

2002 BCSECCOM 561

Headnote

Mutual Reliance Review System for Exemptive Relief Applications – Registration and prospectus relief to allow a limited partnership to distribute limited partnership units to existing unitholders under a distribution reinvestment plan, subject to certain conditions – plan permits unitholders to reinvest income distributions as well as to directly purchase additional units - first trade relief provided, subject to certain conditions

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 34(1)(a), 48, 61 and 76

**IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH
COLUMBIA, SASKATCHEWAN, MANITOBA, ONTARIO, QUÉBEC,
NEW BRUNSWICK, NOVA SCOTIA, 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 FORT CHICAGO ENERGY PARTNERS L.P.

MRRS DECISION DOCUMENT

WHEREAS the local securities regulatory authority or regulator (the "Decision Maker") in each of British Columbia, Saskatchewan, Manitoba, Ontario, Québec, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador (the "Jurisdictions") has received an application from Fort Chicago Energy Partners L.P. ("Fort Chicago") 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 Fort Chicago issued pursuant to a distribution reinvestment plan;

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;

AND WHEREAS Fort Chicago has represented to the Decision Makers that:

2002 BCSECCOM 561

1. Fort Chicago is a limited partnership formed on October 9, 1997 under the *Partnership Act* (Alberta). The business and affairs of Fort Chicago are managed by Fort Chicago Energy Management Ltd. (the "General Partner") pursuant to an amended and restated limited partnership agreement (the "Partnership Agreement") dated as of November 21, 1997, as further amended on March 7, 2001.
2. The business of Fort Chicago consists solely of directly or indirectly participating in the transportation, storage, marketing or processing of hydrocarbons and directly or indirectly investing and managing investments in other parties who are engaged primarily in these activities or carrying on the business of a financial intermediary.
3. Fort Chicago currently holds a 26.026% interest in the Alliance Pipeline and the natural gas liquids extraction and fractionation facilities located near the terminus of the Alliance Pipeline. The Alliance Pipeline transports natural gas from northwestern Alberta and northeastern British Columbia to the midwestern United States via Chicago, Illinois.
4. Fort Chicago has been a reporting issuer, or the equivalent, in each of the Provinces of Canada since 1997, and to its knowledge is not in default of any requirements under the Legislation of any of the Jurisdictions.
5. Fort Chicago is a "qualifying issuer" within the meaning of Multilateral Instrument 45-102 *Resale of Securities*.
6. Fort Chicago is authorized under the Partnership Agreement to issue an unlimited number of Class A limited partnership units ("Units") and one Class B limited partnership unit.
7. As of May 16, 2002, 73,564,509 Units were issued and outstanding, and there were no outstanding options or warrants to purchase Units. The single Class B limited partnership unit that was issued upon the formation of Fort Chicago was redeemed in accordance with the terms of the Partnership Agreement.
8. The Units are listed and posted for trading on The Toronto Stock Exchange (the "TSX").
9. The Partnership Agreement provides that no Units may be owned by or transferred to, among things, a person who is a "non-resident" of Canada, a person in which an interest would be a "tax shelter investment" or a

2002 BCSECCOM 561

partnership which is not a "Canadian partnership" for purposes of the *Income Tax Act* (Canada).

10. According to the terms of the Partnership Agreement, the General Partner shall, to the extent that it has cash available to do so, and subject to certain adjustments relating to U.S. tax withholdings, make quarterly (or monthly, as may be determined by the General Partner in its sole discretion) distributions of the distributable cash (if any) of Fort Chicago to the holders of Units ("Unitholders").
11. The Partnership Agreement defines "distributable cash" for any particular period as the amount by which Fort Chicago's cash on hand at the end of such period (including amounts borrowed by the General Partner on behalf of Fort Chicago and the net proceeds received by Fort Chicago from the issuance of Units or other securities) exceeds: (i) unpaid administrative expenses for that and any previous period, (ii) amounts required for the business and operations of Fort Chicago during such period (including anticipated repayments of amounts borrowed); and (iii) any cash reserve that the board of directors of the General Partner determines is necessary to satisfy Fort Chicago's current and anticipated obligations or to normalize quarterly (or monthly, as the case may be) distributions of cash to Unitholders.
12. Fort Chicago 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 Fort Chicago, as contemplated by the definition of "mutual fund" in the Legislation.
13. The General Partner, on behalf of Fort Chicago, intends to establish a distribution reinvestment plan (the "Plan") pursuant to which eligible Unitholders may, at their option, direct that eligible cash distributions paid by Fort Chicago 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 Plan (the "Distribution Reinvestment Option").
14. Alternatively, the 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 Plan (the "Plan Agent"), to presell through a designated broker (the "Plan Broker"), for the account of the Unitholders who so elect, that number of Units equal to the number of Additional Units issuable on such reinvestment, and to settle such presales 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

2002 BCSECCOM 561

"Premium Distribution Option"). The Plan Broker will be entitled to retain for its own account the difference between the proceeds realized in connection with the presales of such Units and the cash payment to the Plan Agent equal to 102% of the reinvested Cash Distributions.

15. 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 Plan by making optional cash payments within the limits established thereunder (the "Cash Payment Option"). The General Partner 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.
16. All Additional Units purchased under the Plan will be purchased by the Plan Agent directly from Fort Chicago on the relevant distribution payment date at a price determined by reference to the Average Market Price (defined in the Plan as the arithmetic average of the daily volume weighted average trading prices of the Units on the TSX for the trading days from and including the second business day following the distribution record date to and including the second business day prior to the distribution payment date on which at least a board lot of Units was traded, such period not to exceed 20 trading days).
17. 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.
18. The Plan Broker's *prima facie* return under the Premium Distribution Option will be approximately 3% of the reinvested Cash Distributions (based on presales of Units having a market value of approximately 105% of the reinvested Cash Distributions and a fixed cash payment to the Plan Agent, for the account of applicable Participants, of an amount equal to 102% of the reinvested Cash Distributions). The Plan Broker may, however, realize more or less than this *prima facie* amount, as the actual return will vary according to the prices the Plan Broker is able to realize on the presales of Units. The 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.
19. All activities of the Plan Broker on behalf of the Plan Agent that relate to presales of Units for the account of Participants who elect the Premium Distribution Option will be in compliance with applicable Legislation and the

2002 BCSECCOM 561

rules and policies of the TSX (subject to any exemptive relief granted). The 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.

