

2003 BCSECCOM 854

Headnote

Mutual Reliance Review System for Exemptive Relief Application – relief granted from the registration requirement to permit trades of non-mutual fund securities by a group plan administrator under employee plans

Applicable British Columbia Provisions

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

**IN THE MATTER OF THE CANADIAN SECURITIES LEGISLATION OF
BRITISH COLUMBIA, ALBERTA, SASKATCHEWAN, ONTARIO,
NEW BRUNSWICK, NOVA SCOTIA, NEWFOUNDLAND AND
LABRADOR, PRINCE EDWARD ISLAND, THE NORTHWEST
TERRITORIES, YUKON AND NUNAVUT**

AND

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

AND

**IN THE MATTER OF FIDELITY RETIREMENT SERVICES COMPANY
OF CANADA LIMITED**

MRRS DECISION DOCUMENT

WHEREAS the local securities regulatory authority or regulator (the “Registration Exemption Decision Maker”) in each of British Columbia, Alberta, Saskatchewan, Ontario, New Brunswick, Nova Scotia, Newfoundland and Labrador, Prince Edward Island, the Northwest Territories, Yukon and Nunavut (the “Jurisdictions”) has received an application (the “Registration Exemption Application”) from Fidelity Retirement Services Company of Canada Limited (“FRS Co.”) for a decision under the securities legislation (the “Legislation”) of each of the Jurisdictions that the dealer registration requirement shall not apply to certain trades to be made by FRS Co. in Non-Mutual Fund Securities (as herein defined) of issuers that are employers or affiliated entities of employers, in connection with it acting as an administrator for Plans (as defined below) of the issuer (or an affiliated entity of the issuer) that provide for the purchase of Non-Mutual Fund Securities by employees;

2003 BCSECCOM 854

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

AND WHEREAS for the purposes hereof the following terms shall have the following meanings:

“affiliated entity” means, for an issuer, a person or company that:

- (i) would be an affiliated entity of the issuer for the purposes of Multilateral Instrument 45-105 *Trades to Employees, Senior Officers, Directors and Consultants* (“MI 45-105”); or
- (ii) is an income trust, whose only material assets consists of securities of the issuer.

“Component Plan” means, for an employee or former employee, and for a spouse of an employee or former employee, a component plan referred to in paragraph 11;

“employee” means, for an issuer, an employee of the issuer or an affiliated entity of the issuer;

“former employee” means, for an issuer, a person who was, but is no longer, an employee of the issuer or an affiliated entity of the issuer;

“former spouse” means, for an employee or former employee of an issuer, a person who was legally married to or was the “common-law partner”, as defined in the ITA, of the employee or former employee at the time the employee or former employee was an employee of the issuer;

“Non-Mutual Fund Securities” means, for an issuer, securities of the issuer that are not shares or units of a mutual fund;

“Plan” means, for an issuer, a plan or program established by the issuer, or an affiliated entity of the issuer, providing for the acquisition of Non-Mutual Fund Securities of the issuer by employees of the issuer, as compensation or as an incentive or benefit for services provided by the employees, and in respect of which FRS Co. acts as an administrator;

“Plan Participant” means, for the Plan of an issuer, a person who is a participant in the Plan and who was, at the time of their enrolment in the Plan, either an employee of the issuer or the spouse of an employee of the issuer; and

2003 BCSECCOM 854

“spouse” means, for an employee or former employee of an issuer, a person who is legally married to or is the “common-law partner”, as defined in the ITA, of the employee or former employee of the issuer;

AND WHEREAS any other terms used herein that are defined in National Instrument 14-101 *Definitions* shall have the same meaning, unless herein otherwise specifically defined, or the context otherwise requires;

AND WHEREAS FRS Co. has represented to the Registration Exemption Decision Makers that:

