

# 2005 BCSECCOM 397

May 20, 2005

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications

National Instrument 51-102 Continuous Disclosure Obligations - Securities Act, s. 91 Financial Statements & Report - Exemption from the filing and delivery requirements for financial statements, annual reports, and quarterly reports - An issuer of pay-through asset-backed notes wants relief from the requirements concerning the preparation, filing and delivery of unaudited interim financial statements and/or audited annual financial statements - The issuer is a special purpose vehicle; the issuer's sole purpose is to issue asset backed securities; the issuer's security holders only have an interest in the securitized assets; issuer will file and provide its security holders with alternative disclosure that is relevant to the status of the assets

Securities Act, s. 171 - Revoke or Vary Decision - An issuer wants to revoke a previous decision it received - The applicant previously obtained relief from certain requirements in securities legislation but now wishes to have that previous decision revoked

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 91 and 171

*Securities Rules*, B.C. Reg. 194/97, ss. 144 and 145

National Instrument 51-102 *Continuous Disclosure Obligations*, ss. 4.1, 4.3 and 13.1

In the Matter of  
the Securities Legislation of  
British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova  
Scotia and Newfoundland and Labrador

and

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

and

In the Matter of  
Schooner Trust

MRRS Decision Document

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### **Background**

The local securities regulatory authority or regulator (the Decision Maker) in each of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia and Newfoundland and Labrador (the Jurisdictions) has received an application from Schooner Trust (the Issuer) for a decision under the securities legislation of the Jurisdictions (the Legislation) for:

### **Revocation Relief**

1. a revocation of *In the Matter of Solar Trust/Fiducie Solar*, MRRS Decision Document dated February 1, 2001, as amended on December 17, 2001 and May 2, 2003 (collectively, the Original Decision) (the Revocation Relief) and;

### **Replacement Continuous Disclosure Relief**

2. an exemption from the provisions of the Legislation concerning the preparation, filing and delivery of interim and annual financial statements of the Issuer (the Replacement Relief).

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 Issuer:

1. The Issuer was created pursuant to a declaration of trust dated July 5, 2000 (the "Declaration of Trust") under the laws of the Province of Ontario. The Issuer was created under the name of Solar Trust. By a declaration of change of name dated November 17, 2003, the name of the Issuer was changed to Schooner Trust.
2. The issuer trustee of the Issuer is CIBC Mellon Trust Company (the "Issuer Trustee"), a trust company incorporated under the *Trust and Loan Companies Act* (Canada).

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3. The Toronto-Dominion Bank (“TD”) is the administrative agent of the Issuer pursuant to an administration agreement between TD and the Issuer Trustee dated as of July 5, 2000.
4. The Issuer is a reporting issuer, or the equivalent, in each of the provinces of Canada that provides for a reporting issuer regime.
5. The head office of the Issuer Trustee is located in Toronto, Ontario.
6. The financial year end of the Issuer is December 31.
7. The Declaration of Trust of the Issuer restricts the activities of the Issuer to the acquisition of various categories of commercial and multifamily residential mortgages, hypothecs or other charges on real or immovable property situated in Canada and originated by parties other than the Issuer (the “Custodial Property”). The Issuer funds the acquisition of the Custodial Property by issuing mortgage pass-through certificates that receive distributions from the Custodial Property acquired by the Issuer and evidence an undivided co-ownership interest in the Custodial Property (the “Certificates”). The Custodial Property is deposited with a custodian and the recourse of Certificate holders is limited to the Custodial Property and any proceeds thereof.
8. The Issuer was created solely to act as a vehicle for carrying out activities related to issuing asset-backed securities in respect of Custodial Property acquired by the Issuer.
9. The Issuer has issued (i) \$189,550,000 aggregate amount of Commercial Mortgage Pass-Through Certificates, Series 2000-1, designated as Classes A-1, A-2, IO, B, C and D, each with an Approved Rating by an Approved Rating Organization (as such terms are defined in National Instrument 44-101 - *Short Form Prospectus Distributions*), pursuant to a short form prospectus dated October 24, 2000 (the “Series 2000-1 Prospectus”), (ii) \$214,660,425 aggregate amount of Commercial Mortgage Pass-Through Certificates, Series 2001-1, designated as Classes A-1, A-2, B and C, each with an Approved Rating by an Approved Rating Organization, pursuant to a short form prospectus dated August 2, 2001 (the “Series 2001-1 Prospectus”), (iii) \$26,531,063 aggregate amount of Commercial Mortgage Pass-Through Certificates, Series 2001-1, designated as Classes IO, D, E, F, G, H, J and K, on a private placement basis in Canada, (iv) \$253,955,000 aggregate amount of Commercial Mortgage Pass-Through Certificates, Series 2002-1, designated as Classes A-1, A-2, IO, B, C, D and E, each with an Approved Rating by an Approved Rating Organization, pursuant to an amended and

