

# 2008 BCSECCOM 596

October 27, 2008

## Headnote

Multilateral Instrument 11-102 *Passport System* – Securities Act s. 130 – Relief from certain self-dealing restrictions in Part 15 of the Act – Relief from self-dealing requirements and conflict of interest reporting requirements in connection with mutual fund mergers - If the funds were public mutual funds, they would be able to rely on the exemption provided in National Instrument 81-102 *Mutual Funds*; the self-dealing provisions only apply at the time of the merger; the merger is required to be approved by securityholders of both the terminating fund and the continuing fund; securityholders of the funds will receive an information circular for the meetings to approve the merger, which will be prepared in accordance with National Instrument 81-106 *Investment Fund Continuous Disclosure*

## Applicable British Columbia Provisions

*Securities Act*, R.S.B.C. 1996, c.418, ss. 126(a), 127(1)(a), 127(1)(b), 130

In the Matter of  
the Securities Legislation of  
British Columbia  
(the Jurisdiction)

and

In the Matter of  
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of  
McElvaine Investment Management Ltd.  
(the Manager)

and

The McElvaine Investment Trust  
(the Trust)

and

the McElvaine Value Class  
(MVC)

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(collectively, the Filers)

## Decision

### **Background**

¶ 1 The principal regulator in the Jurisdiction has received an application from the Filers for a decision under the securities legislation of the Jurisdiction of the principal regulator (the Legislation) for relief from the following restrictions in the Legislation in connection with the asset transaction described below:

- (a) the Manager, the Trust, and MVC are exempt from the restriction against a mutual fund or responsible person knowingly causing the mutual fund to invest in any issuer in which a responsible person is a partner, officer or director, unless that fact is disclosed to the mutual fund security holders, and, if applicable, their written consent is obtained before the purchase, and to purchase or sell the securities of any issuer from or to the account of a responsible person (the Consent Restriction); and
- (b) the Manager is exempt from the requirement to file a report of every transaction of purchase or sale of securities between a mutual fund it manages and any related person or company for transactions between the Trust and MVC (the Reporting Requirement).

(collectively, the Requested Relief)

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

- (a) the British Columbia Securities Commission (BCSC) is the principal regulator for this application; and
- (b) the Filers have provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in Alberta.

### **Interpretation**

¶ 2 Defined terms contained in National Instrument 14-101 – *Definitions* have the same meaning in this decision unless they are defined in this decision.

### **Representations**

¶ 3 This decision is based on the following facts represented by the Filers:

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1. the Manager is a corporation continued under the *Canada Business Corporations Act*;
2. the Manager's head office is located in Vancouver, British Columbia;
3. the Manager is the manager, promoter and portfolio adviser of the Trust, and the promoter, manager and portfolio adviser of MVC; the Manager provides investment advice to the Trust and MVC under management contracts;
4. the trust is an open-end investment fund established under the laws of British Columbia as a trust on September 27, 1996; MVC is a mutual fund corporation established under the laws of Canada on November 19, 2007; the head office of each of the Trust and MVC is in British Columbia;
5. neither the Trust nor MVC is a reporting issuer under the Act or applicable securities legislation in any other jurisdiction; securities of the Trust and MVC are distributed pursuant to prospectus exemptions; each investor in the Trust and MVC receives an offering memorandum for the applicable fund prepared in accordance with National Instrument 45-106 *Prospectus and Registration Exemptions* (NI 45-106);
6. the Manager is a responsible person of the Trust and MVC as it is the manager, portfolio adviser and promoter of the Trust and MVC;
7. the Trust is a responsible person of MVC as it is a related mutual fund of MVC;
8. on March 29, 2007, the Manager received a decision from the BCSC and the Alberta Securities Commission (the Existing Relief) to permit the Manager to merge The McElvaine Limited Partnership (the Partnership) with the Trust (the Merger Transaction) via the following three step transaction:
  - (a) the assets of the Partnership would be transferred to a mutual fund corporation (the Phase 1 Transaction), and
  - (b) the assets of the mutual fund corporation would be transferred to the Trust (the Phase 2 and Phase 3 Transaction) on a tax-deferred basis;
9. on January 1, 2008, the Phase 1 Transaction was completed between the Partnership and MVC on a tax-deferred basis and the Partnership was wound-up;
10. since that time, the Manager has proceeded to make arrangements to carry out the merger of the Trust and MVC to satisfy the Phase 2 and Phase 3 Transaction;

