

## **2004 BCSECCOM 477**

### **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications – closed-end investment trust exempt from prospectus and registration requirements in connection with issuance of units to existing unit holders pursuant to distribution reinvestment plan whereby distributions of income are reinvested in additional units of the trust, subject to certain conditions – first trade in additional units deemed a distribution unless made in compliance with MI 45-102

### **Applicable British Columbia Provisions**

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

### **MRRS DECISION DOCUMENT 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, YUKON, NUNAVUT AND NORTHWEST TERRITORIES**

**AND**

### **IN THE MATTER OF THE MUTUAL RELIANCE REVIEW SYSTEM FOR EXEMPTIVE RELIEF APPLICATIONS**

**AND**

### **IN THE MATTER OF FLAHERTY & CRUMRINE INVESTMENT GRADE PREFERRED FUND**

### **MRRS DECISION DOCUMENT**

WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in each of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and Labrador, Yukon, Nunavut and Northwest Territories (the “Jurisdictions”) has received an application from Flaherty & Crumrine Investment Grade Preferred Fund (the “Fund”) 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 (the “Registration Requirement”) and to file a preliminary and final prospectus and obtain receipts therefore (the “Prospectus Requirement”) shall not apply to certain trades of units of the Fund pursuant to a distribution reinvestment plan (the “Plan”);

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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;

AND WHEREAS THE FUND has represented to the Decision Makers that:

1. The Fund is a closed-end investment trust established under the laws of the Province of Ontario and governed by a declaration of trust dated April 28, 2004 as amended May 11, 2004.
2. The beneficial interests in the Fund are divided into a single class of limited voting units (the “Units”). The Fund is authorized to issue an unlimited number of Units. Each Unit represents a Unitholder’s proportionate undivided beneficial interest in the Fund.
3. The Fund filed a final prospectus dated April 28, 2004 (the “Prospectus”) with the securities regulatory authorities in each of the Jurisdictions qualifying for distribution units of the Fund and became a reporting issuer or the equivalent thereof in the Jurisdictions upon obtaining a receipt for the Prospectus on April 29, 2004 from each of the Jurisdictions. The Fund is not on the list of defaulting reporting issuers maintained by any of the Jurisdictions.
4. The Fund is not considered to be a “mutual fund” as defined in the Legislation because the holders of the Units (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 part of the net assets of the Fund as contemplated in the definition of “mutual fund” in the Legislation.
5. The Toronto Stock Exchange (the “TSX”) has approved the listing of the Units. The Units will be listed and posted for trading under the symbol “FAC.UN”.
6. Brompton Preferred Management Limited is the manager and the trustee of the Fund (the “Manager”).
7. Flaherty & Crumrine Incorporated is the portfolio manager (the “Portfolio Manager”) of the Fund. The Portfolio Manager will provide investment advisory and portfolio management services for the Fund in accordance with and subject to the terms of the portfolio management agreement.

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8. Brompton Capital Advisors Inc. (the “Advisor”) has been retained by the Fund and the Manager to be the principal investment advisor of the Fund and will be responsible to the Fund for services provided by the Portfolio Manager. BCA will monitor the provision of the investment advisory or portfolio management services for the Fund by the Portfolio Manager.
9. The Fund will invest in securities with the objective of (i) providing Unitholders with a stable stream of monthly distributions targeted to be \$0.14063 per Unit; (ii) mitigate the impact of significant interest rate increases on the value of the Preferred Portfolio; and (iii) preserve the Net Asset Value per Unit (as described in the Prospectus).
10. The Fund intends to make monthly cash distributions (“Distributions”) on the tenth business day of each month (each a “Distribution Date”) to a Unitholder of record on the last business day of the immediately preceding month.
11. The Fund intends to adopt the Plan so that distributions will, if a Unitholder so elects, be automatically reinvested on such Unitholder’s behalf in accordance with the provisions of the agreement governing the operation of the Plan (the “DRIP Agreement”) entered into by the Manager, on behalf of the Fund, and Computershare Investor Services Inc., as plan agent (the “Plan Agent”).
12. Non-residents of Canada within the meaning of the *Income Tax Act* (Canada) are not eligible to participate in the Plan.
13. Pursuant to the terms of the Plan, a Unitholder may elect to become a participant in the Plan by notifying a participant in CDS (the “CDS Participant”) through which the Unitholder holds his or her Units of the Unitholder’s intention to participate in the Plan. The CDS Participant shall, on behalf of the Unitholder, provide notice to CDS (the “Participation Notice”) of the Unitholder’s participation in the Plan no later than the close of business on the business day which is two business days prior to the last business day of each calendar month commencing with June 30, 2004 (the “Record Date”) in respect of the next expected distribution in which the Unitholder intends to participate, by delivering to CDS a completed authorization form in the manner prescribed by CDS from time to time. CDS shall, in turn, notify the Plan Agent no later than the close of business on the business day immediately preceding such Record Date of such Unitholder’s participation in the Plan.
14. Distributions due to Unitholders who have elected to participate in the Plan (the “Plan Participants”) will automatically be reinvested on their behalf by the Plan Agent to purchase plan Units (“Plan Units”) in accordance with the following terms and conditions:

