

# 2004 BCSECCOM 595

October 1, 2004

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act s. 48,76 Other - Exemption from s. 34(1)(a) requirement to be registered as a dealer for a trade and s. 61 requirement to file a prospectus for a distribution other than in connection with a corporate acquisition or reorganization; business associates; debt settlements; or employee investment plans and consultants - Trades by a non-mutual fund in connection with its distribution reinvestment plan - Issuer is an investment trust; under its plan, income of the trust can be distributed to its investors through the automatic issuance of additional units to the investors; investors can elect to receive cash in lieu of additional trust units; no fee is paid by investors to participate in the plan

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 48 and 76

In the Matter of  
the Securities Legislation  
of British Columbia, Manitoba, Ontario, Québec, Nova Scotia, Newfoundland and  
Labrador, Prince Edward Island, Yukon, Nunavut and Northwest Territories  
(The Jurisdictions)

and

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

and

In the Matter of NAV Energy Trust (The Filer)

## 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 Filer for a decision, under the securities legislation of the Jurisdictions (the Legislation), for an exemption (the Requested Relief) from 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 prospectus (the Registration and Prospectus Requirements) in respect of certain trades in units of the Trust (Trust Units) issued pursuant to a distribution reinvestment plan (the DRIP).

## 2004 BCSECCOM 595

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 Filer:

1. The Filer is an open-ended investment trust formed under the laws of the province of Alberta pursuant to an amended and restated trust indenture dated November 12, 2003 (the Trust Indenture) between Navigo Energy Inc. (Navigo) and Computershare Trust Company of Canada.
2. Computershare Trust Company of Canada is the trustee of the Filer (the Trustee).
3. The head and principal office of the Filer is located at Suite 2500, 205 - 5<sup>th</sup> Avenue S.W., Calgary, Alberta T2P 2V7.
4. The Filer is actively engaged through Navigo in the business of crude oil and natural gas exploitation, development, acquisition and production in the provinces of Alberta, British Columbia and Saskatchewan.
5. The Filer currently makes and expects to continue to make monthly distributions of distributable income (Cash Distributions), if any, to the holders of Units (Unitholders). The distributable income of the Filer for any month is a function of the amounts received by the Filer pursuant to certain royalties, other income and certain expenses.
6. An unlimited number of Trust Units may be created and issued pursuant to the Trust Indenture.
7. Each Trust Unit entitles the holder to one vote at any meeting of the holders of Trust Units, and represents an equal undivided beneficial interest in any distribution from the Filer (whether of net income, net realized capital gains or

## 2004 BCSECCOM 595

other amounts) and in any net assets of the Filer in the event of termination or winding-up of the Filer.

8. All Trust Units rank among themselves equally and ratably without discrimination, preference or priority.
9. Each Trust Unit is transferable, is not subject to any conversion or pre-emptive rights and entitles the holder to acquire the Filer to retain any or all of the Trust Units held by such holder.
10. The Filer has been a reporting issuer or the equivalent in each of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland since December 29, 2003.
11. The Filer is not in default of any requirements of the Legislation.
12. The Trust Units are listed and posted for trading on the Toronto Stock Exchange (the TSX) under the symbol "NVG.UN".
13. The Filer has authorized the establishment of the DRIP pursuant to which eligible Unitholders may, at their option, purchase additional Units (Additional Units) of the Filer by directing that Cash Distributions be applied to the purchase of Additional Units.
14. Except as provided in paragraph 16 below, all Additional Units purchased under the DRIP will be purchased by Computershare Trust Company of Canada (the DRIP Agent) directly from the Filer on the relevant distribution payment date at a price determined by reference to the Average Market Price. The Average Market Price is defined in the DRIP as the arithmetic average of the daily volume weighted average trading price 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 (and that period cannot exceed 20 trading days).
15. At the discretion of Navigo, Additional Units purchased under the DRIP will either be acquired from treasury at 95% of Average Market Price or will be purchased at prevailing market prices through the facilities of the TSX following the distribution record date. Additional Units that are purchased through the facilities of the TSX will be acquired during the 20 business-day period following the relevant distribution record date but will only be acquired at prices that are equal to or less than 115% of the volume weighted trading

## **2004 BCSECCOM 595**

price of the Units on the TSX for the 10 trading days immediately preceding the date that Units are purchased.