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11. current market conditions have created an opportunity for the Manager to transfer all or a portion of the assets of MVC to the Trust on a non-tax deferred basis, without negative tax consequences to current shareholders of MVC or unitholders of the Trust;
12. the transfer of assets of MVC to the Trust on a non-tax deferred basis would allow the Manager to complete the Merger Transaction in a more timely manner than the Phase 2 and Phase 3 Transaction originally contemplated in the Existing Relief;
13. accordingly, the Manager seeks the Exemption Sought to complete the transfer of all or a portion of the assets of MVC to the Trust using the following steps (the Revised Steps):
  - (a) MVC and the Trust will enter into an agreement of purchase and sale pursuant to which MVC will transfer all or a portion of its assets to the Trust in one or more transactions for fair market value consideration; the Trust will satisfy the purchase price by issuing units of the Trust with an aggregate net asset value equal to the fair market value of the assets that MVC will transfer to the Trust (the Asset Transfer);
  - (b) following the Asset Transfer, the Manager will cease selling shares of MVC;
  - (c) following the Asset Transfer, shareholders of MVC, at their discretion, may continue to hold their investment in MVC or redeem their shares; no shareholder will be required to redeem his or her investment in MVC following the Asset Transfer; if a shareholder requests a redemption, redemption proceeds will be paid, at the discretion of the shareholder, in either cash or *in specie* using the Trust units held within the portfolio of MVC; and
  - (d) the Manager will continue to operate MVC for a sufficient period of time to allow shareholders an opportunity to redeem their shares at a time that is advantageous for them; at the end of that period, the Manager intends to terminate and wind-up MVC;
14. completion of the Merger Transaction was approved by a majority of the votes cast by unitholders of the Trust and a majority of the partners of the Partnership (now shareholders of MVC) at meetings held for that purpose on May 22, 2007; in connection with those meetings, the Manager provided an information circular to the unitholders of the Trust and partners of the

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Partnership prepared in accordance with National Instrument 81-106 *Investment Fund Continuous Disclosure*, which included, among other things, a description of the proposed transaction and a summary of the principal Canadian federal income tax considerations for the Partnership and for partners of the Partnership; the Manager also provided additional information to partners of the Partnership and sought their re-approval of the Merger Transaction by ballot on November 30, 2007;

15. the Manager intends to complete the Merger Transaction in accordance with the Revised Steps without seeking additional approval of the unitholders of the Trust or shareholders of MVC; based on prevailing market conditions, the Manager does not anticipate that the Revised Steps will have a material adverse tax consequence for unitholders of the Trust or for shareholders of MVC, and the Revised Steps permit shareholders of MVC to become unitholders of the Trust as contemplated by the original Merger Transaction;
16. no sales charges will be paid in connection with the acquisition by the Trust of all or a portion of the assets of MVC as part of the Asset Transfer and the Manager will bear all costs related to effecting the Asset Transfer;
17. by causing MVC to purchase units of the Trust, and by causing the Trust to purchase all or a portion of the assets of MVC as part of the Revised Steps, the Manager, as a responsible person of MVC and the Trust, will be causing MVC to invest in an issuer in which a responsible person is a partner, officer or director and will be causing the purchase of securities from the account of a responsible person; in the absence of the Consent Relief, the Trust and MVC would be prohibited from purchasing the units of the Trust and purchasing the assets of MVC;
18. in the absence of the Reporting Relief, the Manager would need to file a report with respect to the purchase by the Trust of the assets of MVC; and
19. in the opinion of the Manager, the proposed Asset Transfer between the Trust and MVC is not prejudicial to the public interest, is in the best interests of MVC and the Trust, and represents the business judgment of responsible persons uninfluenced by considerations other than the best interests of MVC and the Trust.

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### **Decision**

- ¶ 4 The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Requested Relief is granted.

Martin Eady, CA  
Director, Corporate Finance  
British Columbia Securities Commission