

2005 BCSECCOM 625

September 21, 2005

Headnote

Mutual Reliance Review System for Exemptive Relief Applications - National Instrument 51-102, s. 13.1 - Continuous Disclosure Obligations - An issuer wants relief from the requirements to prepare, file and deliver unaudited interim financial statements - The issuer is a special purpose trust whose business is limited to holding limited partnership units in order to make distributions to unitholders; the limited partnership units are part of a financing structure involving a derivative linked to debt of another issuer; the trust will prepare, file and deliver annual financial statements as required under NI 51-102; the trust will file a notice on its SEDAR profile, advising unitholders of the exemption and letting them know where they can find the continuous disclosure filings of the issuer on whose securities the derivative is based

Multilateral Instrument 52-109, s. 4.5 - Certification of Disclosure in Issuer's Annual and Interim Filings - An issuer wants relief from the requirement in part 3 of MI 52-109 to file interim certificates - The issuer has applied for and received an exemption from filing interim financial statements

Applicable British Columbia Provisions

National Instrument 51-102, s. 13.1

Multilateral Instrument 52-109, s. 4.5

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

and

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

and

In the Matter of Kingsway Linked Return of Capital Trust (The Trust)

MRRS Decision Document

Background

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

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the securities legislation of the Jurisdictions (the Legislation) that, subject to the terms and conditions described below, the requirements contained in National Instrument 51-102 – *Continuous Disclosure Obligations* (NI 51-102) to:

- (a) file interim financial statements with the Decision Makers and to deliver such statements to the holders of the Trust Units (as defined below) (the Holders);
- (b) file interim management's discussion and analysis (MD&A) of the financial condition and results of operation of the Trust with the Decision Makers and send such interim MD&A to the Holders; and
- (c) file material change reports and issue and file press releases related to the Trust, only where such requirement relates solely to a material change in the affairs of Kingsway (as defined below) and which is the subject of a filing by Kingsway;

(collectively the Requested NI 51-102 Relief) shall not apply to the Trust subject to certain terms and conditions.

In addition, the Decision Maker in each of the Jurisdictions has received an application from the Trust for a decision under the Legislation that the provisions of Multilateral Instrument 52-109 – *Certification of Disclosure in Issuers' Annual and Interim Filings* (MI 52-109) concerning the filing of interim certificates (the Requested MI 52-109 Relief) shall not apply to the Trust, subject to certain terms and conditions.

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) the Ontario Securities Commission is the principal regulator for this application; and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

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 Trust:

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The Trust

1. The Trust is an investment trust established under the laws of the Province of Ontario on May 12, 2005. The principal office of the Trust is located in Toronto, Ontario.
2. The Trust is a special purpose entity formed in connection with the Offering (as defined below). The operating activity of the Trust consists of subscribing for and purchasing the LP Units (as defined below) for the purpose of making distributions to the Holders. As a special purpose entity, the Trust's declaration of trust prohibits it from carrying on any business or other activity not related to the foregoing.
3. The Trust is a reporting issuer or its equivalent in all Jurisdictions that provide for a reporting issuer regime.
4. The Trust was receipted on June 30, 2005 for a (final) long form prospectus dated June 29, 2005 (the Prospectus), in connection with the initial public offering (the Offering) of preferred, retractable, redeemable, cumulative units (Trust Units).
5. The Trust's Offering closed on July 14, 2005. Following the completion of the Offering, the Trust's authorized capital consists of 3,120,000 Trust Units.

Kingsway Financial Services Inc.

6. Kingsway Financial Services Inc. (Kingsway) is a corporation incorporated under the laws of the Province of Ontario. The principal office of Kingsway is located in Mississauga, Ontario.
7. Kingsway is a reporting issuer or its equivalent in each of the provinces of Canada that provides for a reporting issuer regime. Kingsway is eligible to file a short form prospectus under National Instrument 44-101 *Short Form Prospectus Distributions*.
8. Kingsway is listed on the New York Stock Exchange and The Toronto Stock Exchange (TSX) and trades under the symbol "KFS". As of closing on August 16, 2005, Kingsway had a quoted market value on the TSX of \$1,220,178,850 with 56,463,621 issued and outstanding shares.

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9. Kingsway's long-term debt is currently rated BBB by Dominion Bond Rating Service.

Details of the Offering

10. In order to achieve its investment objectives, the Trust used the net proceeds of the Offering to subscribe for and purchase all of the limited partnership units (the LP Units) of KL Limited Partnership (KL LP), a newly created limited partnership organized under the laws of the Province of Ontario, which, in turn, used the proceeds of such subscription to pre-pay its purchase obligations under a forward securities purchase agreement (the Purchase Agreement) dated as of July 14, 2005 with The Bank of Nova Scotia (BNS).
11. The Purchase Agreement provides exposure to a note (the Kingsway Note) issued by Kingsway Delaware ROC GP, a newly created general partnership organized under the laws of the State of Delaware (Kingsway ROCGP) and unconditionally guaranteed as to payments of principal, interest and other amounts by Kingsway and by Kingsway America Inc., a corporation incorporated under the laws of the State of Delaware and a wholly-owned subsidiary of Kingsway (Kingsway America). The guarantee of the Kingsway Note is not a guarantee of the Trust Units or the distributions thereunder and Holders of Trust Units have no recourse against Kingsway or Kingsway America or any of their respective affiliates in the event of default on the Kingsway Note or in the event that Kingsway or Kingsway America fail to honour their guarantee of the Kingsway Note. The Kingsway Note is owned by Kingsway Note Trust, a newly created investment trust established under the laws of the Province of Ontario (KN Trust). The initial holder of all of the outstanding units of KN Trust is BNS.
12. Under the Purchase Agreement, BNS delivers to KL LP, on the redemption date (Redemption Date), a specified portfolio (the Portfolio) consisting of securities (the Portfolio Securities) of certain specified Canadian public companies listed on the TSX with a value related to the redemption proceeds paid by KN Trust to holders of its units in connection with the repayment on maturity of the Kingsway Note by Kingsway ROCGP. KL LP distributes proceeds from the sale of the Portfolio Securities to holders of LP Units.
13. In order to permit the Trust to make quarterly distributions on the Trust Units, the Purchase Agreement will be partially settled each quarter by BNS delivering to Scotia Capital Inc. (in such capacity, the Administrator), on behalf of KL LP, Portfolio Securities which will be sold by the