16. Cash Distributions will be paid to the DRIP Agent and applied by the DRIP Agent to the purchase of Additional Units, which will be held under the DRIP for the account of eligible Unitholders who have chosen to participate in the DRIP (Participants).
17. No commissions, brokerage fees or service charges will be payable by Participants in connection with the purchase of Additional Units under the DRIP.
18. Additional Units purchased and held under the DRIP will be registered in the name of the DRIP 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 DRIP and the election of the Participant.
19. The DRIP permits full investment of reinvested Cash Distributions because fractions of Units, as well as whole Units, may be credited to Participants' accounts with the DRIP Agent.
20. The Filer reserves the right to determine, for any distribution payment date, how many Additional Units will be available for purchase under the DRIP.
21. If, in respect of any distribution payment date, fulfilling all of the elections under the DRIP would result in the Filer exceeding the limit on Additional Units set by the Filer, 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.
22. If the Filer determines that no Additional Units will be available for purchase under the DRIP for a particular distribution payment date, then all Participants will receive the Cash Distribution announced by the Filer for that distribution payment date.
23. A Participant may terminate its participation in the DRIP at any time by submitting a termination form to the DRIP Agent. A termination form received between a distribution record date and a distribution payment date will become effective after that distribution payment date.
24. Navigo reserves the right to amend, suspend or terminate the DRIP at any time, provided that such action will not have a retroactive effect that would

## 2004 BCSECCOM 595

prejudice the interests of the Participants. All Participants will be sent written notice of any such amendment, suspension or termination.

25. The DRIP will not be available to Unitholders who are residents of the United States.
26. Legislation in certain of the Jurisdictions provides exemptions from the Registration and Prospectus Requirements for distribution reinvestment plans. Such exemptions are not available to the Applicant in certain of the Jurisdictions because those exemptions are generally with respect to the distribution of one or more of the following: (i) dividends; (ii) interest; (iii) capital gains; or (iv) earnings or surplus. The distributions that are paid to the Unitholders are royalty income in relation to the income that the Filer receives on oil- and gas-producing properties.
27. Legislation in certain of the Jurisdictions provides exemptions from the Registration and Prospectus Requirements for reinvestment plans of a "mutual fund". The Filer 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 a part of the net assets of the Filer, as contemplated by the definition of "mutual fund" in some of the Legislation.

### **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 the Decision Makers under the Legislation is that the Requested Relief is granted, provided that:

- (a) at the time of the trade, the Filer is a reporting issuer or the equivalent in a jurisdiction listed in Appendix B of Multilateral Instrument 45-102 Resale of Securities (MI 45-102) and is not in default of any requirements of the Legislation;
- (b) no sales charge is payable by Unitholders in respect of the trade;
- (c) the Filer 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:

## 2004 BCSECCOM 595

- (i) their right to withdraw from the DRIP and to make an election to receive Cash Distributions instead of Units on the applicable distribution payment date (the Withdrawal Right), and
- (ii) instructions on how to exercise the Withdrawal Right;
- (d) except in Québec, the first trade in Additional Units shall be deemed to be a distribution or primary distribution to the public under the Legislation unless the conditions in subsection 2.6(3) of MI 45-102 are satisfied; and
- (e) in Québec, the alienation (or first trade) of Additional Units acquired under this decision shall be a distribution and cannot take place without a prospectus unless:
  - (i) the Filer is a reporting issuer in Québec and has been a reporting issuer in Québec for the 4 months preceding the first 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 first trade;
  - (iii) no extraordinary commission or other consideration is paid to a person or company in respect of the first trade;
  - (iv) if the seller of the securities is an insider of the Filer, the seller has no reasonable grounds to believe that the Filer is in default of any requirement of securities legislation.

Paul M. Moore  
Commissioner  
Ontario Securities Commission

Paul K. Bates  
Commissioner  
Ontario Securities Commission