

# 2005 BCSECCOM 186

March 4, 2005

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act s. 48,76 Other - Exemption from s. 34(1)(a) requirement to be registered as a dealer for a trade and s. 61 requirement to file a prospectus for a distribution other than in connection with a corporate acquisition or reorganization; business associates; debt settlements; or employee investment plans and consultants - Trades by a non-mutual fund in connection with its distribution reinvestment plan - Issuer is an investment trust; under its plan, income of the trust can be distributed to its investors through the automatic issuance of additional units to the investors; investors can elect to receive cash in lieu of additional trust units; no fee is paid by investors to participate in the plan

## **Applicable British Columbia Provisions**

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

In the Matter of  
the Securities Legislation of  
British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec,  
Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and Labrador  
and Yukon (the Jurisdictions)

and

In the Matter of  
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of  
ACTIVEnergy Income Fund (the Filer)

## MRRS Decision Document

## **Background**

The local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions has received an application from the Filer 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 of units of the Filer pursuant to a distribution reinvestment plan (the Requested Relief);

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Under the Mutual Reliance Review System for Exemptive Relief Applications

- (a) the Ontario Securities Commission is the principal regulator for this application; and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

### **Interpretation**

Defined terms contained in National Instrument 14-101 *Definitions* have the same meaning in this decision unless they are defined in this decision.

### **Representations**

This decision is based on the following facts represented by the Filer:

1. The Filer is an investment trust established under the laws of the Province of Alberta by a declaration of trust dated as of October 27, 2004. The Filer's head office is located in Ontario.
2. The Filer became a reporting issuer or the equivalent in the Jurisdictions on October 27, 2004 upon obtaining a receipt for its final prospectus dated October 27, 2004. As of January 21, 2005, the Filer was not in default of any requirements under the Legislation.
3. The beneficial interests in the Filer are divided into a single class of voting units (Units). The Filer is authorized to issue an unlimited number of Units. Each Unit represents a holder of Units' (Unitholder) proportionate undivided beneficial interest in the Filer.
4. The Units are listed and posted for trading on the Toronto Stock Exchange (the TSX) under the symbol "AEU.UN". As of November 30, 2004, 28,950,000 Units were issued and outstanding.
5. The Filer currently intends to make cash distributions (distributions) of distributable income to Unitholders of record on the day on which the Filer declares a distribution to be payable (each a Declaration Date), and such distributions will be payable on a day which is on or before the last business day of the month following a Declaration Date.
6. The Filer has adopted a distribution reinvestment plan (the Plan) which, subject to obtaining all necessary regulatory approvals, will permit distributions to be automatically reinvested, at the election of each Unitholder,

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to purchase additional Units (Plan Units) pursuant to the Plan and in accordance with a distribution reinvestment plan agency agreement (the Plan Agreement) entered into by the Filer, Middlefield ACTIVEnergy Management Limited in its capacity as manager of the Filer (in such capacity, the Manager) and MFL Management Limited in its capacity as agent under the Plan (in such capacity, the Plan Agent).

7. Pursuant to the terms of the Plan, a Unitholder will be able to elect to become a participant in the Plan by notifying the Manager, or by causing the Manager to be notified, in writing, of the Unitholder's 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).
8. Distributions due to participants in the Plan (Plan Participants) will be paid to the Plan Agent and applied to purchase Plan Units in accordance with the terms and conditions of the Plan.
9. The Plan also allows Plan Participants to make optional cash payments (Optional Cash Payments) which will be used by the Plan Agent to purchase Plan Units in accordance with the terms and conditions of the Plan.
10. The Plan Agent will purchase Plan Units only in accordance with the mechanics described in the Plan and Plan Agreement and, accordingly, there is no opportunity for a Plan Participant or the Plan Agent to speculate on net asset value per Unit.
11. The Plan is open for participation by all Unitholders (other than non-residents of Canada), so that such Unitholders can ensure protection against potential dilution, albeit insignificant, by electing to participate in the Plan.
12. As a result of the Filer's investment objectives and based on historical data, the potential for significant changes in the net asset value per Unit over short periods of time is moderate.
13. The amount of distributions that may be reinvested in the Plan Units issued from treasury is small relative to the Unitholders' equity in the Filer. The potential for dilution arising from the issuance of Plan Units by the Filer is not significant.
14. Plan Units purchased under the Plan will be registered in the name of the Plan Agent, as agent for the Plan Participants.

