

# 2006 BCSECCOM 686

October 13, 2006

## Headnote

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act, ss. 48 and 76 – registration and prospectus requirements - Trades by a non-mutual fund in connection with its distribution reinvestment plan - The issuer is a newly-settled investment trust; the issuer can rely on the exemption in s. 2.2 of NI 45-106 *Prospectus and Registration Exemptions* to distribute units to participants in its distribution reinvestment plan; however, the issuer has only a small number of trust units issued and outstanding at the beginning of its initial financial year, restricting the number of trust units it could issue under the optional cash payment component of the plan during its initial financial year

## 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*, s. 2.6(3)

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

and

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

and

In the Matter of BlackWatch Energy Services Trust

## MRRS Decision Document

## Background

1. The local securities regulatory authority or regulator (the Decision Maker) in each of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and Labrador, Yukon, Nunavut and the Northwest Territories (the Jurisdictions) has received an application from BlackWatch Energy Services Trust (BlackWatch or the Filer) for a decision, pursuant to the securities legislation of the Jurisdictions (the Legislation), that the requirements contained in the Legislation to be registered to trade in a

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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 initial distribution of trust units of BlackWatch to be issued under the optional cash payment provisions of a distribution reinvestment and optional trust unit purchase plan (the Plan) during the Filer's financial year ending December 31, 2006 (the 2006 Financial Year) (the Requested Relief).

2. Pursuant to the Mutual Reliance Review System for Exemptive Relief Applications (the MRRS):
  - 2.1 the Alberta Securities Commission is the principal regulator for this application; and
  - 2.2 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:
  - 4.1 BlackWatch is an open-ended unincorporated investment trust formed under the laws of the province of Alberta and governed by a trust indenture dated as of June 23, 2006 (the Trust Indenture), as amended and restated on July 27, 2006 between Valiant Trust Company, as Trustee, BlackWatch Energy Services Operating Corp., as administrator and Shannon M. Gangl, as settlor.
  - 4.2 The head office and principle place of business of the Filer and the administrator (as defined below) is located at Calgary, Alberta.
  - 4.3 On August 1, 2006, the Filer became a reporting issuer in each of the provinces and territories of Canada, other than Québec, by filing a final prospectus for an initial public offering of its securities in the Jurisdictions on July 31, 2006.
  - 4.4 To its knowledge, the Filer is not in default of any requirements under the Legislation.

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- 4.5 BlackWatch Energy Services Operating Corp. (the Administrator) is a wholly owned subsidiary and the administrator of the Filer pursuant to an administration agreement dated July 27, 2006.
- 4.6 The entire beneficial interest in BlackWatch will be held by holders of trust units (Units) issued by BlackWatch. Each Unit represents an equal undivided beneficial interest in BlackWatch.
- 4.7 The Filer's Units have been trading on the Toronto Stock Exchange (the TSX) under the symbol BWT.UN since August 11, 2006.
- 4.8 BlackWatch currently makes and expects to continue to make monthly cash distributions (Cash Distributions) to holders of Units (Unitholders). The Cash Distributions will depend on numerous factors including the condition of the oil and gas industry, BlackWatch Energy Services Operating Limited Partnership's financial performance (a partnership indirectly wholly-owned by the Filer), debt covenants and obligations, working capital requirements and future capital requirements.
- 4.9 BlackWatch is not a "mutual fund" under the Legislation as 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 BlackWatch, as contemplated by the definition of "mutual fund" in the Legislation.

### **Distribution Reinvestment and Trust Unit Purchase Plan**

- 4.10 BlackWatch has authorized the establishment of the Plan pursuant to which eligible Unitholders may, at their option, (i) purchase additional Units (Additional Units) of BlackWatch by directing that Cash Distributions be applied to the purchase of Additional Units (the Distribution Reinvestment Option) and (ii) acquire new Units by making optional cash payments (the Cash Payment Option).
- 4.11 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 Valiant Trust Company (the Agent).
- 4.12 A registered Unitholder 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 Agent

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of a duly completed enrollment and authorization form no later than five 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. prior to such Record Date or prior to such other deadline as may be set by CDS & Co. from time to time.

- 4.13 Except as provided in paragraph 4.14 below, all Additional Units purchased under the Plan will be purchased by the Agent directly from BlackWatch on the relevant distribution payment date at a price determined by reference to the Weighted Average Market Price (defined in the Plan as the arithmetic average of the daily volume weighted average trading prices of the Units on the TSX (or such other exchange or market on which the Units are then listed for trading) for the ten trading days from and including the second business day following the distribution record date to and including the second business day prior to the distribution payment date on which at least a board lot of Units was traded (such period not to exceed 20 trading days, appropriately adjusted for certain capital changes (including Unit subdivisions, Unit consolidations, certain rights offerings and certain distributions))). Additional Units purchased under the Distribution Reinvestment Option will be purchased at a 5% discount to the Weighted Average Market Price. Additional Units purchased under the Cash Payment Option will be purchased at the Weighted Average Market Price.
- 4.14 At the discretion of the Corporation, Additional Units purchased under the Plan or under the Distribution Reinvestment Option will either be acquired from treasury at 95% of Weighted Average Market Price or will be purchased at prevailing market prices through the facilities of the TSX following the distribution record date. Additional Units which are purchased through the facilities of the TSX will be acquired during the 15 business day period following the relevant distribution record date but will only be acquired at prices that are equal to or less than 115% of the volume weighted trading price of the Units on the TSX for the 10 trading days immediately preceding the date that Units are purchased.
- 4.15 The Cash Payment Option is available to eligible Unitholders who elect to reinvest their Cash Distributions under the Distribution Reinvestment Option.

