

# **2003 BCSECCOM 603**

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Application – relief from registration and prospectus requirements in connection with the distribution of trust units under a distribution reinvestment and optional trust unit purchase plan – first trade relief for additional units not subject to a seasoning period

## **Applicable British Columbia Provisions**

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

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

**AND**

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

**AND**

**IN THE MATTER OF BOYD GROUP INCOME FUND AND  
THE BOYD GROUP INC.**

## **MRRS DECISION DOCUMENT**

WHEREAS the local securities regulatory authority or regulator (the "Decision Maker") in each of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Newfoundland and Labrador, New Brunswick, Nova Scotia and Prince Edward Island (the "Jurisdictions") has received an application from Boyd Group Income Fund (the "Fund") 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 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 certain trades in units of the Fund issued pursuant to a distribution reinvestment plan;

AND WHEREAS the Decision Maker in Manitoba has received an application from The Boyd Group Inc. ("BGI") and the Fund for a decision, pursuant to the Legislation of that Jurisdiction that Registration and Prospectus Requirements shall not apply to certain trades in securities of BGI and the Fund under a dividend reinvestment plan of BGI;

## **2003 BCSECCOM 603**

AND WHEREAS under the Mutual Reliance Review System for Exemptive Relief Applications (the "System"), the Manitoba Securities Commission is the principal regulator for this application;

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

1. The Fund is an unincorporated open-ended investment trust governed by the laws of the Province of Manitoba created pursuant to a declaration of trust dated as of December 16, 2002. The head office of the Fund is located in Winnipeg, Manitoba.
2. The Fund was established for the purposes of, among other things, investing in securities of BGI.
3. As of June 30, 2003, the Fund directly held approximately 63.7% of the voting equity securities of BGI. The remaining voting equity interest in BGI is held directly by Boyd Group Holdings Inc. ("BGHI"), a corporation that is controlled by the Fund through its ownership of 70% of the outstanding voting shares of BGHI.
4. The Fund has been a reporting issuer or the equivalent under the Legislation of British Columbia, Alberta, Saskatchewan, Manitoba and Ontario since February 17, 2003 and, to the best of its knowledge, is not in default of any requirements of such Legislation.
5. The Fund is not a "mutual fund" under the Legislation as the holders of Units 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 by the definition of "mutual fund" in the Legislation.
6. The Fund is authorized to issue an unlimited number of units ("Units"), each of which represents an equal fractional undivided beneficial interest in any distributions from the Fund and in any net assets of the Fund in the event of termination or winding-up of the Fund. All Units are of the same class with equal rights and privileges. Each Unit is transferable, entitles the holder thereof to participate equally in distributions and entitles the holder thereof to one vote at all meetings of holders of Units ("Unitholders") for each Unit held. As of June 30, 2003, there were 3,626,443 Units issued and outstanding.
7. The Units are listed and posted for trading on the Toronto Stock Exchange (the "TSX").

