "Retained Assets") from KeyWest in exchange for Luke Shares, which Luke Shares will be distributed to shareholders of KeyWest. The Retained Assets are comprised principally of certain producing properties and undeveloped acreage of KeyWest located in Alberta which represent production of approximately 160 BOE/d (485 mmcf/d of gas and 80 bbls/d of oil), 415 mboe of proved producing reserves, and approximately 11,720 net acres of undeveloped land;
- 3.14 the authorized capital of Luke includes an unlimited number of Luke Shares;
- 3.15 Luke has applied to list the Luke Shares on the TSX;
- 3.16 on December 19, 2002, KeyWest and Viking jointly announced that they had entered into an agreement to effect a business combination by way of plan of arrangement pursuant to the CBCA whereby KeyWest and Viking would combine their mature assets and certain of KeyWest's growth assets would be transferred to

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Luke. On January 17, 2003, KeyWest, Luke, Viking, VHI and Acquisitionco entered into the Arrangement Agreement formalizing the terms and conditions upon which the Arrangement would occur;

- 3.17 under the terms of the Arrangement, KeyWest has agreed to transfer certain KeyWest properties to Luke and then combine the remaining business of KeyWest and Viking. The Arrangement provides that Viking (or a subsidiary of Viking) will acquire all of the KeyWest Shares. Each KeyWest Share will be exchanged, for 0.5214 Trust Units of Viking (to a maximum of 28 million Trust Units) or \$3.65 in cash (to a maximum of \$66 million). In addition, each KeyWest Shareholder will receive 0.10 of one Luke Share for each KeyWest Share held. All holders of outstanding Options have agreed to surrender and terminate their Options prior to the Meeting in consideration of the payment of an amount per Option not exceeding the difference between the exercise price and \$3.65 for each Common Share issuable under the Option. In connection with such agreement, each optionholder has acknowledged they will not be entitled to vote such Options at the Meeting and will not be entitled to exercise any rights of dissent;
- 3.18 under the terms of the Arrangement, KeyWest has agreed to transfer the Retained Assets to Luke and then combine the remaining business of KeyWest with Viking.
- 3.19 the Arrangement provides for the following transactions to occur on the Effective Date:
  - 3.19.1 the Retained Assets shall be transferred by KeyWest to Luke, and Luke shall issue Luke Shares to KeyWest in consideration therefor in accordance with the terms and conditions of the Purchase and Sale Agreement. The number of Luke Shares to be issued to KeyWest shall be:
    - (i) the difference between the number of KeyWest Shares outstanding immediately prior to the effective time of the Arrangement (the "Effective Time") and the number of Luke Shares held by KeyWest immediately prior to the Effective Time, divided by ten (10); less
    - (ii) the number of Luke Shares held by KeyWest immediately prior to the Effective Time divided by ten (10);

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- 3.19.2 each issued and outstanding KeyWest Share (other than KeyWest Shares held by Dissenting Shareholders) shall be transferred to Viking KeyWest Inc. (“Acquisitionco”) (free and clear of all claims) in exchange for:
  - 3.19.2.1 Luke Share Consideration on the basis of one Luke Note for each ten (10) KeyWest Shares held; and
  - 3.19.2.2 in accordance with the election or deemed election of the holder of such KeyWest Share and subject to sections 3.02 and 3.03 of the Plan of Arrangement:
    - 3.19.2.2.1 Trust Unit consideration on the basis of one Acquisition Note for each KeyWest Share held (“Trust Unit Consideration”);
    - 3.19.2.2.2 Cash consideration on the basis of \$3.65 in cash for each KeyWest Share held (“Cash Consideration”); or
    - 3.19.2.2.3 a combination of Trust Unit Consideration and Cash Consideration;
- 3.19.3 each Acquisition Note shall be exchanged with Viking for 0.5214 of a Trust Unit;
- 3.19.4 KeyWest and Acquisitionco shall be amalgamated (the “Amalgamation”) and continue as one corporation (the “Amalgamated Corporation”) in accordance with the following:
  - 3.19.4.1 the KeyWest Shares shall be cancelled without any repayment of capital;
  - 3.19.4.2 the articles of the Amalgamated Corporation shall be the same as the articles of Acquisitionco, and the name of the amalgamated corporation shall be the name of Acquisitionco;