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restated short form prospectus dated December 4, 2002 (the “Series 2002-1 Prospectus”), (v) \$12,664,153 aggregate amount of Commercial Mortgage Pass-Through Certificates, Series 2002-1, designated as Classes F, G, H, J and K, on a private placement basis in Canada, (vi) \$430,150,000 aggregate amount of Commercial Mortgage Pass-Through Certificates, Series 2003-CC1, designated as Classes A-1, A-2, IO-1, B, C and D-1, each with an Approved Rating by an Approved Rating Organization, pursuant to a short form prospectus dated May 21, 2003 (the “Series 2003-CC1 Prospectus”), (vii) \$38,020,452 aggregate amount of Commercial Mortgage Pass-Through Certificates, Series 2003-CC1, designated as Classes IO-2, D-2, E, F, G, H, J, K and L, on a private placement basis in Canada, (viii) \$437,575,000 aggregate amount of Commercial Mortgage Pass-Through Certificates, Series 2004-CCF1, designated as Classes A-1, A-2, IO-1, B, C and D-1, each with an Approved Rating by an Approved Rating Organization, pursuant to a short form prospectus dated January 15, 2004 (the “Series 2004-CCF1 Prospectus”), (ix) \$36,439,947 aggregate amount of Commercial Mortgage Pass-Through Certificates, Series 2004-CCF1, designated as Classes IO-2, D-2, E, F, G, H, J, K and L, on a private placement basis in Canada, (x) \$332,445,000 aggregate amount of Commercial Mortgage Pass-Through Certificates, Series 2004-CF2, designated as Classes A-1, A-2, B and C, each with an Approved Rating by an Approved Rating Organization, pursuant to a short form prospectus dated September 20, 2004 (the “Series 2004-CF2 Prospectus”), (xi) \$30,881,924 aggregate amount of Commercial Mortgage Pass-Through Certificates, Series 2004-CF2, designated as Classes X, D, E, F, G, H, J, K, L and M, on a private placement basis in Canada, (xii) \$375,700,000 aggregate amount of Commercial Mortgage Pass-Through Certificates, Series 2005-3, designated as Classes A-1, A-2, XP-1, XC-1, B, C, D-1 and E, each with an Approved Rating by an Approved Rating Organization, pursuant to a short form prospectus dated April 15, 2005 (the “Series 2005-3 Prospectus”, and together with the Series 2000-1 Prospectus, the Series 2001-1 Prospectus, the Series 2002-1 Prospectus, the Series 2003-CC1 Prospectus, the Series 2004-CCF1 Prospectus and the Series 2004-CF2 Prospectus, the “Prospectuses”), and (xiii) \$20,266,045 aggregate amount of Commercial Mortgage Pass-Through Certificates, Series 2005-3, designated as Classes XP-2, XC-2, D-2, F, G, H, J, K, L and M, on a private placement basis in Canada (collectively, the “Issued Certificates”). All issues completed prior to November 17, 2003 continue to trade under the name of Solar Trust.

10. The Issuer is currently a venture issuer (as such term is defined in National Instrument 51-102 - *Continuous Disclosure Obligations*).