## 2003 BCSECCOM 603

8. The Fund makes and expects to continue to make monthly cash distributions to its Unitholders in an amount per Unit equal to a pro rata share of all amounts received by the Fund in each month including, without limitation, dividends, interest or other distributions on securities held by the Fund, less: (i) costs and expenses of the Fund incurred or anticipated; (ii) amounts that may be paid by the Fund in connection with any cash redemptions of Units; (iii) interest expenses of the Fund; and (iv) any amount the trustees of the Fund feel is necessary to provide for the liabilities and costs incurred in the activities and operations of the Fund.
9. The Fund intends to establish a distribution reinvestment plan (the "Fund Plan") pursuant to which eligible Unitholders may, at their option, direct that cash distributions paid by the Fund in respect of their existing Units ("Cash Distributions") be applied to the purchase of additional Units ("Additional Units") to be held for their account under the Fund Plan (the "Distribution Reinvestment Option").
10. Alternatively, the Fund Plan will enable eligible Unitholders who wish to reinvest their Cash Distributions to authorize and direct the trust company that is appointed as agent under the Fund Plan (the "Fund Plan Agent"), to pre-sell through a designated broker (the "Fund Plan Broker"), for the account of the Unitholders who so elect, a number of Units approximately equal to the number of Additional Units issuable on such reinvestment, and to settle such pre-sales with the Additional Units issued on the applicable distribution payment date in exchange for a premium cash payment equal to 102% of the reinvested Cash Distribution (the "Premium Distribution Option"). The Fund Plan Broker will be entitled to retain for its own account the difference between the proceeds realized in connection with such pre-sales and the cash payment to the Fund Plan Agent in an amount equal to 102% of the reinvested Cash Distributions.
11. Eligible Unitholders who have directed that their Cash Distributions be reinvested in Additional Units under either the Distribution Reinvestment Option or the Premium Distribution Option ("Participants") may also be able to directly purchase Additional Units under the Fund Plan by making optional cash payments within the limits established thereunder (the "Cash Payment Option"). The Fund shall have the right to determine from time to time whether the Cash Payment Option will be available. The Cash Payment Option will only be available to Unitholders that are Participants.
12. The Fund anticipates that Unitholders who are resident in the United States will be permitted under U.S. federal securities laws to participate in the

## 2003 BCSECCOM 603

Distribution Reinvestment Option or the Premium Distribution Option, but not the Cash Payment Option.

13. All Additional Units purchased under the Fund Plan will be purchased by the Fund Plan Agent directly from the Fund on the relevant distribution payment date at a price determined by reference to the Average Market Price (as defined in the Fund Plan), being the arithmetic average of the daily volume weighted average trading prices of the Units on the TSX for a defined period prior to the distribution payment date.
14. Additional Units purchased under the Distribution Reinvestment Option or the Premium Distribution Option will be purchased at a 5% discount to the Average Market Price. Additional Units purchased under the Cash Payment Option will be purchased at the Average Market Price.
15. The Fund Plan Broker's *prima facie* return under the Premium Distribution Option will be approximately 3% of the reinvested Cash Distributions (based on pre-sales of Units having a market value of approximately 105% of the reinvested Cash Distributions and a fixed cash payment to the Fund Plan Agent, for the account of applicable Participants, of an amount equal to 102% of the reinvested Cash Distributions). The Fund Plan Broker may, however, realize more or less than this *prima facie* amount, as the actual return will vary according to the prices the Fund Plan Broker is able to realize on the pre-sales of Units. The Fund Plan Broker bears the entire risk of adverse changes in the market, as Participants who have elected the Premium Distribution Option are assured a premium cash payment equal to 102% of the reinvested Cash Distributions.
16. All activities of the Fund Plan Broker on behalf of the Fund Plan Agent that relate to pre-sales of Units for the account of Participants who elect the Premium Distribution Option will be in compliance with applicable Legislation and the rules and policies of the TSX (subject to any exemptive relief granted). The Fund Plan Broker will also be a member of the Investment Dealers Association of Canada and will be registered under the legislation of any Jurisdiction where the first trade in Additional Units pursuant to the Premium Distribution Option makes such registration necessary.
17. Participants may elect either the Distribution Reinvestment Option or the Premium Distribution Option in respect of their Cash Distributions. Eligible Unitholders may elect to participate in either the Distribution Reinvestment Option or the Premium Distribution Option at their sole option and are free to

## **2003 BCSECCOM 603**

terminate their participation under either option, or to change their election, in accordance with the terms of the Fund Plan.