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- 3.19.4.3 no securities shall be issued by the Amalgamated Corporation in connection with the Amalgamation and for greater certainty, the Acquisitionco shares, Acquisition Notes and Luke Notes shall survive and continue to be Acquisitionco shares, Acquisition Notes and Luke Notes of the Amalgamated Corporation without amendment;
- 3.19.4.4 the property of each of the amalgamating corporations shall continue to be the property of the Amalgamated Corporation;
- 3.19.4.5 the Amalgamated Corporation shall continue to be liable for the obligations of each of the amalgamating corporations;
- 3.19.4.6 any existing cause of action, claim or liability to prosecution of any of the amalgamating corporations shall be unaffected;
- 3.19.4.7 any civil, criminal or administrative action or proceeding pending by or against any of the amalgamating corporations may be continued to be prosecuted by or against the Amalgamated Corporation;
- 3.19.4.8 a conviction against, or ruling, order or judgment in favour of or against, any of the amalgamating corporations may be enforced by or against the Amalgamated Corporation;
- 3.19.4.9 the Articles of Amalgamation of the Amalgamated Corporation shall be deemed to be the Articles of Incorporation of the Amalgamated Corporation and the Certificate of Amalgamation of the Amalgamated Corporation shall be deemed to be the Certificate of Incorporation of the Amalgamated Corporation;
- 3.19.4.10 the by-laws of Acquisitionco shall be the by-laws of the Amalgamated Corporation;

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- 3.19.4.11 the first directors of the Amalgamated Corporation shall be the directors of Acquisitionco;
- 3.19.4.12 the first officers of the Amalgamated Corporation shall be the officers of Acquisitionco; and
- 3.19.4.13 the registered office of the Amalgamated Corporation shall be the registered office of Acquisitionco; and
- 3.19.5 subject to adjustment as provided in the Plan of Arrangement, the Luke Notes shall be redeemed by the Amalgamated Corporation in exchange for Luke Shares on the basis of one Luke Note for one Luke Share;
- 3.19.6 with respect to the elections to be made by KeyWest Shareholders other than Dissenting Shareholders:
  - 3.19.6.1 each KeyWest Shareholder shall elect to receive either the Trust Unit Consideration, the Cash Consideration or a combination thereof by depositing with the Depositary, prior to the Election Deadline, a duly completed Letter of Transmittal and Election Form indicating such holder's election, together with certificates representing such holder's KeyWest Shares; and
  - 3.19.6.2 any KeyWest Shareholder who does not deposit with the Depositary a duly completed Letter of Transmittal and Election Form prior to the Election Deadline, or otherwise fails to comply with the requirements of subsection 3.02(a) of the Plan of Arrangement and the Letter of Transmittal and Election Form, shall be deemed to have elected to receive the Trust Unit Consideration for such holder's KeyWest Shares;
- 3.19.7 with respect to elections by KeyWest Shareholders to receive the Cash Consideration and elections by KeyWest Shareholders to receive a combination of the Cash Consideration and the Trust Unit Consideration, the aggregate amount of cash available is limited to

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\$66,000,000 (the “Cash Limit”). With respect to elections by KeyWest Shareholders to receive the Trust Unit Consideration and elections by KeyWest Shareholders to receive a combination of the Cash Consideration and the Trust Unit Consideration, the aggregate number of Trust Units that may be issued is limited to 28,000,000 (the “Trust Unit Limit”). If the aggregate cash elected exceeds the Cash Limit, the amount of Cash Consideration paid to the holders of KeyWest Shares so electing shall be prorated (based on the fraction equal to the Cash Limit divided by the aggregate cash elected) among all such holders who made an election to receive the Cash Consideration or an election to receive a combination of the Cash Consideration and the Trust Unit Consideration so that the aggregate amount of cash payable to all such holders shall be equal to the Cash Limit, and such holders shall receive the Trust Unit Consideration in respect of the balance of such holders’ KeyWest Shares. If the aggregate Trust Units elected exceeds the Trust Unit Limit, the amount of Trust Unit Consideration issued to the holders so electing shall be prorated (based on the fraction equal to the Trust Unit Limit divided by the aggregate Trust Units elected) among all holders who made (or are deemed to have made) an election to receive the Trust Unit Consideration or an election to receive a combination of the Cash Consideration and the Trust Unit Consideration so that the number of Trust Units issuable to all such holders shall be equal to the Trust Unit Limit, and such holders shall receive the Cash Consideration in respect of the balance of such holders’ KeyWest Shares;