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15. A Plan Participant may terminate his or her participation in the Plan by providing, or by causing to be provided, at least ten business days' prior written notice to the Manager and, such notice, if actually received no later than ten business days prior to the next Declaration Date, will have effect beginning with the distribution to be made with respect to such Declaration Date. After such time, distributions payable to such Unitholder will be in cash.
16. The Manager reserves the right to suspend or terminate the Plan at any time in its sole discretion, in which case Plan Participants and the Plan Agent will be sent written notice. In particular, the Manager may, on behalf of the Filer, terminate the Plan in its sole discretion, upon not less than 30 days' prior written notice to the Plan Participants and the Plan Agent.
17. The Manager may amend or modify the Plan at any time in its sole discretion, provided that it obtains the prior approval of the TSX (if Units are then listed on the TSX) and provided further that if, in the Manager's reasonable opinion: (i) the amendment or notification is material to Plan Participants, then at least 30 days' prior written notice is given to Plan Participants and the Plan Agent; or (ii) the amendment or modification is not material to Plan Participants, then notice may be given to Plan Participants and the Plan Agent after effecting the amendment or modification. The Manager may also, in consultation with the Plan Agent, adopt additional rules and regulations to facilitate the administration of the Plan.
18. The distribution of the Plan Units by the Filer pursuant to the Plan can be made in reliance on certain registration and prospectus exemptions contained in the Legislation of Alberta and Saskatchewan but not in reliance on registration and prospectus exemptions contained in the Legislation of the other Jurisdictions because the Plan involves the reinvestment of distributable income distributed by the Filer and not the reinvestment of dividends or interest of the Filer.
19. The distribution of the Plan Units by the Filer pursuant to the Plan cannot be made in reliance on registration and prospectus exemptions contained in the Legislation for distribution reinvestment plans of mutual funds, as the Filer 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 Filer.

### **Decision**

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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:

- (a) except in New Brunswick, Alberta and Saskatchewan, the Requested Relief is granted provided that:
  - (i) at the time of the trade the Filer is a reporting issuer or the equivalent under the Legislation and is not in default of any requirements of the Legislation;
  - (ii) no sales charge is payable in respect of the distributions of Plan Units from treasury;
  - (iii) the Filer 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:
    - (A) 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 Filer; and
    - (B) instructions on how to exercise the right referred to in (A);
  - (iv) in the calendar year during which the trade takes place, the aggregate number of Plan Units issued pursuant to the Optional Cash Payments shall not exceed 2% of the aggregate number of Units outstanding at the commencement of that calendar year;
  - (v) the first trade (alienation) of the Plan Units acquired pursuant to the Plan in a Jurisdiction shall be deemed a distribution or primary distribution to the public under the Legislation;
- (b) in each of the Jurisdictions, the Prospectus Requirement contained in the Legislation shall not apply to the first trade (alienation) of Plan Units acquired by Plan Participants pursuant to the Plan, provided that:
  - (i) except in Québec, the conditions of paragraphs 2 through 5 of subsection 2.6(3) of Multilateral Instrument 45-102 - Resale of Securities are satisfied; and

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(ii) in Québec:

- (A) at the time of the first trade, the Filer is a reporting issuer in Québec and is not in default of any of the requirements of securities legislation in Québec;
- (B) no unusual effort is made to prepare the market or to create a demand for the Plan Units;
- (C) 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
- (D) the vendor of the Plan Units, if in a special relationship with the Filer, has no reasonable grounds to believe that the Filer is in default of any requirement of the Legislation of Québec.

Robert L. Shirriff  
Commissioner

Suresh Thakrar  
Commissioner

Ontario Securities Commission