18. Under the Distribution Reinvestment Option, Cash Distributions will be paid to the Fund Plan Agent and applied by the Fund Plan Agent to the purchase of Additional Units, which will be held under the Fund Plan for the account of Participants who have elected to participate in that component of the Fund Plan.
19. Under the Premium Distribution Option, Cash Distributions will be paid to the Fund Plan Agent and applied by the Fund Plan Agent to the purchase of Additional Units for the account of Participants who have elected to participate in that component of the Fund Plan, but the Additional Units purchased thereby will be automatically transferred to the Fund Plan Broker to settle pre-sales of Units made by the Fund Plan Broker on behalf of the Fund Plan Agent for the account of such Participants in exchange for a premium cash payment equal to 102% of the reinvested Cash Distributions.
20. Under the Cash Payment Option, a Participant may, through the Fund Plan Agent, purchase Additional Units up to a specified maximum dollar amount per distribution period and subject to a minimum amount per remittance. The aggregate number of Additional Units that may be purchased under the Cash Payment Option by all Participants in any financial year of the Fund will be limited to a maximum of 2% of the number Units issued and outstanding at the start of the financial year.
21. No brokerage fees or service charges will be payable by Participants in connection with the purchase of Additional Units under the Fund Plan.
22. Additional Units purchased and held under the Fund Plan will be registered in the name of the Fund Plan Agent (or its nominee) and credited to the accounts of the appropriate Participants, and all Cash Distributions on Units so held under the Fund Plan will be automatically reinvested in Additional Units in accordance with the terms of the Fund Plan and the current election of that Participant.
23. The Fund Plan permits full investment of reinvested Cash Distributions and optional cash payments under the Cash Payment Option (if available) because fractions of Units, as well as whole Units, may be credited to Participants' accounts with the Fund Plan Agent.

## **2003 BCSECCOM 603**

24. The Fund reserves the right to determine, for any distribution payment date, the amount of Unitholders' equity that may be issued pursuant to the Fund Plan.
25. If, in respect of any distribution payment date, fulfilling all of the elections under the Fund Plan would result in the Fund exceeding either the limit on Unitholders' equity set by the Fund 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; (ii) second, from Participants electing the Premium Distribution Option; and (iii) third, from Participants electing the Cash Payment Option (if available). If the Fund 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.
26. If the Fund determines not to issue any Unitholders' equity through the Fund Plan on a particular distribution payment date, then all Participants will receive the Cash Distribution announced by the Fund for that distribution payment date.
27. A Participant may terminate its participation in the Fund Plan at any time by submitting a termination form to the Fund Plan Agent, provided that a termination form received between a distribution record date and the distribution payment date to which such record date relates will not become effective until after that distribution payment date.
28. The Fund reserves the right to amend, suspend or terminate the Fund Plan at any time, provided that such action shall not have a retroactive effect that would prejudice the interests of the Participants. All Participants will be sent written notice of any such amendment, suspension or termination.
29. The distribution of Additional Units by the Fund pursuant to the Fund Plan cannot be made in reliance on registration and prospectus exemptions contained in the Legislation as the Fund Plan involves the reinvestment of distributions of the distributable cash of the Fund and not the reinvestment of dividends, interest or distributions of capital gains or out of earnings or surplus.
30. The distribution of Additional Units by the Fund pursuant to the Fund Plan cannot be made in reliance on registration and prospectus exemptions

## 2003 BCSECCOM 603

contained in the Legislation for distribution reinvestment plans of mutual funds, as the Fund is not a "mutual fund" as defined in the Legislation.

AND WHEREAS BGI and the Fund have represented to the Decision Maker in Manitoba that:

31. BGI is a corporation amalgamated on February 28, 2003, pursuant to a plan of arrangement (the "Arrangement") under the laws of the Province of Manitoba and maintains its head office in Winnipeg, Manitoba. BGI owns and operates, either directly or through subsidiaries, automotive collision repair centers in Canada and the United States.
32. BGI is not currently a reporting issuer or the equivalent thereof in any of the provinces or territories of Canada, although it was a "reporting issuer" (or the equivalent thereof) in the Provinces of Manitoba and Ontario until May 20, 2003 when The Manitoba Securities Commission issued a decision under the System deeming BGI to have ceased to be a reporting issuer in those Jurisdictions.
33. The authorized capital of BGI consists of an unlimited number of Class I Shares, an unlimited number of Class II Shares and an unlimited number of Class III Shares. As of June 30, 2003, there were 3,626,443 Class I Shares and 2,062,863 Class II Shares issued and outstanding, all of which are owned by the Fund and BGHI, respectively. There are presently no issued and outstanding Class III Shares. BGI also has outstanding a class of notes (the "BGI Notes"), all of which are held by the Fund.
34. On January 5, 1998, BGI issued convertible debentures in the aggregate principal amount of \$2 million (the "1998 Debentures") and on December 3, 2002 and December 16, 2002, issued convertible debentures in the aggregate principal amount of \$7.5 million (collectively, the "2002 Debentures"). Prior to completion of the Arrangement, each of the 1998 Debentures and the 2002 Debentures were convertible into Class A (Restricted Voting) Shares of BGI at a rate of one Class A (Restricted Voting) Share for each \$1.17647 of aggregate principal amount of the 1998 Debentures so converted and at a rate of one Class A (Restricted Voting) Share for each \$2.00 of aggregate principal amount of the 2002 Debentures so converted. As part of the Arrangement, the trust indenture in respect of each of the 1998 Debentures and the 2002 Debentures was amended by making the Fund a party thereto and changing certain of the provisions thereof to provide the holder of the Debentures issued thereunder the right to exchange such Debentures for Units in lieu of BGI's previously publicly traded securities, Class A (Restricted Voting) Shares, at the rate (after taking into account the 4 for 1 share consolidation which was

## 2003 BCSECCOM 603

part of the Arrangement) of \$4.68 and \$8.00 per Unit, respectively. As at the date hereof, there are \$1,332,000 aggregate principal amount of 1998 Debentures and \$6,525,000 aggregate principal amount of 2002 Debentures outstanding.

35. BGHI was incorporated under *The Corporations Act* (Manitoba) for purposes of participating in the Arrangement and owns an approximate 36.3% voting equity interest in BGI through its ownership of all of the Class II Shares of BGI. BGHI, subject to applicable legal and contractual requirements, distributes all of its income on a monthly basis to its shareholders by way of a dividend on its issued and outstanding common shares.
36. The authorized capital of BGHI consists of 2,062,606 Class A Common Shares, all of which are outstanding as fully paid and non-assessable shares in the capital of BGHI, an unlimited number of Class B Common Shares of which 257 are issued and outstanding, and an unlimited number of Voting Shares, of which 100,000,000 are issued and outstanding. Of those 2,062,606 issued and outstanding Class A Common Shares, as of the date hereof, the public unitholders of the Fund hold approximately 57.4% of the Class A Common Shares and 4612094 Manitoba Inc. ("Management Holdco"), a private corporation established by certain senior management of BGI to participate in the Arrangement, holds the remaining 42.6%. All of the issued and outstanding Class B Common Shares of BGHI are owned by the Fund. The Fund owns 70% of the issued and outstanding Voting Shares of BGHI and Management Holdco owns the balance.
37. BGI intends to establish a dividend reinvestment plan (the "BGI Plan") pursuant to which BGHI, the sole shareholder of BGI Class II Shares, at its option, may direct that cash dividends paid by BGI in respect of its Class II Shares (the "BGI Dividends") be applied to the purchase of Class III Shares (the "BGI Class III Shares") of BGI (the "BGHI Dividend Reinvestment Option"). The purchase price of the BGI Class III Shares purchased by BGHI pursuant to the BGHI Dividend Reinvestment Option will be equal to a 5% discount of the Average Market Price of the Units (as determined in accordance with the terms of the Fund Plan).
38. The BGI Class III Shares are, by their terms, convertible at the option of either the holder or BGI into Units on a one-for-one basis (the "Class III Share to Unit Conversion Right"). Pursuant to an exchange agreement between BGI, the Fund and BGHI, BGI can require the Fund to issue a sufficient number of Units (the "Class III Share Converted Units") to satisfy any such conversion request, provided that BGI issues a sufficient number of BGI Notes and Class



## 2003 BCSECCOM 603

I Shares to the Fund in satisfaction of the purchase price for the Class III Share Converted Units.