- 3.19.8 with respect to the transfer of the Retained Assets to Luke in exchange for the issuance to KeyWest of the Luke Shares immediately before the Effective Time pursuant to subsection 3.01(a) of the Plan of Arrangement, KeyWest shall become the holder of the Luke Shares so exchanged and shall be added to the register of holders of Luke Shares;
- 3.19.9 with respect to each KeyWest Shareholder (other than Dissenting Shareholders) immediately before the Effective Time:



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3.19.9.1 upon the exchange of KeyWest Shares thereof pursuant to subsection 3.01(b) of the Plan of Arrangement:

3.19.9.1.1 such holder shall cease to be a holder of KeyWest Shares and the name of such holder shall be removed from the register of holders of KeyWest Shares;

3.19.9.1.2 Acquisitionco shall become the holder of the KeyWest Shares so exchanged and shall be added to the register of holders of KeyWest Shares;

3.19.9.2 Acquisitionco shall allot and issue to such holder the number of Luke Notes issuable to such holder on the basis set forth in subsection 3.01(b)(i) of the Plan of Arrangement, and the name of such holder shall be added the register of holders of Luke Notes; and

3.19.9.3 Acquisitionco shall allot and issue to such holder the number of Acquisition Notes issuable and/or Cash Consideration payable to such holder on the basis set forth in subsection 3.01(b)(ii) of the Plan of Arrangement, and the name of such holder shall be added to the register of holders of Acquisition Notes, as applicable;

3.19.10 upon the exchange of Acquisition Notes for Trust Units pursuant to subsection 3.01(c) of the Plan of Arrangement:

3.19.10.1 such holder shall cease to be a holder of Acquisition Notes and the name of such holder shall be removed from the register of holders of Acquisition Notes;

3.19.10.2 Viking shall become the holder of the Acquisition Notes so exchanged and shall be entered on the register of holders of Acquisition Notes; and

3.19.10.3 Viking shall allot and issue to such holder the number of Trust Units issuable to such holder on

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the basis set forth in subsection 3.01(c) of the Plan of Arrangement and the name of such holder shall be added to the register of holders of Trust Units; and

3.19.11 upon the exchange of Luke Notes for Luke Shares pursuant to subsection 3.01(e) of the Plan of Arrangement:

3.19.11.1 such holder shall cease to be a holder of Luke Notes and the name of such holder shall be removed from the register of holders of Luke Notes;

3.19.11.2 the Amalgamated Corporation shall cease to be a holder of Luke Shares and the Amalgamated Corporation shall be removed from the register of holders of Luke Shares;

3.19.11.3 the Amalgamated Corporation shall transfer to such holder the number of Luke Shares issuable to such holder on the basis set forth in subsection 3.01(e) of the Plan of Arrangement, and the name of such holder shall be added to the register of holders of Luke Shares; and

3.19.11.4 all of the Luke Notes shall be cancelled.

3.20 no certificates representing fractional Luke Shares or Trust Units shall be issued upon the exchange of Luke Notes for Luke Shares or Acquisition Notes for Trust Units, as the case may be. In lieu of any fractional Luke Shares or Trust Units, each registered KeyWest Shareholder otherwise entitled to a fractional interest in a Luke Share or Trust Unit will receive the next highest whole number of Luke Shares or Trust Units, as the case may be.

3.21 the Information Circular in connection with the Arrangement provided to all holders of common Shares, and filed in all of the Jurisdictions contains (or, to the extent permitted, has incorporated by reference) prospectus-level disclosure in respect of KeyWest, Viking and Luke;

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- 3.22 the Retained Assets have been the subject of continuous disclosure on an ongoing basis for more than 12 months, in accordance with KeyWest's responsibilities as a reporting issuer;
- 3.23 holders of Common Shares will have the right to dissent from the Arrangement under Section 192 of the CBCA, and the Information Circular discloses full particulars of this right in accordance with applicable law;
- 3.24 exemptions from registration and prospectus requirements of the Atlantic Legislation in respect of trades made in securities of Viking are not available. Exemptions from registration and prospectus requirements of the Legislation in respect of trades made in securities of Luke in connection with the Arrangement and exemptions from prospectus requirements of the Legislation in respect of first trades in Trust Units and Luke Shares following the Arrangement are not otherwise available in all Jurisdictions;
- 3.25 Luke will not be a reporting issuer within the definitions of all of the applicable Jurisdictions at the time of the Arrangement becoming effective;
- 4. AND WHEREAS under the System, this MRRS Decision Document evidences the decision of each Decision Maker (collectively, the "Decision");
- 5. 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;
- 6. THE DECISION of the Decision Makers under the Legislation and the Applicable Legislation is that:
  - 6.1 all trades made in securities of the Viking Entities in connection with the Arrangement shall not be subject to the registration and prospectus requirements of the Applicable Legislation;
  - 6.2 all trades made in securities of Luke in connection with the Arrangement shall not be subject to the registration and prospectus requirements of the Legislation in Alberta, Saskatchewan, Manitoba, Québec, New Brunswick, Prince Edward Island and Newfoundland;

