

# 2005 BCSECCOM 509

July 27, 2005

## Headnote

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act s. 48,76 Other - Exemption from registration and prospectus requirements for situations other than a corporate acquisition or reorganization; trades to business associates; debt settlements; or trades involving employee investment plans and consultants - 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 - 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, Manitoba, Ontario, Quebec, New Brunswick, Prince Edward  
Island, Nova Scotia and Newfoundland and Labrador (the “Jurisdictions”)

and

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

and

In the Matter of Daylight Energy Trust (the “Filer”)

## MRRS Decision Document

## Background

1. 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 under the securities legislation of the Jurisdictions (the “Legislation”), for an exemption (the “Requested Relief”) from 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 prospectus (the “Prospectus and Registration Requirements”) with respect to

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certain trades in units of the trust (“Units”) issued or delivered pursuant to a distribution reinvestment and optional trust unit purchase plan (the “Plan”).

2. Under the Mutual Reliance Review System for Exemptive Relief Applications (“MRRS”)
  - (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**

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

### **Representations**

4. This decision is based on the following facts represented by the Filer:
  - (a) The Filer is an open-end unincorporated trust established under the laws of Alberta pursuant to the amended and restated trust indenture made effective October 1, 2004.
  - (b) The Filer is a reporting issuer or the equivalent in each of the Jurisdictions, other than Manitoba, Prince Edward Island, Nova Scotia and Newfoundland and Labrador. To its knowledge, the Filer is not in default of any requirements under the Legislation.
  - (c) Daylight Energy Ltd. (the “Manager”) is a wholly-owned subsidiary of the Filer and the manager of the Filer pursuant to administration agreement made effective October 1, 2004.
  - (d) The head office and principal place of business of each of the Filer and the Manager is located at 400, 321 – 6<sup>th</sup> Avenue S.W., Calgary, Alberta, T2P 3H3.
  - (e) The Filer's issued and outstanding Units are listed on the TSX and any Units issued from treasury pursuant to the Plan will be listed on the TSX.
  - (f) The Filer currently makes and expects to continue to make monthly cash distributions (“Cash Distributions”) on certain prescribed distribution dates (a “Cash Distribution Date”), to the holders of

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Units (“Unitholders”), which are dependent upon the amount of distributable cash generated from the Filer's assets.

- (g) The Filer is not a “mutual fund” under the Legislation as the holders of Units 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 Filer, as contemplated by the definition of “mutual fund” in the Legislation.

### Distribution Reinvestment and Trust Unit Purchase Plan

- (h) The Filer has authorized the establishment of the Plan pursuant to which Unitholders may elect to (i) reinvest their cash distributions in new Units (the “Distribution Reinvestment Option”), and (ii) acquire new Units by making optional cash payments (the “Cash Payment Option”).
- (i) Except as described below, a registered holder of Units is eligible to join the Plan at any time by completing an enrollment and authorization form and sending it to Computershare Trust Company of Canada (the “Plan Agent”).
- (j) A registered holder shall become a participant (a “Participant”) in the Plan in regard to the investment of distributions as of the first distribution record date (a “Record Date”) following receipt by the Plan Agent of a duly completed enrollment and authorization form no later than five (5) business days prior to the Record Date. Beneficial owners of Units which are registered through a nominee in the name of CDS & Co., or its nominee, must deliver such authorization form to CDS & Co. no later than five (5) business days prior to such Record Date and also prior to such other deadline as may be set by CDS & Co. from time to time.
- (k) Under the Cash Payment Option, Participants in the Plan may make further payments of not less than \$2,000 per remittance and not more than \$100,000 per calendar year by forwarding a certified cheque or money order to the Plan Agent in Canadian dollars payable to the Plan Agent together with an optional cash payment form.
- (l) The number of Units which may be issued each fiscal year pursuant to the Cash Payment Option will not be more than 2% of the number of issued and outstanding Units.

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- (m) The Plan is not available to persons who are “non-residents” within the meaning of the *Income Tax Act* (Canada) and the regulations thereunder.
- (n) Cash distributions payable on the Units registered in the Plan, will be applied automatically on each Cash Distribution Date to the purchase of Units either from treasury or, at the discretion of the Manager, through the facilities of the TSX following the Cash Distribution Date.
- (o) Optional cash payments to the Plan will be applied to the purchase of additional new Units on the Cash Distribution Date following Record Dates where a completed enrollment and authorization form and optional cash payment form has been received.
- (p) Where the Trust issues Units from treasury under this Plan, the price of such Units to Participants shall be (i) in the case of investment by the Cash Payment Option, the weighted average closing price of the Units on the TSX for each of the ten (10) trading days immediately preceding the Cash Distribution Date (the “Treasury Purchase Price”), and (ii) in the case of investment by the Distribution Reinvestment Option, 95% of the Treasury Purchase Price.
- (q) Where the Manager determines to apply cash distributions or optional cash payments, or both, to the purchase of Units through the facilities of the TSX, the price of such Units to Participants will be equal to the average price of all Units acquired through the facilities of the TSX for the purposes of this Plan during the period beginning on the Cash Distribution Date and ending on the date that is three (3) business days prior to the next applicable Record Date. Where the Plan Agent is unable, or is directed by the Manager not to purchase sufficient Units through the TSX, additional Units will be issued from treasury to Participants at a price equal to the average price of all Units acquired through the TSX as described in the foregoing sentence.
- (r) There is no charge to Participants for reinvesting distributions. The Plan Agent’s fees for handling the reinvestment of distributions will be paid by the Manager. There will be no brokerage charges with respect to Units either issued directly from treasury or purchased in the open market.

