

2006 BCSECCOM 575

September 26, 2006

Headnote

Mutual Reliance Review System for Exemptive Relief Applications

Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*, s. 4.5 – certification of annual and interim f/s - An issuer wants relief from the requirement in parts 2 and 3 of MI 52-109 to file annual and interim certificates - The issuer is a special purpose passive investment vehicle; the issuer is structured like an investment fund; the issuer's operations are not expected to change and its principal asset is the right to receive a monthly distribution fee that is declining over time

National Instrument 58-101 *Disclosure of Corporate Governance Practices*, s. 3.1 – all disclosure requirements - A special purpose passive investment vehicle wants an exemption from NI 58-101 - The issuer is structured like an investment fund; the issuer's operations are not expected to change and its principal asset is the right to receive a monthly distribution fee that is declining over time

Applicable British Columbia Provisions

Multilateral Instrument 52-109, Parts 2 and 3, s. 4.5

National Instrument 58-101, s. 3.1

In the Matter of
the Securities Legislation of
British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New
Brunswick, Nova Scotia, Newfoundland and Labrador, Northwest Territories,
Nunavut and Yukon (the Jurisdictions)

and

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

and

In the Matter of
Talvestco Inc. (the General Partner) and Talvest and Company Limited
Partnership 1994 (the Limited Partnership), (the General Partner and the Limited
Partnership are collectively, the Filers)

MRRS Decision Document

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Background

The local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions has received an application from the Filers for a decision under the securities legislation of the Jurisdictions (the Legislation):

- except in the Yukon, for an exemption pursuant to section 4.5 of Multilateral Instrument 52 - 109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (MI 52-109) exempting the Limited Partnership from:

- (a) the requirements that the chief executive officer (CEO) and chief financial officer (CFO) or person who performs similar functions for the Limited Partnership file an annual certificate concurrently with the latest of the filing of an Annual Information Form, annual financial statements or annual Management's Discussion & Analysis; and
- (b) the requirements that the CEO and CFO or person who performs similar functions for the Limited Partnership file an interim certificate concurrently with its interim filings

(together, the Certification Requirements);

- Except in British Columbia and the Yukon, for an exemption pursuant to section 8.1 of Multilateral Instrument 52-110 *Audit Committees* (MI 52-110) exempting the Limited Partnership from the application of MI 52-110

(the Audit Committee Requirements); and

- For an exemption pursuant to section 3.1 of National Instrument 58-101 *Disclosure of Corporate Governance Practices* (NI 58-101) exempting the Limited Partnership from the requirement to provide disclosure required by Form 58-101F2

(the Governance Practices Disclosure Requirements).

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) Quebec is the principal regulator for this application, and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

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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 Filers:

1. The Limited Partnership is a reporting issuer in the Jurisdictions.
2. The Limited Partnership is a “venture issuer” as defined in National Instrument 51-102 *Continuous Disclosure Obligation*, MI 52-110 and NI 58-101.
3. The Limited Partnership is a passive, single purpose vehicle, formed for the purpose of arranging for the distribution in Canada of securities of a group of mutual funds managed by a fund manager (collectively, the Funds) which purchasers of securities of the Funds elected to acquire on a deferred sales charge basis.
4. The business of the General Partner is limited to the management of the business of the Limited Partnership for which it is the general partner.
5. Since its formation, the activities of the Limited Partnership has primarily consisted: (i) of collecting subscriptions from its limited partners (the Limited Partners); (ii) paying selling commissions in respect of securities of the applicable Funds sold on a deferred sales charge basis during a particular period of time; (iii) making distributions of its net income to its Limited Partners; and (iv) incurring expenses to maintain the Limited Partnership.
6. The principal asset of the Limited Partnership is its right to receive a monthly distribution fee based on the value of the securities of the applicable Funds for which the Limited Partnership paid selling commissions until such units are redeemed, any deferred sales charges payable in respect of those securities payable on redemption, and any investment income earned on cash assets pending distribution of net income to its Limited Partners.
7. Each year, the Limited Partnership distributes to its Limited Partners an amount equal to the amount by which distribution fees, deferred sales charges and investment income earned by the Limited Partnership during the year and the amount of any reserves retained at the end of the previous year exceeds the expenses.

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8. The Limited Partnership will not earn any further deferred sales charges as the period during which deferred sales charges were payable according to the applicable redemption fee schedule is finished.
9. As noted above, the Limited Partnership only receives distribution fees in respect of units, which have not been redeemed. As a considerable number of years have passed, the securities which were funded by the Limited Partnership and still remain outstanding have declined and will continue to decline with a corresponding reduction in the distribution fee revenue. As the income of the Limited Partnership declines, any expenses of the Limited Partnership increase in percentage terms.
10. The entitlement to distribution fees will continue for the Limited Partnership until such time as the Limited Partnership is terminated in accordance with the Partnership Agreement governing the Limited Partnership.
11. The performance of the Limited Partnership is largely out of the control of the General Partner. It is controlled by the decisions of investors in Funds to retain or redeem their investment and by market conditions and the investment performance of the Funds themselves. As a result, commentary on the historical performance is of little value to investors since it does not predict future results or distribution levels. Factual information regarding the distribution fees earned and expenses are contained in the financial statements.
12. The Limited Partners of the Limited Partnership will receive semi-annual financial statements prepared as at June 30 and audited annual financial statements prepared as at December 31 of the Limited Partnership as well as distribution letters for each distribution to the Limited Partners.
13. Given the passive, limited nature of its business, it is not warranted to required the Limited Partnership to formally establish and maintain disclosure controls and procedures and financial reporting controls and procedures as are required if the CEO and CFO or person who performs similar functions is to provide the certificates required by MI 52-109.
14. Given the passive, limited nature of its business and the constantly declining size of the Limited Partnership, it is not warranted to required the General Partner of the Limited Partnership to: (i) appoint independent directors; (ii) have an independent audit committee, nominating committee or compensation committee; (iii) develop a written mandate for its board of directors, and position descriptions for its chair; (iv) provide orientation and continuing education for its directors; or(v) develop a written code for its directors, or regularly assess the effectiveness and contribution of the board, its committees

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and individual directors. As the substantive elements of corporate governance as described in NI 58-101 are not applicable to the structure of the Limited Partnership, it is not warranted to require that a Limited Partnership provide annual disclosure in respect of corporate governance to the Limited Partners.

15. The benefits to be derived by the Limited Partners of the Limited Partnership from requiring the General Partner of the Limited Partnership to have an independent audit committee, to implement disclosure controls and procedures and internal controls over financial reporting or to consider the corporate governance practices described in NI 58-101 do not justify the associate expense. All the costs of implementing these requirements will come from the distributions otherwise payable to the Limited Partners.
16. In the absence of the requested relief, the Filers would be required to comply with the Certification Requirements, the Audit Committee Requirements, and the Governance Practices Disclosure Requirements.

Decision

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 the Filers are exempt from:

- (a) the Certification Requirements;
- (b) the Audit Committee Requirements; and
- (c) the Governance Practices Disclosure Requirement;

provided that the exemptions shall terminate in respect of a Filer on the occurrence of a material change in the affairs of the Filer unless the Filer satisfies the Decision Makers that the exemptions should continue.

Louis Morisset
Executive Director, Securities Markets
Autorité des marchés financiers