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- (a) if the weighted average trading price of Units on the TSX (or such other exchange or market on which Units are then listed, if the Units are not listed by the TSX) for the 10 trading days immediately preceding the relevant Distribution Date, plus applicable commissions or brokerage charges (the "Market Price") on the relevant Distribution Date is less than the Net Asset Value per Unit on the Distribution Date, the Plan Agent shall apply the Distributions otherwise payable in cash by the Fund to such Plan Participants on such Distribution Date either to purchase Plan Units in the market or from treasury in accordance with subparagraph (c) below;
  - (b) if the Market Price is equal to or greater than the Net Asset Value per Unit on the relevant Distribution Date, the Plan Agent shall apply the Distributions to purchase Plan Units from the Fund through the issue of new Trust Units at a purchase price equal to the higher of (A) the Net Asset Value per Unit on the relevant Distribution Date, and (B) 95% of the Market Price on the relevant Distribution Date; and
  - (c) purchases of Plan Units described in subparagraph (a) above will be made in the market by the Plan Agent on an orderly basis during the 6 trading day period following the Distribution Date and the price paid for those Plan Units will not exceed 115% of the Market Price of the Trust Units on the relevant Distribution Date. On the expiry of such 6 day period, the unused part, if any, of the Distributions will be used to purchase Plan Units from the Fund at a purchase price equal to the Net Asset Value per Unit on the relevant Distribution Date;
15. Plan Units purchased under the Plan will be registered in the name of CDS and credited to the account of the CDS Participant through whom a Unitholder holds Units.
16. No fractional Units will be issued under the Plan. A cash adjustment for any uninvested Distributions will be paid by the Plan Agent to CDS on a monthly basis to be credited to the Plan Participants via the applicable CDS Participants.
17. The Plan Agent will be purchasing Plan Units only in accordance with the mechanisms described in the Plan and, accordingly, there is no opportunity for a Plan Participant or the Plan Agent to speculate on changes in the Net Asset Value per Unit.

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18. The amount of Distributions that may be reinvested in Plan Units issued from treasury is small relative to the Unitholders' equity in the Fund. The potential for dilution arising from the issuance of Plan Units by the Fund at the Net Asset Value per Unit on a relevant distribution date is not significant.
19. The Plan is open for participation by all Unitholders other than non-residents of Canada, such that any Canadian resident Unitholder can ensure protection against potential dilution by electing to participate in the Plan.
20. A Plan Participant may terminate his or her participation in the Plan by written notice to the CDS Participant through which the Plan Participant holds his or her Units. CDS will then inform the Plan Agent and thereafter distributions on such Units held by such Unitholder will be paid to the CDS Participant.
21. The Plan Agent's charges for administering the Plan will be paid by the Fund out of the assets of the Fund.
22. The Manager may terminate the Plan at any time in its sole discretion upon not less than 30 days' notice to the Plan Participants, via the applicable CDS Participant and the Plan Agent.
23. The Manager also reserves the right in its sole discretion to suspend the Plan at any time, in which case the Manager must give written notice of the suspension to all Plan Participants via the applicable CDS Participant.
24. The Manager may, in consultation with the Plan Agent, adopt additional rules and regulations to facilitate the administration of the Plan, which shall, once adopted, be deemed to form part of the DRIP Agreement.
25. The Manager may also amend the Plan or the DRIP Agreement at any time, in its sole discretion, provided that: (i) if the amendment is material to Plan
26. Participants, at least 30 days' notice thereof shall be given to Plan Participants via the applicable CDS Participant and to the Plan Agent; and (ii) if the amendment is not material to Plan Participants, notice thereof may be given to Plan Participants and to the Plan Agent after effecting the amendment. No material amendment will be effective until it has been approved by the TSX (if required).
27. The Manager may, upon 90 days' written notice to the Plan Agent, and upon payment to the Plan Agent of all outstanding fees payable hereunder, remove the Plan Agent and appoint any person or entity licensed to carry on business in Ontario as the agent under the Plan.

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28. The distribution of the Plan Units by the Fund pursuant to the Plan cannot be made in reliance on certain registration and prospectus exemptions contained in the Legislation as the Plan involves the reinvestment of distributable income distributed by the Fund and not the reinvestment of dividends or interest of the Fund.

29. The distribution of the Plan Units by the Fund 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 Fund 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 Fund.

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 under the Legislation is that:

- (a) except in Alberta and Saskatchewan, Requirement and Prospectus Requirement contained in the Legislation shall not apply to trades or distributions by the Fund or by an administrator or agent of the Fund of Plan Units for the account of Plan Participants pursuant to the Plan, provided that:
  - (i) at the time of the trade or distribution, the Fund 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 trade;
  - (iii) the Fund 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 elect to participate in the Plan on a monthly basis to receive Plan Units instead of cash on the making of

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a distribution by the Fund and how to terminate such participation; and

- (B) instructions on how to make the election referred to in (I);
- (iv) the first trade of the Plan Units acquired under this Decision shall be deemed to be a distribution or a primary distribution to the public; and
- (b) the Prospectus Requirement contained in the Legislation shall not apply to the first trade of Plan Units acquired by Plan Participants pursuant to the Plan, provided that:
  - (i) except in Québec, the conditions in paragraphs 2 through 5 of subsection 2.6(3) of Multilateral Instrument 45-102 – *Resale of Securities* are satisfied; and
  - (ii) in Québec:
    - (A) The Fund will be required to file a report on the number of units distributed for every financial year in Québec at the time of filing its annual report;
    - (B) at the time of the first trade the Fund is a reporting issuer in Québec and is not in default of any of the requirements of securities legislation in Québec;
    - (C) no unusual effort is made to prepare the market or to create a demand for the Plan Units;
    - (D) no extraordinary commission or other consideration is paid to a person or company other than the vendor of the Plan Units in respect of the first trade; and
    - (E) the vendor of the Plan Units, if an insider with the Fund, has no reasonable grounds to believe that the Fund is in default of any requirement of the Legislation.

DATED July 30, 2004

Paul M. Moore

Suresh Thakrar