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- 4.16 Under the Cash Payment Option, Participants in the Plan may make optional cash payments of at least \$1,000 per remittance and not more than \$5,000 per month by forwarding payment together with an optional cash payment form to the Agent.
- 4.17 Under the Distribution Reinvestment Option, Cash Distributions will be paid to the Agent and applied by the Agent to the purchase of Additional Units, which will be held under the Plan for the account of eligible Participants.
- 4.18 No brokerage fees or service charges will be payable by Participants in connection with the purchase of Additional Units under the Plan.
- 4.19 Additional Units purchased and held under the Plan will be registered in the name of the 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.
- 4.20 The Plan permits full investment of reinvested Cash Distributions and optional cash payments because fractions of Units, as well as whole Units, may be credited to Participants' accounts with the Agent.
- 4.21 BlackWatch reserves the right to determine for any distribution payment date how many Additional Units will be available for purchase under the Plan.
- 4.22 If, in respect of any distribution payment date, fulfilling all of the elections under the Plan would result in BlackWatch exceeding either the limit on Additional Units set by BlackWatch or the aggregate annual limit on Additional Units issuable pursuant to the Cash Payment Option, then elections for the purchase of Additional Units on such distribution payment date will be accepted: (i) first, from Participants electing the Distribution Reinvestment Option; and (ii) second, from Participants electing the Cash Payment Option. If BlackWatch is not able to accept all elections in a particular category, then purchases of Additional Units on the applicable distribution payment date will be pro rated among all Participants in that category according to the number of Additional Units sought to be purchased.
- 4.23 If the Corporation determines not to issue any equity through the Plan on a particular distribution payment date, then all Participants will

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receive the Cash Distribution to which they would otherwise be entitled to on such distribution payment date, subject to the Agent purchasing Units in the market at prevailing market prices in accordance with the Plan.

- 4.24 A Participant may terminate its participation in the Plan at any time by submitting a termination form to the Agent. A termination form received between a Cash Distribution record date and a Cash Distribution payment date will become effective after that Cash Distribution payment date.
- 4.25 A copy of the Plan, containing a statement describing a Participant's right to withdraw from the Plan and that upon withdrawing, a Participant will receive a certificate for the number of whole Units held by the Agent in such Participant's account and a cash payment for any remaining fraction of a Unit so held and for any optional cash payments received from such Participant prior to termination where such optional cash payments have not yet been invested and instructions on how the Participant can exercise their right to withdraw from the Plan, will be delivered to all Participants.
- 4.26 BlackWatch reserves the right to amend, suspend or terminate the Plan at any time, provided that such action shall not have a retroactive effect, which would prejudice the interests of the Participants. All Participants will be sent written notice of any such amendment, suspension or termination.
- 4.27 The Plan will not be available to Unitholders who are not residents of Canada.
- 4.28 The distribution of Units by the Filer under the Plan cannot be made in reliance on existing registration and prospectus exemptions contained in the Legislation for dividend reinvestment plans of mutual funds as the Filer is not a mutual fund as defined in the Legislation.
- 4.29 National Instrument 45-106 *Prospectus and Registration Exemptions* (NI 45-106) provides an exemption from the Registration and Prospectus Requirements for distributions of the Units under the Plan. However, with respect to the optional cash payment provisions of the Plan, the exemption is only available if the aggregate number of securities issued does not exceed 2% of the issued and outstanding securities as at the commencement of each financial year. At the start of the 2006 Financial Year, the Filer did not have any Units issued and

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outstanding. As a result, the Filer is not able to rely on the exemption in NI 45-106 to issue Units under the Cash Payment option.

### 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 pursuant to the Legislation is that the Requested Relief is granted, provided that:
  - 6.1 at the time of the trade or distribution BlackWatch is a reporting issuer or the equivalent under the Legislation and is not in default of any requirements of the Legislation;
  - 6.2 no sales charge is payable by Participants purchasing Units under the Plan;
  - 6.3 the aggregate number of Additional Units issuable under the Cash Payment Option of the Plan in the 2006 Financial Year shall not exceed 2% of the Units issued and outstanding immediately after the closing of the Filer's initial public offering (including any Units outstanding following the closing of the exercise of the over-allotment option granted to the agents under the initial public offering); and
  - 6.4 the first trade of Additional Units acquired pursuant to this Decision will be a distribution or primary distribution to the public unless the conditions in section 2.6(3) of National Instrument 45-102 *Resale of Securities* are satisfied.

Glenda A. Campbell, Q.C., Vice-Chair  
Alberta Securities Commission

Stephen R. Murison, Vice-Chair  
Alberta Securities Commission