

## **2004 BCSECCOM 642**

### **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 mutual fund in units of itself to its existing unitholders in connection with the fund's distribution of capital reinvestment plan. - Under its plan, capital of the mutual fund can be distributed to its investors through the automatic issuance of additional units of the fund to the investors; investors can elect to receive cash in lieu of additional 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, NEW BRUNSWICK,  
NOVA SCOTIA, PRINCE EDWARD ISLAND, NEWFOUNDLAND AND  
LABRADOR, NORTHWEST TERRITORIES, YUKON TERRITORY AND  
NUNAVUT**

**AND**

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

**AND**

**IN THE MATTER OF NEWALTA INCOME FUND**

### **MRRS DECISION DOCUMENT**

WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in each of British Columbia, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Northwest Territories, Yukon Territory and Nunavut (the “Jurisdictions”) has received an application from Newalta Income Fund (the “Fund”) 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 before effecting a trade that is a distribution (the “Registration and Prospectus

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Requirements”) shall not apply to the distribution of units of the Fund (“Units”) issued pursuant to a distribution reinvestment plan, subject to certain conditions;

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, unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 *Definitions* or Québec Commission Notice 14-101;

AND WHEREAS the Fund has represented to the Decision Makers that:

1. The Fund is an open-end investment trust established pursuant to a deed of trust dated January 16, 2003 (the “Deed of Trust”) and governed by the laws of the Province of Alberta. The head office of the Fund is located at 1200, 333 - 11th Avenue S.W., Calgary, Alberta T2R 1L9.
2. The principal undertaking of the Fund is to indirectly hold the property and assets of Newalta Corporation (“Newalta”). The Fund participates in the cash flow generated by the business carried on by Newalta (namely the processing and recovery of resalable products from waste materials) through its ownership of all of the issued and outstanding common shares of Newalta and the unsecured subordinated notes of Newalta.
3. Newalta is responsible for the management and general administration of the affairs of the Fund, including without limitation the timing and terms of future offerings of Units, pursuant to an administration agreement dated January 13, 2003.
4. The Fund has been a reporting issuer or the equivalent under the Legislation of British Columbia, Alberta, Manitoba, Ontario and Québec since March 2003 following the completion of an arrangement under the *Business Corporations Act* (Alberta) pursuant to which, among other things, the Fund became the sole holder of the issued and outstanding common shares of Newalta and the former holders of such shares became holders of Units (“Unitholders”) of the Fund. To the best of its knowledge, the Fund is not in default of any requirements of the Legislation of such Jurisdictions.
5. The Fund is authorized to issue an unlimited number of Units, each of which represents an equal fractional undivided beneficial interest in, and ranks equally and rateably with all other Units with respect to, any distribution from the Fund and in any net assets of the Fund in the event of the termination or

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winding-up of the Fund. Each Unit entitles the holder thereof to one vote at all meetings of Unitholders or in respect of any written resolution of Unitholders.

6. The Units are listed and posted for trading on the Toronto Stock Exchange (the "TSX"). As of June 9, 2004, there were 27,230,099 Units issued and outstanding.
7. In accordance with the terms of the Deed of Trust, the Fund makes regular cash distributions ("Cash Distributions") to its Unitholders in an amount per Unit equal to a *pro rata* share of all cash amounts received by the Fund in each distribution period, less certain expenses and other amounts. Until otherwise determined by the Trustees, Cash Distributions are declared and paid monthly.
8. The Trustees of the Fund have approved, subject to receipt of necessary regulatory approvals, a distribution reinvestment plan (the "Plan") pursuant to which eligible Unitholders will be able, at their option, to direct that Cash Distributions paid on their Units be applied to the purchase of additional Units ("DRIP Units") for their account directly from the Fund.
9. DRIP Units issued under the Plan will be purchased directly from the Fund by the trust company that is appointed as agent under the Plan (the "Plan Agent") on the relevant distribution payment date at a price equal to 95% of the volume weighted average trading price of the Units on the TSX for the 10 trading days preceding the applicable distribution payment date, all in accordance with the terms of the Plan.
10. DRIP Units purchased by the Plan Agent for the account of eligible Unitholders who have enrolled in the Plan ("Participants") will be registered in the name of the Plan Agent (or its nominee) and credited to appropriate Participants' accounts.
11. From and after the effective time of a Unitholder's enrolment under the Plan, and until the Unitholder's participation in the Plan is terminated, all Cash Distributions on Units registered in the name of the Unitholder (including any Units that may become registered in the name of that Unitholder after the initial time of enrolment) or held for the Unitholder's account under the Plan, will be automatically reinvested in DRIP Units in accordance with the terms of the Plan.
12. Participants who enroll in the Plan are free to terminate their enrollment by providing written notice to the Plan Agent in accordance with the terms of the Plan. A notice of termination must be received not less than the number of

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business days specified in the Plan prior to a distribution record date in order to be effective for the purposes of the Cash Distribution to which that record date relates. Notices of termination received after that time will be effective only for the purposes of the next following Cash Distribution and thereafter.

