

## **2004 BCSECCOM 243**

### **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications – relief from the registration and prospectus requirements in connection with the issuance of units to existing unit holders under a distribution reinvestment plan, 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 and 76

Multilateral Instrument 45-102 *Resale of Securities*

### **IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH COLUMBIA, ALBERTA, SASKATCHEWAN, MANITOBA, ONTARIO, QUÉBEC, NOVA SCOTIA, NEW BRUNSWICK, 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 SKYLON GROWTH & INCOME TRUST**

### **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 and Newfoundland and Labrador (the “Jurisdictions”) has received an application from Skylon Growth & Income Trust (the “Trust”) 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 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 distribution of units of the Trust pursuant to a distribution reinvestment plan (the “Plan”), subject to certain conditions;

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;

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AND WHEREAS, unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 Definitions or in Québec Commission Notice 14-101;

AND WHEREAS the Trust has represented to the Decision Makers that:

1. The Trust is an unincorporated closed-end investment trust established under the laws of the Province of Ontario by a declaration of trust dated as of January 30, 2004.
2. The Trust is not considered to be a “mutual fund” as defined in the Legislation because the holders of Units (“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 Trust as contemplated in the definition of “mutual fund” in the Legislation.
3. The Trust became a reporting issuer or the equivalent thereof in the Jurisdictions on January 30, 2004 upon obtaining a receipt for its final prospectus dated January 30, 2004 (the “Prospectus”). As of the date hereof, the Trust is not in default of any requirements under the Legislation.
4. The beneficial interests in the Trust are divided into a single class of voting units (the “Units”). The Trust is authorized to issue an unlimited number of Units. Each Unit represents a Unitholder’s proportionate undivided beneficial interest in the Trust. As of the date hereof, 20,530,000 Units are issued and outstanding.
5. The Units are listed and posted for trading on the Toronto Stock Exchange (the “TSX”) under the symbol “SKG.UN”.
6. Skylon Advisors Inc. is the manager of the Trust and its principal registered office is in Toronto, Ontario.
7. The Trust currently intends to make cash distributions of distributable income to Unitholders of record on the day on which the Trust declares a distribution to be payable (each, a “Record Date”), and such distributions will be payable on a day which is on or about the 15<sup>th</sup> business day of the month following a Record Date (each a “Distribution Payment Date”).
8. The Trust has adopted the Plan which, subject to obtaining all necessary regulatory approvals, will permit distributions to be automatically reinvested, at the election of each Unitholder, to purchase additional Units (“Plan Units”) pursuant to the Plan and in accordance with a distribution reinvestment plan

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services agreement entered into by the Trust and Computershare Trust Company of Canada in its capacity as agent under the Plan (in such capacity, the “Plan Agent”).

9. Distributions due to Unitholders who have elected to participate in the Plan (the “Plan Participants”) will be automatically reinvested on their behalf by the Plan Agent to purchase Plan Units from the Trust’s treasury and the number of Plan Units will be determined by using the volume-weighted average of the closing price for a board lot (100 Units) of Units quoted in Canadian dollars on the TSX for the 5 trading days immediately preceding the relevant Distribution Payment Date. No commissions, service charges or brokerage fees are payable by Plan Participants in connection with the Plan.
10. The Plan Agent will purchase Plan Units only in accordance with mechanics described in the Plan and, accordingly, there is no opportunity for a Plan Participant or the Plan Agent to speculate on net asset value (“NAV”) per Unit.
11. The Plan is open for participation by all Unitholders (other than non-residents of Canada), so that such Unitholders can reduce potential dilution by electing to participate in the Plan.
12. As all Units, including those issued pursuant to the Plan, are issued in book-entry only form and are held by, and registered in the name of, The Canadian Depository for Securities Limited (“CDS”), Plan Participants will not be entitled to receive certificates representing Plan Units purchased or issued under the Plan.
13. A Plan Participant may terminate his or her participation in the Plan by providing the Plan Agent (via the applicable CDS Participant) at least one business day prior written notice and, such notice, if actually received no later than one business day prior to the next Record Date, will have effect beginning with the distribution to be made with respect to such Record Date. Thereafter, distributions payable to such Unitholder will be in cash.
14. The Trust reserves the right to terminate the Plan at any time in its sole discretion, in which case Plan Participants will be sent written notice thereof.
15. The Trust may amend or suspend the Plan at any time, provided that it gives notice of that amendment or suspension to the Plan Participants (through applicable CDS Participants). Any amendments to the Plan are subject to prior approval by the TSX. The Manager may adopt additional rules and regulations to facilitate the administration of the Plan subject to the approval

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of any applicable securities regulatory authority or stock exchange. The Trust also reserves the right to regulate and interpret the Plan as it deems necessary or desirable to ensure the efficient and equitable operation of the Plan.

16. Except in Alberta, the distribution of the Plan Units by the Trust 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 by the Trust and not the reinvestment of dividends or interest of the Trust as contemplated by the Legislation.
17. The distribution of the Plan Units by the Trust 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 Trust 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 Trust.

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 pursuant to the Legislation is that, except in Alberta, the trades of Plan Units to the Plan Participants pursuant to the Plan shall not be subject to the Registration and Prospectus Requirements of the Legislation provided that:

- (a) at the time of the trade the Trust is a reporting issuer or the equivalent under the Legislation and is not in default of any requirements of the Legislation;
- (b) no sales charge is payable in respect of the distributions of Plan Units from treasury;
- (c) the Trust 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:

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- i. their right to withdraw from the Plan and to make an election to receive cash instead of Plan Units on the making of a distribution by the Trust; and
  - ii. instructions on how to exercise the right referred to in (i);
- (d) in each of the Jurisdictions other than Québec, the first trade or resale of Plan Units acquired pursuant to the Plan in a Jurisdiction shall be deemed a distribution or primary distribution to the public under the Legislation unless the conditions of paragraphs 2 through 5 of subsection 2.6(3) or (4) of Multilateral Instrument 45-102 are satisfied; and
- (e) in Québec, the first trade (alienation) of Plan Units acquired pursuant to the Plan in a Jurisdiction shall be deemed to be a distribution or primary distribution to the public unless:
  - i. at the time of the first trade, the Trust is a reporting issuer in Québec and is not in default on any of the requirements of securities legislation in Québec;
  - ii. no unusual effort is made to prepare the market or to create a demand for the Plan Units;
  - iii. no extraordinary commission or consideration is paid to a person or company other than the vendor of the Plan Units in respect of the first trade; and
  - iv. the vendor of the Plan Units, if in a special relationship with the Trust, has no reasonable grounds to believe that the Trust is in default of any requirement of the Legislation of Québec.

DATED March 31, 2004.

Robert W. Korthals

Wendel S. Wigle