

# **2003 BCSECCOM 755**

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications – relief granted from certain mutual fund self-dealing restrictions and reporting requirements to permit top funds to invest in securities of certain underlying funds, subject to certain conditions

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 121(2)(b), 123, 126(a) and (d) and 130

**IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH  
COLUMBIA, ALBERTA, SASKATCHEWAN, ONTARIO, NOVA SCOTIA,  
AND NEWFOUNDL AND LABRADOR**

**AND**

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

**AND**

**IN THE MATTER OF TD ASSET MANAGEMENT INC.  
AND THE TD MANAGED ASSETS PROGRAM PORTFOLIOS**

## **MRRS DECISION DOCUMENT**

WHEREAS the Canadian securities regulatory authority or regulator (collectively, the Decision Makers”) in each of the provinces of British Columbia, Alberta, Saskatchewan, Ontario, Nova Scotia and Newfoundland and Labrador (collectively, the “Jurisdictions”) has received an application from TD Asset Management Inc. (“TDAM”) for a decision by each Decision Maker (collectively, the “Decision”) under the securities legislation of the Jurisdictions (the “Legislation”) revoking and replacing the MRRS Decision Document dated November 29, 2001 entitled *In the Matter of TD Asset Management Inc. and The TD Managed Assets Program Portfolios* (the “Existing Decision Document”) which decided that the Applicable Requirements (as defined below) did not apply to TDAM or the TD Managed Assets Program Portfolios (as defined in Schedule “A”, collectively, the “Existing Top Funds”) and other mutual funds managed by TDAM after the date of the Existing Decision Document that will have an investment objective to invest substantially all of their assets in other mutual funds (individually, a “Future Top Fund” and together with the Existing Top Funds, the “Top Funds”), as the case may be, in respect of certain investments to be made by the Top Funds in units of a mutual fund managed by TDAM or a person or company unrelated to TDAM (together, the “Existing Underlying Funds”) and

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future mutual funds managed by TDAM or a person or company unrelated to TDAM (the “Future Underlying Funds” and collectively with the Existing Underlying Funds, the “Underlying Funds”);

AND WHEREAS TDAM, as manager of the Top Funds, has requested a Decision that the following provisions of the Legislation (the “Applicable Requirements”) shall not apply to TDAM or the Top Funds, as the case may be, in respect of certain investments to be made from time to time by a Top Fund in securities of an Underlying Fund:

1. the restrictions contained in the Legislation prohibiting a mutual fund from knowingly making or holding an investment in a person or company in which the mutual fund, alone or together with one or more related mutual funds, is a substantial securityholder; and
2. the requirements contained in the Legislation requiring a management company, or in British Columbia, a mutual fund manager, to file a report relating to a purchase or sale of securities between the mutual fund and any related person or company, or any transaction in which, by arrangement other than an arrangement relating to insider trading in portfolio securities, the mutual fund is a joint participant with one or more of its related persons or companies;

AND WHEREAS under the Mutual Reliance Review System (“MRRS”) for Exemptive Relief Applications (the “System”), the Ontario Securities Commission is the principal regulator for this application;

AND WHEREAS unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 - *Definitions*;

AND WHEREAS TDAM has represented to the Decision Makers as follows:

1. TDAM is a corporation incorporated under the laws of Ontario and is a wholly-owned subsidiary of The Toronto-Dominion Bank (“TD Bank”) and is the manager or will be the manager of the Top Funds and the TD Underlying Funds (collectively, the “TD Funds” and “TD Underlying Funds” being Underlying Funds that are or will be managed by TDAM).
2. TDAM’s head office is located in Toronto, Ontario. TDAM is registered as an investment counsel and portfolio manager or their equivalent in all provinces and territories other than Prince Edward Island, as a mutual fund dealer in Quebec, as a limited market dealer in Ontario and Newfoundland and

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Labrador, and as a commodity trading manager under the *Commodity Futures Act* (Ontario).