13. The Fund intends to make the Plan available to all Unitholders who are resident in Canada and, if appropriate under U.S. federal securities laws, the United States. Residents of any foreign jurisdiction with respect to which the issue of DRIP Units by the Fund under the Plan would not be lawful will not be able to participate in the Plan.
14. No commissions, brokerage fees or service charges will be payable by Participants in connection with the purchase of DRIP Units under the Plan.
15. The Plan permits full investment of reinvested Cash Distributions because fractions of Units, as well as whole Units, may be credited to Participants' accounts under the Plan (although, in the case of a person who holds their Units and participates in the Plan through a broker, financial institution or other nominee, the crediting of fractional Units may depend on the policies of that broker, financial institution or other nominee).
16. The Fund (or its administrator, as applicable) reserves the right to determine, for any distribution payment date, the number of DRIP Units (if any) that will be available for purchase under the Plan.
17. If, in respect of any distribution payment date, full reinvestment under the Plan of the aggregate Cash Distributions otherwise payable to Participants would result in the Fund exceeding the maximum number of DRIP Units available for purchase under the Plan for that distribution period, then purchases of DRIP Units on the applicable distribution payment date will be prorated among all Participants according to the number of DRIP Units that would, in the absence of any proration, have been purchased on their behalf under the Plan.
18. If the Fund (or its administrator, as applicable), determines that no DRIP Units will be available for purchase under the Plan for a particular distribution payment date, or to the extent that the availability of DRIP Units is prorated in accordance with the terms of the Plan, then Participants will receive the usual Cash Distribution for that distribution payment date.
19. The Fund (or its administrator, as applicable) 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.

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The Fund will provide notice of any such amendment, suspension or termination in accordance with the terms of the Plan and applicable securities laws.

20. The distribution of DRIP Units by the Fund pursuant to the Plan cannot be made in reliance on the registration and prospectus exemptions contained in the Legislation of certain of the Jurisdictions for the reinvestment of dividends, interest or distributions of capital gains or out of earnings or surplus, as the Plan involves the reinvestment of the distributable cash flow of the Fund, which may not fall into any of these categories.
21. Additionally, the distribution of DRIP Units by the Fund pursuant to the Plan cannot be made in reliance on the registration and prospectus exemptions contained in the Legislation of certain of the Jurisdictions for distribution reinvestment plans of mutual funds, as the Fund is not a “mutual fund” as defined in the Legislation of the relevant Jurisdictions because the Unitholders 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 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 Makers with the jurisdiction to make the Decision has been met;

THE DECISION of the Decision Makers pursuant to the Legislation is that the Registration and Prospectus Requirements shall not apply to the distribution by the Fund of DRIP Units to the Participants pursuant to the Plan provided that:

- (a) at the time of the trade the Fund 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 such Legislation;
- (b) no sales charge is payable by Participants in respect of the distribution;
- (c) the Fund has caused to be sent to each Participant, not more than twelve months before the trade, notice of their right to withdraw from the Plan and instructions on how to exercise that right;

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- (d) except in Québec, the first trade of DRIP Units will be a distribution or primary distribution to the public under the Legislation unless the conditions in paragraphs 2 through 5 of subsection 2.6(3) of MI 45-102 are satisfied; and
- (e) in Québec, the first trade of DRIP Units acquired under the Plan will be a distribution unless:
  - (i) at the time of the first trade, the Fund is a reporting issuer in Québec and is not in default of any of the requirements of securities legislation of Québec;
  - (ii) no unusual effort is made to prepare the market or to create a demand for the DRIP Units that are the subject of the first trade;
  - (iii) no extraordinary commission or consideration is paid to a person or company other than the vendor of the DRIP Units respect of the first trade;
  - (iv) if the vendor of the DRIP Units is an insider of the Fund, the vendor has no reasonable grounds to believe that the Fund is in default of any requirement of the Legislation of Québec.

DATED August 27, 2004.

Paul Moore

Harold P. Hands