20. 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 terminate their participation under either option, or to change their election, in accordance with the terms of the Plan.
21. Under the Distribution Reinvestment Option, Cash Distributions will be paid to the Plan Agent and applied by the Plan Agent to the purchase of Additional Units, which will be held under the Plan for the account of Participants who have elected to participate in that component of the Plan.
22. Under the Premium Distribution Option, Cash Distributions will be paid to the Plan Agent and applied by the Plan Agent to the purchase of Additional Units for the account of Participants who have elected to participate in that component of the Plan, but the Additional Units purchased thereby will be automatically transferred to the Plan Broker to settle presales of Units made by the Plan Broker on behalf of the Plan Agent for the account of such Participants in exchange for a premium cash payment equal to 102% of the reinvested Cash Distributions.
23. Under the Cash Payment Option, a Participant will be able, through the Plan Agent, to 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 Fort Chicago will be limited to a maximum of 2% of the number Units issued and outstanding at the start of the financial year.
24. No brokerage fees or service charges will be payable by Participants in connection with the purchase of Additional Units under the Plan.
25. Additional Units purchased and held under the Plan will be registered in the name of the Plan Agent (or its nominee) as agent for the Participants, and all Cash Distributions on Units so held for the account of a Participant will be automatically reinvested in Additional Units in accordance with the terms of the Plan and the current election of that Participant.

2002 BCSECCOM 561

26. The 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 Plan Agent.
27. The General Partner reserves the right to determine, for any distribution payment date, the amount of partners' equity that may be issued through the Plan.
28. If, in respect of any distribution payment date, fulfilling all of the elections under the Plan would result in Fort Chicago exceeding either the limit on partners' equity set by the General Partner 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 Fort Chicago is not able to accept all elections in a particular category, then purchases of Additional Units on the applicable distribution payment date will be prorated among all Participants in that category according to the number of Additional Units sought to be purchased.
29. If the General Partner determines not to issue any partners' equity through the Plan on a particular distribution payment date, then all Participants will receive the Cash Distribution announced by Fort Chicago for that distribution payment date.
30. A Participant may terminate its participation in the Plan at any time by submitting a termination form to the Plan Agent, provided that a termination form received between a distribution record date and a distribution payment date will not become effective until after that distribution payment date.
31. Fort Chicago reserves the right to amend, suspend or terminate the 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.
32. The distribution of Additional Units by Fort Chicago pursuant to the Plan cannot be made in reliance on certain existing registration and prospectus exemptions contained in the Legislation as the Plan involves the reinvestment of distributions of the distributable cash of Fort Chicago and not the

2002 BCSECCOM 561

reinvestment of dividends, interest or distributions of capital gains or out of earnings or surplus.

33. The distribution of Additional Units by Fort Chicago 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 Fort Chicago is not a "mutual fund" as defined in the Legislation.

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 the trades of Additional Units by Fort Chicago to the Plan Agent for the account of 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 Fort Chicago 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 Additional Units from treasury;
- (c) Fort Chicago 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 Plan and to make an election to receive Cash Distributions instead of Additional Units on the making of a distribution by Fort Chicago, 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 Plan in any financial year of Fort Chicago shall not exceed 2% of the aggregate number of Units outstanding at the start of that financial year;

2002 BCSECCOM 561

- (e) except in Québec, the first trade in Additional Units acquired pursuant to this Decision in a Jurisdiction will be a distribution or primary distribution to the public unless the conditions in paragraphs 2 through 5 of subsection 2.6(4) of Multilateral Instrument 45-102 *Resale of Securities* are satisfied;
- (f) in Québec, the first trade (alienation) in Additional Units acquired pursuant to the Plan will be a distribution or primary distribution to the public unless:
 - (i) Fort Chicago is and has been a reporting issuer in Québec for the 12 months immediately preceding the trade;
 - (ii) no unusual effort is made to prepare the market or to create a demand for the securities that are the subject of the alienation;
 - (iii) no extraordinary commission or other consideration is paid in respect of the alienation; and
 - (iv) if the seller of the securities is an insider of the issuer, the seller has no reasonable grounds to believe that Fort Chicago is in default of any requirement of securities legislation; and
- (g) disclosure of the initial distribution of Additional Units pursuant to this Decision is made to the relevant Jurisdictions by providing particulars of the date of the distribution of such Additional Units, the number of such Additional Units and the purchase price paid or to be paid for such Additional Units in:
 - (i) an information circular or take-over bid circular filed in accordance with the Legislation; or
 - (ii) a letter filed with the Decision Maker in the relevant Jurisdiction by a person or company certifying that the person or company has knowledge of the facts contained in the letter,

when Fort Chicago distributes such Additional Units for the first time, and thereafter not less frequently than annually, unless the aggregate number of Additional Units so distributed in any month exceeds 1% of the aggregate number of Units outstanding at the beginning of the month in which the Additional Units were distributed, in which case the disclosure required under this paragraph shall be made in each relevant

2002 BCSECCOM 561

Jurisdiction (other than Québec) in respect of that month within ten days of the end of such month.

June 19, 2002

Robert W. Korthals

Harold P. Hands