39. It is anticipated that BGHI will elect to convert all of the BGI Class III Shares that it receives pursuant to the BGHI Dividend Reinvestment Option into Units, and upon receipt thereof transfer such Class III Share Converted Units to the Fund Plan Broker to settle pre-sales of Units made by the Fund Plan Broker on behalf of BGHI in exchange for a premium cash payment equal to 102% of the amount of the reinvested BGI Dividends. This arrangement between the Fund Plan Broker and BGHI with respect to the pre-sale of Class III Share Converted Units will be substantially the same as that which is implemented under the Fund Plan with respect to the Premium Distribution Option.
40. The issue of Units to BGHI upon the conversion of BGI Class III Shares (the "Class III Converted Units Issue") and the issue by BGI of the BGI Notes and Class I Shares to the Fund in satisfaction of the purchase price for the Units issued in respect of the Class III Share to Unit Conversion Right (the "BGI Note and Class I Share Issue") involve trades in securities occurring only in the Province of Manitoba, but are not exempt from the Registration and Prospectus Requirements under the Legislation of that Jurisdiction.

AND WHEREAS under the System, this MRRS Decision Document evidences the decision of each Decision Maker (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:

1. the trades of Additional Units by the Fund to the Fund Plan Agent for the account of Participants pursuant to the Fund Plan shall not be subject to the Registration and Prospectus Requirements of the Legislation provided that:
  - (a) at the time of the trade the Fund is a reporting issuer or the equivalent in a jurisdiction listed in Appendix B of Multilateral Instrument 45-102 *Resale of Securities* ("MI 45-102") and is not in default of any requirements of the Legislation of that jurisdiction;
  - (b) no sales charge is payable in respect of the trade;

## 2003 BCSECCOM 603

- (c) the Fund has caused to be sent to the person or company to whom the Additional Units are traded, not more than 12 months before the trade, a statement describing:
    - (i) their right to withdraw from the Fund Plan and to make an election to receive Cash Distributions instead of Additional Units, and
    - (ii) instructions on how to exercise the right referred to in paragraph (i) above;
  - (d) the aggregate number of Additional Units issued under the Cash Payment Option of the Fund Plan in any financial year of the Fund shall not exceed 2% of the aggregate number of Units outstanding at the start of that financial year;
  - (e) except in Quebec, the first trade in Additional Units acquired pursuant to this Decision will be a distribution or primary distribution to the public unless the conditions in paragraphs 2 through 5 of subsection 2.6(3) of MI 45-102 are satisfied;
  - (f) in Québec, the alienation of Additional Units acquired pursuant to this Decision will be a distribution unless:
    - (i) all of the following are true:
      - (A) the Fund is and has been a reporting issuer in Québec for the 12 months preceding the alienation;
      - (B) no unusual effort is made to prepare the market or to create a demand for the securities that are the subject of the alienation;
      - (C) no extraordinary commission or other consideration is paid in respect of the alienation;
      - (D) if the seller of the securities is an insider of the issuer, the seller has no reasonable grounds to believe that the issuer is in default of any requirement of securities legislation; or
    - (ii) such alienation is made through the TSX;
2. the Registration and Prospectus Requirements shall not apply to the first trade of the Class III Share Converted Units by BGHI in settlement of the pre-sales of Units made by the Fund Plan Broker on its behalf, provided that the

## **2003 BCSECCOM 603**

conditions in paragraphs 2 through 5 of subsection 2.6(3) of MI 45-102 are satisfied.

THE DECISION of the Decision Maker in Manitoba pursuant to the Legislation of that Jurisdiction is that the Registration and Prospectus Requirements shall not apply to the Class III Converted Units Issue or the BGI Note and Class I Share Issue.

DATED this 3rd day of September, 2003.

Chris Besko  
Deputy Director - Legal