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Headnote

Mutual Reliance Review System for Exemptive Relief Applications - open-end investment trust - trades of trust units under a distribution reinvestment plan to holders of trust units and trade by related partnership to holders of exchangeable securities which are exchangeable into trust units are exempt from prospectus and registration requirements - relief subject to conditions

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 45(2)(11), 48, 74(2)(10) and 76
Multilateral Instrument 45-102

**IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH
COLUMBIA, ALBERTA, SASKATCHEWAN, MANITOBA, ONTARIO,
QUEBEC, NEW BRUNSWICK, NOVA SCOTIA, PRINCE EDWARD
ISLAND AND NEWFOUNDLAND AND LABRADOR**

AND

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

AND

**IN THE MATTER OF BOARDWALK REAL ESTATE INVESTMENT
TRUST AND BOARDWALK REIT LIMITED PARTNERSHIP**

MRRS DECISION DOCUMENT

1. WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in each of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador (the “Jurisdictions”) has received an application from Boardwalk Real Estate Investment Trust (“Boardwalk REIT”) and Boardwalk REIT Limited Partnership (the “Partnership”), for a decision under 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 prospectus and a final prospectus and obtain receipts therefor (the “Prospectus Requirement”) shall not apply to certain trades in trust units of Boardwalk REIT (“REIT Units”) and certain trades in class B limited partnership units of the Partnership (“LP Class B Units”) under a distribution reinvestment plan (the “DRIP”);

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2. AND WHEREAS under the Mutual Reliance Review System for Exemptive Relief Applications (the “System”), the Alberta Securities Commission is the principal regulator for this application;
3. AND WHEREAS, unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 *Definitions* or in Autorité des Marchés Financiers Notice 14-101;
4. AND WHEREAS Boardwalk REIT has represented to the Decision Makers that:
 - 4.1 Boardwalk REIT is an unincorporated open-ended real estate investment trust established under the laws of Alberta pursuant to a declaration of trust dated January 9, 2004 (the “Declaration of Trust”), as amended and restated on May 3, 2004 (the “Effective Date”). The head office of Boardwalk REIT is located in Calgary, Alberta.
 - 4.2 Boardwalk REIT became a reporting issuer or the equivalent in each of the Provinces of Canada where such a concept exists on the Effective Date by virtue of the Arrangement (as defined below).
 - 4.3 Under the Declaration of Trust, Boardwalk REIT is authorized to issue an unlimited number of two classes of units, REIT Units and special voting units (“Special Voting Units”), of which there were 48,753,274 REIT Units and 4,475,000 Special Voting Units issued and outstanding on May 5, 2004.
 - 4.4 Each REIT Unit represents an equal fractional undivided beneficial interest in Boardwalk REIT; in distributions made by Boardwalk REIT, whether of net income, net realized capital gains or other amounts; and in the event of a liquidation, dissolution, winding-up or other termination of Boardwalk REIT, in the net assets of Boardwalk REIT after satisfaction of all liabilities.
 - 4.5 The REIT Units are listed on the Toronto Stock Exchange (the “TSX”) under the symbol “BEI.UN”.
 - 4.6 On May 3, 2004, Boardwalk REIT indirectly acquired substantially all of the assets and business of Boardwalk Equities Inc. (“BEI”). The acquisition of BEI was part of a transaction (the “Arrangement”) effected, in part, by way of a statutory plan of arrangement involving BEI and its shareholders that resulted in the

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acquisition of all of the issued and outstanding shares of BEI by 1098369 Alberta Ltd., a corporation incorporated immediately prior to the Effective Date (“Newco”) as a wholly-owned subsidiary of the former principal shareholder of BEI, Boardwalk Properties Company Limited (“BPCL”). In connection with the Arrangement, BEI changed its name to BPCL Holdings Inc. (“BPCL Holdings”).

- 4.7 The Partnership is a limited partnership formed under the laws of the Province of British Columbia, of which Boardwalk Real Estate Management Ltd. (“GP”) is the sole general partner. All of the outstanding shares of GP are held by Boardwalk REIT. The head office of the Partnership is located in Calgary, Alberta.
- 4.8 The Partnership is authorized to issue an unlimited number of: (a) LP Class A Units; (b) LP Class B Units; and (c) LP Class C Units, and, subject to certain restrictions, such other classes of partnership interests as GP may decide from time to time.
- 4.9 All of the LP Class A Units are indirectly held by Boardwalk REIT.
- 4.10 All of the issued and outstanding LP Class B Units and LP Class C Units are held, directly or indirectly, by BPCL Holdings.
- 4.11 Each LP Class B Unit may be surrendered for or, if such surrender cannot be effected, indirectly exchanged for one REIT Unit at any time by the holder thereof.
- 4.12 The Partnership is not a reporting issuer (or its equivalent) in any of the Jurisdictions.
- 4.13 The LP Class B Units are not listed or posted for trading on any stock exchange.
- 4.14 In connection with the Arrangement, one Special Voting Unit was issued by Boardwalk REIT in respect of each issued and outstanding LP Class B Unit. The purpose of the Special Voting Units of Boardwalk REIT is to provide a means by which holders of LP Class B Units (“LP Class B Unitholders”) may vote at meetings of unitholders of Boardwalk REIT.