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Administrator on behalf of KL LP and the proceeds therefrom will be used to make distributions on the LP Units.

14. The Trust distributes the amounts received by it from KL LP to the Holders. The Holders are exposed, by virtue of the Purchase Agreement and the Trust's holding of LP Units, to the credit risk of Kingsway, Kingsway America, Kingsway ROCGP, BNS (as counterparty to the Purchase Agreement) and KL LP.
15. The Administrator has been retained to act as administrator for the Trust, KL LP and KN Trust and is responsible for providing, or arranging for the provision of, administrative services required by the Trust, KL LP and KN Trust. The Administrator is responsible for entering into the Purchase Agreement for and on behalf of KL LP. The Administrator is also responsible for arranging the sale of Portfolio Securities delivered to it, on behalf of KL LP, under the Purchase Agreement by BNS, as required to make proceeds available to KL LP in order for it to make distributions on the LP Units, which is to be used by the Trust to fund the quarterly distributions to the Holders, retractions (to the extent applicable) and the payments due to the Holders on the Redemption Date or upon an early redemption.

Rationale for the Requested Relief

16. The Trust has made this application for the Requested NI 51-102 Relief and the Requested MI 52-109 Relief on the basis of the following rationale.
17. The operating activity of the Trust consists of holding the LP Units for the purpose of making distributions to the Holders. The payment of the distributions on the Trust Units and the repayment of the subscription price therefor on the Redemption Date or upon earlier redemption will be dependent on the payment of amounts due under the Kingsway Note, which is unconditionally guaranteed as to payment of principal, interest and other amounts by Kingsway and Kingsway America (the financial condition and results of which are consolidated in the financial statements of Kingsway).
18. As a result of the foregoing, a Holder's investment decision in relation to the Trust Units will be based primarily on the financial condition of Kingsway and Kingsway America rather than the Trust.
19. Kingsway has undertaken to provide to the Trust, and file, on the Trust's behalf under the Trust's SEDAR profile, the unaudited consolidated interim financial statements and audited consolidated annual financial statements

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and accompanying management's discussion and analysis of Kingsway, its management information circular, its annual information form, any material change reports and other documents which may be required to be filed by Kingsway under applicable securities laws to meet its continuous disclosure obligations.

20. The Trust will continue to file its AIF, annual audited financial statements and management's discussion and analysis thereon with the Decision Makers in accordance with the Legislation. The Trust will mail a copy of its annual audited financial statements to a Holder upon request.
21. The Trust will issue press releases and file material change reports in accordance with the requirements of the Legislation in respect of material changes in its affairs which do not relate solely to the affairs of Kingsway and which have not been the subject of a filing by Kingsway.

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 each of the Decision Makers under the Legislation is that the Requested NI 51-102 Relief is granted provided that and for so long as:

- (i) the Trust carries on no business or activities other than those set out in paragraph 2;
- (ii) the Trust does not issue any securities other than Trust Units;
- (iii) the Trust complies with paragraphs 20 and 21 of this MRRS Decision Document;
- (iv) Kingsway remains a reporting issuer under the Legislation;
- (v) The Trust, prior to relying on an exemption contained in this MRRS Decision Document, files with the Decision Makers, in electronic format under the Trust's SEDAR profile, a Notice to Holders that
 - (A) advises Holders that the Trust has obtained an exemption from certain continuous disclosure requirements, makes reference to this MRRS Decision Document and explains how Holders can obtain a copy of this MRRS Decision Document;

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- (B) advises Holders that, in accordance with the exemption, the Trust intends to rely on the continuous disclosure filings of Kingsway to satisfy certain of its continuous disclosure requirements and explains to Holders where the Kingsway continuous disclosure filings may be found on SEDAR; and
- (C) is duly authorized by a representative of Kingsway and a representative of the the Trust; and
- (vi) Kingsway sends, or causes the Trust to send, its interim financial statements, annual audited financial statements, Information Circular, Annual Report, AIF and MD&A to Holders at the same time and in the same manner as if the Holders were security holders of Kingsway;

And provided further that this MRRS Decision Document shall expire within thirty (30) days of a material adverse change in the affairs of the Trust.

It is further the decision of the Decision Makers under the Legislation that the Trust is exempted from the requirements of MI 52-109 concerning the filing of interim certificates, provided that and for so long as the Trust remains eligible for the Requested NI 51-102 Relief pursuant to the exemption contained in this Decision.

Charlie MacCready
Assistant Manager,
Ontario Securities Commission