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- (s) Additional Units purchased and held under the Plan will be registered in the name of the Plan Agent or its nominee as agent for the Participants, and all cash distributions on Units so held for the account of a Participant will be automatically reinvested in additional Units in accordance with the terms of the Plan and the election of the Participant.
- (t) If, in respect of any Cash Distribution Date, fulfilling all of the elections under the Plan would result in the Filer exceeding either the limit on additional Units set by the Filer or the aggregate annual limit on additional Units issuable under the Cash Payment Option, then elections for the purchase of additional Units on such Cash Distribution Date will be accepted: (i) first, from Participants electing the Distribution Reinvestment Option; and (ii) second, from Participants electing the Cash Payment Option. If the Filer is not able to accept all elections in a particular category, then purchases of additional Units on the applicable Cash Distribution Date will be prorated among all Participants in that category according to the number of additional Units sought to be purchased.
- (u) If the Filer determines that no additional Units will be available for purchase under the Plan for a particular Cash Distribution Date, then all Participants will receive the Cash Distribution announced by the Filer for that Cash Distribution Date.
- (v) A Participant may terminate its participation in the Plan at any time by completing a termination request form and delivering it to the Plan Agent. A termination received between a Record Date and a Cash Distribution Date will become effective after that Cash Distribution Date.
- (w) Legislation in certain of the Jurisdictions provides exemptions from the Prospectus and Registration Requirements for distribution reinvestment plans. Such exemptions are not available to the Filer in the Jurisdictions (other than New Brunswick) for trades by the Filer in Units issued or delivered pursuant to the Plan, because those exemptions are generally with respect to the distribution of one or more of the following: (i) dividends; (ii) interest; (iii) capital gains; or (iv) earnings or surplus. The distributions that are paid to the Unitholders are royalty income in relation to the income that the Filer receives on oil- and gas-producing properties. Although Legislation in New Brunswick provides exemptions from the Prospectus and Registration Requirements for distribution reinvestment plans that

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are available to the Filer, relief from the Prospectus and Registration Requirements for the first trade in Units acquired pursuant to the Plan is required in New Brunswick.

- (x) The distribution of Units under the Plan by the Filer cannot be made in reliance on certain exemptions from the Prospectus and Registration 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**

- 5. 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 is that the Requested Relief is granted, provided that:
  - (a) in the Jurisdictions other than New Brunswick, the Prospectus and Registration Requirements shall not apply to trades by the Filer in Units issued or delivered pursuant to the Plan, provided that:
    - (i) at the time of the trade the Filer is a reporting issuer in a jurisdiction listed in Appendix B to Multilateral Instrument 45-102 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 trade;
    - (iii) the Filer has caused to be sent to the person or company to whom the Units under the Plan 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 Units on the applicable Cash Distribution Date (the “Withdrawal Right”), and
      - (B) instructions on how to exercise the Withdrawal Right; and

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- (iv) the aggregate number of Units issued under the Cash Payment Option of the Plan in any financial year of the Filer shall not exceed 2% of the aggregate number of Units outstanding at the start of that financial year;
- (b) except in Québec, the first trade in Units acquired pursuant to the Plan will be a distribution or primary distribution to the public unless the conditions in subsection 2.6(3) of Multilateral Instrument 45-102 - *Resale of Securities* are satisfied; and
- (c) in Québec, the alienation (or first trade) in Units acquired pursuant to the Plan will be a distribution unless:
  - (i) the issuer is and has been a reporting issuer in Québec for the 4 months preceding the alienation;
  - (ii) no unusual effort is made to prepare the market or to create a demand for the securities that are the subject of the alienation;
  - (iii) no extraordinary commission or other consideration is paid in respect of the alienation; and
  - (iv) if the seller of the securities is an insider of the issuer, the seller has no reasonable grounds to believe that the issuer is in default of any requirement of securities legislation.

Paul M. Moore  
Vice-Chair  
Ontario Securities Commission

Harold P. Hands  
Commissioner  
Ontario Securities Commission