1. FRS Co. is registered, or has applied to be registered, under the Legislation in each of the Jurisdictions as a dealer in the category of “mutual fund dealer” (or the equivalent). FRS Co. is a member of the Mutual Fund Dealers Association of Canada (the “MFDA”).
2. FRS Co. is a wholly-owned subsidiary of Fidelity Investments Canada Limited (“FICL”).
3. FICL, a corporation continued under the laws of Ontario, is registered under the Legislation in each of the Jurisdictions, as a dealer in the category of “mutual fund dealer”, and as an “adviser”, in the categories of “investment counsel” and “portfolio manager”.
4. Fidelity Retirement Services (“FRS”) is the division of FICL currently responsible for its business (the “Group Retirement Business”) of servicing Group Retirement Clients (as defined below).
5. FICL has obtained relief (the “MFDA Relief”) pursuant to the Legislation of certain of the Jurisdictions, exempting it from the requirements under the Legislation: (i) to be a member of the MFDA on or after July 2, 2002; and (ii) to file with the MFDA an application for membership and corresponding fees for membership before the date specified under the Legislation of the Jurisdiction.
6. The registration of FICL as a “mutual fund dealer” under the Legislation of each of the Jurisdictions, other than New Brunswick, has been restricted to certain trades which are incidental to its principal business. The restricted trading activity includes trades by FICL to participants (“Group Retirement Clients”) in employer-sponsored ITA-registered plans or other savings plans until the earlier of: (i) the assumption of such trading activity by Fidelity Intermediary Securities Company Limited (“FISCo”), a wholly-owned

2003 BCSECCOM 854

subsidiary of FICL and a member of the Investment Dealers Association of Canada; and (ii) December 31, 2003.

7. For some time, FICL has been actively engaged in a project to determine the most appropriate regulatory platform for its Group Retirement Business. Until recently, FICL's plan had been to transfer FRS to FISCo by December 31, 2003. FICL has now decided, subject to all necessary regulatory approvals, to instead transfer the Group Retirement Business from FRS to FRS Co. (the "Transfer") and is endeavouring to effect such Transfer on or before December 31, 2003.
8. In certain Jurisdictions, for its Group Retirement Business and its related activities as the administrator of employer-sponsored, ITA-registered plans and other savings plans, FICL has obtained exemptions from the dealer registration requirement for its trading activities in securities of the employer or an affiliate of the employer. FRS Co. requires similar exemptions from the dealer registration requirement to act as the administrator of these Plans and other plans that may administered by FRS Co. in the future.
9. For each Plan of an issuer, the employer of employees that participate in the Plan, or an affiliated entity of such employer, selects mutual funds that Plan Participants may purchase through payroll contributions, transfers, and, in some cases, lump-sum payments.
10. Under the Plan of each issuer, in addition to purchasing shares or units of one or more mutual funds, Plan Participants may purchase Non-Mutual Fund Securities, so long as these Non-Mutual Fund securities are listed and posted for trading on a stock exchange (either within or outside of Canada, or both).
11. Non-Mutual Fund Securities of an issuer that may be purchased by an employee under a Plan are purchased through, depending upon the Plan, one or more of the following component plans:
 - (a) an "employees profit sharing plan", as defined in the ITA, that has been established for the benefit of employees;
 - (b) a "registered retirement savings plan", as defined in the ITA, that has been established by or for the benefit of the employee;
 - (c) a "registered retirement savings plan", as defined in the ITA, that has been established by or for the benefit of a spouse of the employee;

2003 BCSECCOM 854

- (d) a “locked-in retirement account” registered with the Canada Customs and Revenue Agency, that has been established by or for the benefit of the employee;
 - (e) a “defined profit sharing plan”, as defined in the ITA, that has been established by or for the benefit of employees.
 - (f) a defined contribution “registered pension plan”, as defined in the ITA, that has been established by or for the benefit of employees;
 - (g) a “registered retirement income fund”, as defined in the ITA, that has been established by or for the benefit of the employee; and
 - (h) a “registered educational savings plan”, as defined in the ITA, that has been established by or for the benefit of the employee; and
 - (i) an “employee savings plan” that has been established for the benefit of the employee.
12. Where, under the Plan of an issuer an Employee Spouse RRSP is a Component Plan, the corresponding spouse of the employee may be permitted to purchase Non-Mutual Fund Securities of the issuer through the Employee Spouse RRSP.
13. Under each Plan of an issuer, it is proposed that FRS Co. carry out the following activities:
- (i) receive orders from Plan Participants that are employees of the issuer to purchase Non-Mutual Fund Securities of the issuer (including, depending upon the Plan, Non-Mutual Fund Securities to be purchased with employer matching contributions, and/or Non-Mutual Fund Securities to be purchased upon the automatic reinvestment of dividends paid in respect of Non-Mutual Fund Securities) through a Component Plan;
 - (ii) receive orders from Plan Participants that are spouses of employees of the issuer to purchase Non-Mutual Fund Securities of the issuer (including, depending upon the Plan, Non-Mutual Fund Securities to be purchased upon the automatic reinvestment of dividends paid in respect of Non-Mutual Fund Securities) through their Employee Spouse RRSPs;