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11. As a special purpose vehicle, the Issuer will not carry on any activities other than activities related to issuing asset-backed securities in respect of Custodial Property acquired by the Issuer.
12. The Issued Certificates sold pursuant to the Prospectuses have been, and the Certificates to be sold in the future pursuant to a short form prospectus will be, sold on the basis of an Approved Rating by an Approved Rating Organization which will from time to time independently review such rating based on the performance of the Custodial Property.
13. The Issuer currently has, and will continue to have, no material assets or liabilities other than its rights and obligations arising from acquiring Custodial Property and issuing asset-backed securities. Certificate holders will only have recourse to the Custodial Property and will not have any recourse to the Issuer.
14. For each offering of the Issued Certificates, the Issuer entered into, and for each future offering of Certificates, the Issuer will enter into, a pooling and servicing agreement (the "Pooling and Servicing Agreement") with a reporting agent (the "Reporting Agent"), one or more servicers (each, a "Servicer"), and a Canadian trust company, as custodian on behalf of the Certificate holders (the "Custodian"), among others, providing for, among other things, the issuance of Certificates and governing the rights of Certificate holders.
15. The Pooling and Servicing Agreements in respect of the Issued Certificates provide, and each Pooling and Servicing Agreement in respect of future series of Certificates will provide, for the fulfillment of certain administrative functions relating to such Certificates, such as maintaining a register of Certificate holders and the preparation by the Servicer and the Reporting Agent of periodic reports (the "Reports") to Certificate holders containing financial and other information in respect of the Custodial Property.
16. There will be no annual meetings of Certificate holders since the Pooling and Servicing Agreements with respect to the Issued Certificates provide, and each Pooling and Servicing Agreement with respect to future series of Certificates will provide, that only the holders of a certain percentage of Certificates of each series of the Issuer have the right to direct a Servicer or the Custodian to take certain actions under the Pooling and Servicing Agreement with respect to such series of Certificates.
17. The Reporting Agent provides, and will continue to provide, on a website to be identified in the relevant short form prospectus of the Issuer, the financial and other information prescribed therein to be made available to Certificate

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holders on a monthly basis, such information to include information relating to distributions made in that month, Certificate balances, administration and other fees, and certain aspects of the performance and composition of the Custodial Property, and the Issuer has contemporaneously filed, and will continue to contemporaneously file or cause to be reasonably contemporaneously filed, the monthly reports commonly known as distribution date statements or their equivalent (the "Distribution Date Statements") on the System for Electronic Document Analysis and Retrieval ("SEDAR").

18. Notwithstanding paragraph 17 hereof, the Issuer may amend the contents of the financial and other information posted on the Reporting Agent's website and filed on SEDAR to prevent the disclosure of the name or address of a mortgaged property or any obligor pursuant to the *Personal Information Protection and Electronic Documents Act* (Canada), confidentiality agreements or other obligations of confidentiality binding on the Issuer and certain information on the Reporting Agent's website will only be available on a restricted access basis. No material information will be disclosed on the Reporting Agent's website unless it is also filed contemporaneously via SEDAR with the Decision Makers for posting on [www.sedar.com](http://www.sedar.com).
19. On not less than an annual basis, the Issuer will request intermediaries to deliver a notice to Certificate holders pursuant to the procedures stipulated by National Instrument 54-101 - *Communication with Beneficial Owners of Securities of a Reporting Issuer* or any successor instrument thereto, advising Certificate holders that the monthly information prescribed in paragraph 17 hereof, the quarterly information prescribed in paragraph 20 hereof and the annual information prescribed in paragraph 21 hereof is available on SEDAR and on a website, providing the website address and advising that Certificate holders may request that paper copies of such reports be provided to them by ordinary mail.
20. Within 60 days of the end of each interim period of the Issuer (or within 45 days of the end of an interim period if the Issuer is not a venture issuer at the end of such interim period), the Reporting Agent or the Issuer or its duly appointed representative or agent will post on the applicable website and file on SEDAR, and mail to Certificate holders who so request, interim management discussion and analysis with respect to the Custodial Property pools acquired with the proceeds of the Certificates and a quarterly report which shall include the amount of distributions of principal and interest on the Certificates, administration and other fees, and other information on the Certificates for the interim period.