3. Each of the TD Funds is or will be an open-ended mutual fund trust or mutual fund corporation established under the laws of Ontario or Canada, as the case may be. Units of each of the TD Funds are or will be qualified for distribution in all of the provinces and territories of Canada pursuant to a simplified prospectus and annual information form filed with and accepted by the Decision Makers.
4. Each of the TD Funds is or will be a reporting issuer in each of the provinces and territories of Canada and will not be in default of any of the requirements of the Legislation.
5. As part of its investment objective, each of the Top Funds invests or will invest a certain fixed percentage (the “Fixed Percentages”) of its assets (excluding cash and cash equivalents) in units of specified Underlying Funds, subject to a variation of 2.5% above or below the Fixed Percentages (the “Permitted Ranges”) to account for market fluctuations.
6. Certain Top Funds (the “RSP Top Funds”) have or will have an objective to limit its holdings in foreign property such that its units are or will not be foreign property under Part XI of the *Income Tax Act* (Canada) (the “Tax Act”).
7. TDAM now wishes to revoke and replace the Existing Decision Document so that the RSP Top Funds may invest in the Underlying Funds in the same manner as the other Top Funds invest, as described in paragraph 5, on substantially the same terms as other “passive” fund-on-fund structures, subject to compliance with restrictions in the Tax Act relating to holdings of foreign property.
8. Investments of each Top Fund will be made in accordance with the fundamental investment objectives of the Top Fund.
9. A Top Fund will not invest in an Underlying Fund with an investment objective which includes investing directly or indirectly in other mutual funds.
10. The simplified prospectus for each of the Top Funds will disclose the investment objectives, investment strategies, risks and restrictions of the Top Fund and the investment objectives and risk factors of the Underlying Funds, the adviser to the Underlying Funds and the Fixed Percentages and the Permitted Ranges.

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11. The investments by the Top Funds in securities of the Underlying Funds represent the business judgement of “responsible persons” (as that term is defined in the Legislation) uninfluenced by considerations other than the best interests of the Top Funds.
12. Except to the extent evidenced by this Decision and specific approvals granted by the Decision Makers pursuant to National Instrument 81-102 - *Mutual Funds* ("NI 81-102"), the investments by each of the Top Funds in the Underlying Funds have been structured to comply with the investment restrictions of the Legislation and NI 81-102.
13. In the absence of this Decision, pursuant to the Legislation, each Top Fund is prohibited from knowingly making or holding an investment in a person or company in which the mutual fund, alone or together with one or more related mutual funds, is a substantial security holder. As a result, in the absence of this Decision, each Top Fund would be required to divest itself of any such investments.
14. In the absence of this Decision, the Legislation requires TDAM to file a report on every purchase or sale of securities of the Underlying Funds by a Top Fund.

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 Maker with the jurisdiction to make the Decision has been met;

THE DECISION of the Decision Makers under the Legislation is that the Existing Decision Document is hereby revoked and replaced with the following Decision with effect as of, and from, the date hereof;

AND THE DECISION of the Decision Makers under the Legislation is that the Applicable Requirements shall not apply so as to prevent the Top Funds from making and holding an investment in securities of the Underlying Funds or require TDAM to file a report relating to the purchase and sale of such securities;

PROVIDED IN EACH CASE THAT:

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1. The Decision, as it relates to the jurisdiction of a Decision Maker, will terminate one year after the publication in final form of any legislation or rule of that Decision Maker dealing with matters in section 2.5 of NI 81-102.
2. The Decision shall only apply if, at the time a Top Fund makes or holds an investment in its Underlying Funds, the following conditions are satisfied:
  - (a) the securities of both the Top Fund and the Underlying Funds are being offered for sale in the jurisdiction of the Decision Maker pursuant to a simplified prospectus and annual information form which has been filed and accepted by the Decision Maker;
  - (b) the investment by the Top Fund in the Underlying Funds is compatible with the fundamental investment objectives of the Top Fund;
  - (c) the simplified prospectus discloses the intent of the Top Fund to invest in securities of the Underlying Funds, the names of the Underlying Funds, the Fixed Percentages and the Permitted Ranges within which such Fixed Percentages may vary;
  - (d) the investment objective of the Top Fund discloses that the Top Fund invests in securities of other mutual funds;
  - (e) the Underlying Funds are not mutual funds whose investment objective includes investing directly or indirectly in other mutual funds;
  - (f) the Top Fund invests its assets (exclusive of cash and cash equivalents) in the Underlying Funds in accordance with the Fixed Percentages disclosed in the simplified prospectus;
  - (g) the Top Fund's holding of securities in the Underlying Funds does not deviate from the Permitted Ranges;
  - (h) subject to condition (j) with respect to the RSP Top Funds, any deviation from the Fixed Percentages is caused by market fluctuations only;
  - (i) subject to condition (j) with respect to the RSP Top Funds, if an investment by the Top Fund in any of the Underlying Funds has deviated from the Permitted Ranges as a result of market fluctuations, the Top Fund's investment portfolio was re-balanced to comply with the Fixed Percentages on the next day on which the net asset value was calculated following the deviation;