2003 BCSECCOM 854

- (iii) receive orders from Plan Participants that are employees of the issuer, and from Plan Participants that are former employees of the issuer, to sell Non-Mutual Fund Securities of the issuer then held on their behalf through a Component Plan;
- (iv) receive orders from Plan Participants that are spouses and former spouses of employees of the issuer, and from Plan Participants that are spouses and former spouses of former employees of the issuer, to sell Non-Mutual Fund Securities of the issuer then held on their behalf through an Employee Spouse RRSP;
- (v) for each business day, FRS Co. will aggregate orders to purchase Non-Mutual Fund Securities, referred to above, that have been received by FRS Co. before the “cut off time” (the “Cut Off Time”) specified for the Plan (which will have been previously identified to the Plan Participants) and, separately, aggregate orders to sell Non-Mutual Fund Securities, referred to above, that have been received by FRS Co. before the Cut Off Time;
- (vi) transmit aggregate orders to purchase Non-Mutual Fund Securities, and aggregate orders to sell Non-Mutual Fund Securities, referred to in paragraph (v), above, for execution through another dealer that is registered as a dealer in a category that permits it to act as a dealer for the subject trade under the applicable securities legislation in each of the jurisdictions, where the order is received by FRS Co. and where the order is received by the dealer; and
- (vii) for each order to purchase or sell Non-Mutual Fund Securities, received from a Plan Participant, that comprises an aggregate order to purchase or sell Non-Mutual Fund Securities that is transmitted by FRS Co. to another dealer, as described in paragraph (vi), above, FRS Co. will allocate, on a pro rata basis, to the corresponding Plan Participants the corresponding Non-Mutual Fund Securities, that are purchased pursuant to the execution by the other dealer of the aggregate purchase order, and the corresponding proceeds from the sale of Non-Mutual Fund Securities that are received pursuant to the execution by the other dealer of the aggregate sale order.

14. For each Plan of an issuer, no Plan Participant (or any Component Plan of the Plan Participant) will be charged any trading commissions, fees, costs or other

2003 BCSECCOM 854

expenses in respect of their purchase or sale of any Non-Mutual Fund Securities of the issuer pursuant to the Plan.

15. Under each Plan, FRS Co. will maintain books and records in respect of the activities referred to in paragraph 13, above, reflecting, among other things: all related payments, receipts, account entries and adjustments.
16. Under each Plan of an issuer, Non-Mutual Fund Securities of the issuer will be held on behalf of Plan Participants by a custodian that is not affiliated with FRS Co. and records of Non-Mutual Fund Securities held under the Plan through Component Plans will be maintained by FRS Co.
17. If an employee of an issuer, who is a Plan Participant in a Plan of the issuer, becomes a former employee of the issuer, neither the former employee nor any spouse of the former employee will be permitted to make purchases of Non-Mutual Fund Securities through a Component Plan of the former employee, other than Non-Mutual Fund Securities to be purchased upon the automatic reinvestment of dividends paid in respect of Non-Mutual Fund Securities then held on their behalf through a Component Plan, but, subject to time limitations in certain cases, the former employee and any spouse of the former employee will be permitted to continue to hold, through a Component Plan, under the Plan, Non-Mutual Fund Securities previously purchased under the Plan, through the Component Plan, and to instruct FRS Co., from time to time, to sell such Non-Mutual Fund Securities or to transfer such Non-Mutual Fund Securities to an account with another dealer, or to receive a certificate representing such Non-Mutual Fund Securities.
18. To participate in a Plan of an issuer, employees of the issuer and spouses of employees of the issuer must be (or have been) enrolled through FRS Co. (or FICL, if the enrolment takes or took place before the Transfer) by application, which may be completed: in writing; on the telephone, by way of a recorded call; or, through the Internet, by way of secure access to the website of FRS Co. (or FICL, if the enrolment takes or took place before the Transfer).
19. No employee or spouse of an employee will be induced to participate in any Plan of an issuer, or to purchase any Non-Mutual Fund Securities of the issuer through the Plan, by expectation of the employee's employment or continued employment.
20. Except for ascertaining the "suitability" of any purchase or sale of Non-Mutual Fund Securities by a Plan Participant, through a Component Plan, referred to in paragraph 13, above, FRS Co. will, with respect to any Non-Mutual Fund Securities it purchases, sells or holds under a Plan, comply with

2003 BCSECCOM 854

all other conditions or other requirements under the Legislation that would be applicable to it as a mutual fund dealer if the Non-Mutual Fund Securities were, instead, shares or units of a mutual fund, including requirements relating to, but not limited to: capital; record keeping; account supervision; segregation of funds and securities; confirmations of trades; “know-your-client”; and statements of account.