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6.3 except in British Columbia, Québec and Nova Scotia, the first trade in a Jurisdiction of Luke Shares acquired by former holders of Common Shares in connection with the Arrangement shall be a distribution or primary distribution to the public under the Legislation of such Jurisdiction, except that where:

6.3.1 Luke is a reporting issuer in a jurisdiction listed in Appendix B to Multi-lateral Instrument 45-102 Resale of Securities preceding the trade;

6.3.2 the seller is in a special relationship with Luke, as defined in the Legislation, the seller has reasonable grounds to believe that Luke is not in default of any requirement of the Legislation; and

6.3.3 no unusual effort is made to prepare the market or to create a demand for the securities and no extraordinary commission or consideration is paid in respect of the first trades;

then such a first trade shall be a distribution or a primary distribution to the public only if it is from the holdings of any person, company or combination of persons or companies holding a sufficient number of securities of Luke, as the case may be, to affect materially the control of Luke, but any holding of any person, company or combination of persons or companies holding more than 20% of the outstanding voting securities of Luke shall, in the absence of evidence to the contrary, be deemed to affect materially the control of Luke;

6.4 in Québec, the first trade (alienation) of Luke Shares acquired by former holders of Common Shares in connection with the Arrangement shall be distributions under the legislation of Québec except that where:

6.4.1 Luke is a reporting issuer in Québec immediately preceding the trade;

6.4.2 no unusual effort is made to prepare the market or to create a demand for the securities that are the subject of the trade;

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- 6.4.3 no extraordinary commission or consideration is paid to a person or company in respect of the trade; and
- 6.4.4 if the selling shareholder is an insider or officer of Luke, the selling securityholder has no reasonable grounds to believe that Luke is in default of any requirement of securities legislation;
- 6.5 in Quebec, the alienation of Trust Units acquired by former holders of Common Shares in connection with the Arrangement shall be distributions under the legislation of Québec except where:
  - 6.5.1 Viking is a reporting issuer in Québec immediately preceding the trade;
  - 6.5.2 no unusual effort is made to prepare the market or to create a demand for the securities that are the subject of the trade;
  - 6.5.3 no extraordinary commission or consideration is paid to a person or company in respect of the trade; and
    - 6.5.3.1 if the selling shareholder is an insider or officer of Viking, the selling shareholder has no reasonable grounds to believe that Viking is in default of any requirement of securities legislation;
- 6.6 upon the effectiveness of the Arrangement:
  - 6.6.1 in British Columbia, Alberta, Saskatchewan, Ontario and Nova Scotia, the requirement contained in the Legislation to have a Current AIF filed on SEDAR in order to be a Qualifying Issuer under MI 45-102 shall not apply to Luke provided that:
    - 6.6.1.1 Luke files a notice on SEDAR advising that the Information Circular has been filed as an alternate form of annual information form and identifying the SEDAR Project Number under which the Information Circular was filed;
    - 6.6.1.2 Luke files a Form 45-102F2 on or before the tenth day after the distribution day of any securities

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certifying that it is a Qualifying Issuer except for the requirement to have a current AIF;

6.6.1.3 such order to expire 140 days after Luke's financial year ended December 31, 2003; and

6.7 in Québec, Luke will be exempted from the requirements of sub-paragraph 1(e) of decision no. 2003-C-0016 of the Commission des valeurs mobilières du Québec given that the Information Circular in connection with the Arrangement contains prospectus level disclosure including audited financial statements for the year ended December 31, 2001, for the purpose of Luke qualifying for the shortened hold period. This exemption will expire 140 days after Luke's financial year ended December 31, 2003; and

6.8 Luke shall be deemed or declared a reporting issuer at the time of the Arrangement becoming effective for the purposes of the Legislation of Alberta, Ontario and Québec.

DATED this 25<sup>th</sup> day of February, 2003.

Stephen P. Sibold, Q.C., Chair

Glenda A. Campbell, Q.C., Vice-Chair