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- (j) if, due to the foreign property investment limitations under the Tax Act, the RSP Top Fund was precluded from purchasing additional securities or re-instating the Fixed Percentages in order to comply with condition (i), or the RSP Top Fund was re-balanced in order to comply with those foreign property investment limitations and such re-balancing required the RSP Top Fund to temporarily deviate beyond the Permitted Ranges, the RSP Top Fund complied with condition (i) as soon as it was possible to do so in compliance with those foreign property investment limitations;
- (k) if the Fixed Percentages and the Underlying Funds which are disclosed in the simplified prospectus have been changed, either the simplified prospectus has been amended in accordance with securities legislation to reflect this significant change, or a new simplified prospectus reflecting the significant change has been filed within ten days thereof, and the securityholders of the Top Fund have been given at least 60 days' notice of the change;
- (l) there are compatible dates for the calculation of the net asset value of the Top Fund and the Underlying Funds for the purpose of the issue and redemption of the securities of such mutual funds;
- (m) no sales charges are payable by the Top Fund in relation to its purchase of securities in the Underlying Funds;
- (n) no redemption fees or other charges are charged by an Underlying Fund in respect of the redemption by the Top Fund of securities of the Underlying Fund owned by the Top Fund;
- (o) no fees or charges of any sort are paid by the Top Fund and the Underlying Funds, by their respective managers or principal distributors, or by any affiliate or associate of any of the foregoing entities, to anyone in respect of the Top Fund's purchase, holding or redemption of the securities of the Underlying Funds other than trailing commissions paid to TDAM by the Underlying Funds managed by a person or company unrelated to TDAM;
- (p) the arrangements between or in respect of the Top Fund and the Underlying Funds are such as to avoid the duplication of management fees;

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- (q) any notice provided to securityholders of an Underlying Fund as required by applicable laws or the constating documents of that Underlying Fund has been delivered by the Top Fund to its securityholders;
- (r) all of the disclosure and notice material prepared in connection with a meeting of securityholders of the Underlying Funds and received by the Top Fund has been provided to its securityholders, the securityholders have been permitted to direct a representative of the Top Fund to vote its holdings in the Underlying Fund in accordance with their direction, and the representative of the Top Fund has not voted its holdings in the Underlying Funds except to the extent the securityholders of the Top Fund have directed;
- (s) in addition to receiving the annual and, upon request, the semi-annual financial statements, of the Top Fund, securityholders of the Top Fund have received appropriate summary disclosure in respect of the Top Fund's holdings of securities of the Underlying Funds in the financial statements of the Top Fund; and
- (t) to the extent that the Top Fund and the Underlying Funds do not use a combined simplified prospectus and annual information form containing disclosure about the Top Fund and the Underlying Funds, copies of the simplified prospectus and annual information form of the Underlying Funds have been provided upon request to securityholders of the Top Fund and the right to receive these documents is disclosed in the prospectus of the Top Fund.

DATED September 26, 2003

Robert W. Davis

Paul M. Moore

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### Schedule "A"

#### TD Managed Portfolios

TD Managed Income Portfolio  
TD Managed Income & Moderate Growth Portfolio  
TD Managed Balanced Growth Portfolio  
TD Managed Aggressive Growth Portfolio  
TD Managed Maximum Equity Growth Portfolio

TD Managed Income RSP Portfolio  
TD Managed Income & Moderate Growth RSP Portfolio  
TD Managed Balanced Growth RSP Portfolio  
TD Managed Aggressive Growth RSP Portfolio  
TD Managed Maximum Equity Growth RSP Portfolio

#### TD FundSmart Managed Portfolios

TD FundSmart Managed Income Portfolio  
TD FundSmart Managed Income & Moderate Growth Portfolio  
TD FundSmart Managed Balanced Growth Portfolio  
TD FundSmart Managed Aggressive Growth Portfolio  
TD FundSmart Managed Maximum Equity Growth Portfolio

TD FundSmart Managed Income RSP Portfolio  
TD FundSmart Managed Income & Moderate Growth RSP  
Portfolio  
TD FundSmart Managed Balanced Growth RSP Portfolio  
TD FundSmart Managed Aggressive Growth RSP Portfolio  
TD FundSmart Managed Maximum Equity Growth RSP  
Portfolio

#### TD Managed Index Portfolios

TD Managed Index Income Portfolio  
TD Managed Index Income & Moderate Growth Portfolio  
TD Managed Index Balanced Growth Portfolio  
TD Managed Index Aggressive Growth Portfolio  
TD Managed Index Maximum Equity Growth Portfolio

TD Managed Index Income RSP Portfolio  
TD Managed Index Income & Moderate Growth RSP Portfolio  
TD Managed Index Balanced Growth RSP Portfolio  
TD Managed Index Aggressive Growth RSP Portfolio  
TD Managed Index Maximum Equity Growth RSP Portfolio