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21. Within 120 days of the end of each financial year of the Issuer (or within 90 days of the end of a financial year of the Issuer if the Issuer is not a venture issuer at the end of such financial year), the Reporting Agent or the Issuer or its duly appointed representative or agent will post on the applicable website and file on SEDAR, and mail to Certificate holders who so request:
- (a) annual management discussion and analysis with respect to the Custodial Property pools acquired with the proceeds of the Certificates and an annual report which shall include the amount of distributions of principal and interest on the Certificates, administration and other fees, and other information on the Certificates for the financial year;
  - (b) an annual statement of compliance (the “Compliance Certificate”) signed by a senior officer of each applicable Servicer or other party acting in a similar capacity for the applicable Custodial Property pool certifying that the Servicer or such other party acting in a similar capacity has fulfilled all of its obligations under the applicable Pooling and Servicing Agreement during the year, or, if there has been a material default, specifying each such default and the nature and status thereof; and
  - (c) an annual accountants’ report (the “Accountants’ Report”) prepared by a firm of independent public or chartered accountants respecting compliance by each Servicer, or such other party acting in a similar capacity with the Uniform Single Attestation Program for Mortgage Bankers, or such other servicing standard acceptable to the Decision Makers, during the year.
22. The Issuer will issue news releases and file material change reports in accordance with the requirements of the securities legislation of the Jurisdictions in respect of material changes in the status (including as a result of defaults in payments due to Certificate holders) of the Custodial Property pool underlying the Certificates which may reasonably be considered to be material to Certificate holders.
23. Other than in Ontario, fees payable in connection with the filing of annual financial statements will be paid at the time that, and in respect of, the annual financial information specified in paragraph 21 hereof is required to be filed.
24. In Ontario, the fees payable by the Issuer pursuant to the Ontario Securities Commission Rule 13-502 - *Fees* or as otherwise determined by the Decision Maker in Ontario, will be paid no later than the date on which the annual financial information specified in paragraph 21 hereof is required to be filed.

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25. The provision of information to Certificate holders on a monthly, quarterly and annual basis as described in paragraphs 17, 20 and 21 hereof, as well as the annual notices to be given by the Issuer as to the availability of such information given pursuant to the terms of paragraph 19 hereof will meet the objectives of allowing the Certificate holders to monitor and make informed decisions about their investment.
26. The Compliance Certificate and the Accountants' Report will provide assurance to Certificate holders in respect of the accuracy of the Reports since the Issuer does not participate in the preparation of the Reports other than reviewing the Reports and informing the Reporting Agent of any errors that they are aware of therein.
27. Certificate holders will obtain adequate and relevant financial information regarding the Certificates from the information described in paragraphs 17, 20 and 21 hereof.

### **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.

### **Revocation Relief**

The decision of the Decision Makers in the Jurisdictions under the Legislation is that the Revocation Relief is granted.

Paul M. Moore  
Vice-Chair  
Ontario Securities Commission

Wendell S. Wigle  
Commissioner  
Ontario Securities Commission

### **Replacement Continuous Disclosure Relief**

The further decision of the Decision Makers in the Jurisdictions under the Legislation is that the Replacement Relief is granted provided that:

- (a) the Issuer has not issued any securities, other than Certificates;
- (b) the Issuer complies with paragraphs 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 hereof;
- (c) the Issuer complies with all requirements of National Instrument 51-102 - *Continuous Disclosure Obligations* other than the requirements concerning



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the preparation, filing and delivery of interim and annual financial statements; and

- (d) this decision shall terminate sixty days after the occurrence of a material change in any of the representations of the Issuer contained in paragraphs 4, 7, 11, 13, 15 and 17 hereof, unless the Issuer satisfies the Decision Makers that the exemption should continue.

Iva Vranic  
Manager, Corporate Finance  
Ontario Securities Commission