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- 4.15 LP Class B Units are intended to be, to the greatest extent practicable, the economic equivalent of REIT Units and were created solely for Canadian tax purposes. Holders of LP Class B Units are entitled to receive distributions paid by the Partnership, which distributions are equal, to the greatest extent practicable, to distributions paid by Boardwalk REIT to holders of REIT Units (“REIT Unitholders”). LP Class B Units are exchangeable for an equal number of REIT Units at any time and are required to be exchanged for an equal number of REIT Units in certain circumstances.
- 4.16 Boardwalk REIT is not 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 part of the net assets of Boardwalk REIT as contemplated in the definition of “mutual fund” contained in the Legislation.
- 4.17 Under the DRIP, Boardwalk REIT intends to make monthly cash distributions out of its distributable income on or about the 15th day of a given month to persons who are REIT Unitholders on the last business day of the immediately preceding month and the Partnership intends to make identical monthly cash distributions out of its distributable income on the same conditions to persons who are LP Class B Unitholders on the last business day of the immediately preceding month (subject to an LP Class B Unitholder being entitled to elect to receive such amounts in the form of non-interest bearing loans rather than as distributions).
- 4.18 Boardwalk REIT has established the DRIP to permit REIT Unitholders and LP Class B Unitholders, other than such holders who are resident in the United States, at their discretion, to automatically reinvest the cash distributions paid on their REIT Units (or LP Class B Units, as the case may be) in additional REIT Units (“DRIP Units”), in the case of REIT Unitholders, and additional LP Class B Units (“DRIP B Units” and collectively with the DRIP Units the “Plan Units”) in the case of LP Class B Unitholders, as an alternative to receiving cash distributions.
- 4.19 Following enrolment in the DRIP by a REIT Unitholder or LP Class B Unitholder (a “DRIP Participant”), distributions due to DRIP Participants will be automatically paid to Computershare Trust Company of Canada in its capacity as agent under the DRIP

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(in such capacity, the “DRIP Agent”) and applied to the purchase of DRIP Units directly from Boardwalk REIT, or in the case of LP Class B Unitholders to the purchase of DRIP B Units directly from the Partnership.

- 4.20 Distributions due to DRIP Participants will be automatically reinvested in Plan Units at a price per Plan Unit to be determined by Boardwalk REIT, but which is expected to be calculated by reference to the weighted average closing price of REIT Units on the TSX preceding the relevant distribution payment date. DRIP Participants will be entitled to receive a further distribution of Plan Units equal in value to 3% of each distribution that is reinvested under the DRIP.
- 4.21 No commissions, service charges or brokerage fees will be payable by DRIP Participants in connection with the DRIP. The DRIP Agent’s fees for administering the DRIP will be paid by Boardwalk REIT out of its assets.
- 4.22 DRIP Participants may terminate their participation in the DRIP by providing written notice to the DRIP Agent no later than the business day immediately preceding the applicable record date. Such notice, if actually received no later than the business day immediately preceding the applicable record date, will have effect for the distribution associated with that record date, and if not so received will have effect for the next following distribution. After such termination is processed, distributions by Boardwalk REIT or the Partnership, as the case may be, will thereafter be payable to such REIT Unitholder or LP Class B Unitholder, as the case may be, in cash or otherwise in the form declared by Boardwalk REIT or the Partnership, as the case may be.
- 4.23 Boardwalk REIT reserves the right to amend, suspend or terminate the DRIP at any time in its sole discretion, in which case DRIP Participants and the DRIP Agent will be sent written notice thereof in accordance with the DRIP.
- 4.24 Except in Alberta, Boardwalk REIT is unable to rely on the exemptions from the Registration Requirement and Prospectus Requirement for reinvestment plans contained in the Legislation (the “Reinvestment Exemptions”) for the purposes of distributing the DRIP Units pursuant to the DRIP because:

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- 4.24.1 such exemptions are generally limited to plans that provide for the distribution of one or more of the following:
 - 4.24.1.1 dividends;
 - 4.24.1.2 interest;
 - 4.24.1.3 capital gains; or
 - 4.24.1.4 earnings or surplus.
- 4.25 The Partnership is unable to rely on the Reinvestment Exemptions for the purposes of distributing the DRIP B Units pursuant to the DRIP because the LP Class B Units are not publicly traded securities.
- 4.26 In addition, while Legislation in the Jurisdictions generally provide exemptions for the issuance of securities by an issuer on the exchange of securities of that same issuer, because the DRIP B Units are securities of the Partnership, the exemptions are not available for the issuance of REIT Units in exchange for DRIP B Units.
- 5. AND WHEREAS under the System, this MRRS Decision Document evidences the decision of each of the Decision Makers (collectively, the “Decision”);
- 6. AND WHEREAS 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;
- 7. THE DECISION of the Decision Makers under the Legislation (excluding Alberta in paragraph 7.1 only insofar as it pertains to trades by Boardwalk REIT of DRIP Units) is that:
 - 7.1 The Registration Requirement and Prospectus Requirement contained in the Legislation shall not apply to trades by Boardwalk REIT of DRIP Units or by the Partnership of DRIP B Units, in each case, for the account of DRIP Participants pursuant to the DRIP, provided that:

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- 7.1.1 at the time of the trade Boardwalk REIT is a reporting issuer or the equivalent under the Legislation and is not in default of any requirements of the Legislation;
- 7.1.2 no sales charge is payable in respect of the trade;
- 7.1.3 Boardwalk REIT 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 copy of the DRIP which contains a statement describing:
 - 7.1.3.1 their right to withdraw from the DRIP and to make an election to receive cash instead of Plan Units on the making of a distribution of income by Boardwalk REIT or the Partnership, as the case may be (the “Withdrawal Right”); and
 - 7.1.3.2 instructions on how to exercise the Withdrawal Right;
- 7.1.4 except in Quebec, the first trade or resale of Plan Units acquired pursuant to the DRIP in a Jurisdiction shall be deemed to be a distribution or primary distribution to the public under the Legislation unless the conditions set out in paragraphs 1 through 5 of subsection 2.6(3) of MI 45-102 are satisfied at the time of such first trade or resale; and
- 7.1.5 in Quebec, the first trade (alienation) of Plan Units acquired pursuant to the DRIP shall be deemed to be a distribution or primary distribution to the public unless:
 - 7.1.5.1 at the time of the first trade, Boardwalk REIT is a reporting issuer in Quebec and is not in default of any of the requirements of the Legislation in Quebec;
 - 7.1.5.2 no unusual effort is made to prepare the market or to create a demand for the Plan Units;
 - 7.1.5.3 no extraordinary commission or consideration is paid to a person or company other than the vendor of the Plan Units in respect of the trade; and

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7.1.5.4 the vendor of the Plan Units, if an insider of Boardwalk REIT, has no reasonable grounds to believe that Boardwalk REIT is in default of any requirement of the Legislation in Quebec; and

7.2 The Registration Requirement and Prospectus Requirement contained in the Legislation shall not apply to trades by Boardwalk REIT of REIT Units on the exchange of DRIP B Units, provided that:

7.2.1 at the time of the trade Boardwalk REIT is a reporting issuer or the equivalent under the Legislation and is not in default of any requirements of the Legislation;

7.2.2 no sales charge is payable in respect of the trade;

7.2.3 Boardwalk REIT has caused to be sent to the person or company to whom the REIT Units are traded, not more than 12 months before the trade, a copy of the DRIP which contains a statement describing:

7.2.3.1 their right to withdraw from the DRIP and to make an election to receive cash instead of Plan Units on the making of a distribution of income by Boardwalk REIT or the Partnership, as the case may be (the “Withdrawal Right”); and

7.2.3.2 instructions on how to exercise the Withdrawal Right;

7.2.4 except in Quebec, the first trade or resale of REIT Units acquired by Class B Unitholders on the exchange of DRIP B Units in a Jurisdiction shall be deemed to be a distribution or primary distribution to the public under the Legislation unless the conditions set out in paragraphs 1 through 5 of subsection 2.6(3) of MI 45-102 are satisfied at the time of such first trade or resale; and

7.2.5 in Quebec, the first trade (alienation) of REIT Units acquired by Class B Unitholders on the exchange of DRIP B Units, shall be deemed to be a distribution or primary distribution to the public unless:

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7.2.5.1 at the time of the first trade, Boardwalk REIT is a reporting issuer in Quebec and is not in default of any of the requirements of the Legislation in Quebec;

7.2.5.2 no unusual effort is made to prepare the market or to create a demand for the REIT Units issued on the exchange of DRIP B Units;

7.2.5.3 no extraordinary commission or consideration is paid to a person or company other than the vendor of the REIT Units issued on the exchange of DRIP B Units, in respect of the trade; and

7.2.5.4 the vendor of the REIT Units issued on the exchange of DRIP B Units, if an insider of Boardwalk REIT, has no reasonable grounds to believe that Boardwalk REIT is in default of any requirement of the Legislation in Quebec.

DATED this 14th day of July, 2004.

Stephen P. Sibold, Q.C., Chair

Stephen R. Murison, Vice-Chair