21. Employees and spouses of employees who are enrolled (or were enrolled) in a Plan of an issuer that, at the time of their enrolment, offers (or offered) Plan Participants the option of purchasing Non-Mutual Fund Securities of the issuer, will be (may have been, depending upon the Plan) required, when completing their enrolment application, to acknowledge that FRS Co. (or FICL, if the enrolment takes place or took place before the Transfer) will not be performing any “suitability” analysis with respect to any purchase or sale of Non-Mutual Fund Securities of the issuer on their behalf under the Plan: by signing the application form, where the application is completed in writing; orally, where the application is completed on the telephone; or, by making the appropriate selection on the Website, where the application is completed on the Internet.
22. Where employees of an issuer or their spouses were enrolled in a Plan of the issuer, that, at the time of their enrolment, did not offer the employee or spouse the option of purchasing Non-Mutual Fund Securities of the issuer and the Plan was subsequently revised to offer them the option of purchasing Non-Mutual Fund Securities, before FRS Co. purchases any Non-Mutual Fund Securities of the issuer on their behalf pursuant to the Plan, FRS Co. (or the issuer, or an affiliate of the issuer, on behalf of FRS Co.) will send to the employee or spouse, as the case may be, a notice that FRS Co. will not perform “suitability” analysis with respect to any purchase or sale of Non-Mutual Fund Securities of the issuer on their behalf under the Plan.
23. For each Plan of an issuer, FRS Co. will, no later than 45 days after the date of the Transfer, send notice to Plan Participants who were enrolled in the Plan prior to the date of the Transfer confirming that the Transfer has occurred, describing the role of FRS Co. as successor to FICL and advising that FRS Co. will not be performing any “suitability” analysis with respect to any purchase or sale of Non-Mutual Fund Securities of the issuer on behalf of the Plan Participants under the Plan.

AND WHEREAS under the System, this MRRS Decision Document evidences the decision of each Registration Exemption Decision Maker (collectively, the “Registration Exemption Decision”);

2003 BCSECCOM 854

AND WHEREAS each of the Registration Exemption Decision Makers is satisfied that the test contained in the Legislation that provides the Registration Exemption Decision Maker with the jurisdiction to make the Registration Exemption Decision has been met;

THE DECISION of the Registration Exemption Decision Makers under the Legislation is that the dealer registration requirement contained in the Legislation shall not apply to any trades in Non-Mutual Fund Securities of an issuer referred to in paragraph 13, above, that are made by FRS Co., as an administrator of a Plan of the issuer, with or on behalf of a Plan Participant, through a Component Plan, provided that:

- A. in the case of each trade made in a Jurisdiction, FRS Co., is, at the time of the trade, registered under the Legislation of the Jurisdiction as a dealer in the category of “mutual fund dealer”, and, the trade is made on its behalf by a person that is registered under the Legislation to trade shares or units of mutual funds on behalf of FRS Co. as a salesperson or officer; and
- B. at the time of the trade, FRS Co. is a member of the MFDA.

December 20, 2003

Robert W. Davis
Theresa McLeod

AND WHEREAS FRS Co. has also made an application (the “Suitability Exemption Application”) to the local securities regulatory authority or regulator (the “Suitability Exemption Decision Makers”) in Alberta and Ontario (the “Suitability Exemption Decision Jurisdictions”) for a decision that the requirements (the “Suitability Requirements”) in the Legislation of each Suitability Exemption Decision Jurisdiction to make enquiries of a Plan Participant – that would otherwise arise as a result of FRS Co., purchasing or selling Non-Mutual Fund Securities for a Plan Participant, through a Component Plan, as described in the Registration Exemption Decision, above – to determine:

- (a) the general investment needs and objectives of the Plan Participant, and
- (b) the suitability of a proposed purchase or sale of Non-Mutual Fund Securities for the Plan Participant,

shall not apply to FRS Co., subject to certain terms and conditions;

2003 BCSECCOM 854

AND WHEREAS under the System, the Ontario Securities Commission is the principal regulator for this Suitability Exemption Application;

AND WHEREAS under the System, this MRRS Decision Document evidences the decision of each Suitability Exemption Decision Maker (collectively, the "Suitability Exemption Decision");

AND WHEREAS each of the Suitability Exemption Decision Makers is satisfied that the test contained in the Legislation that provides the Suitability Exemption Decision Maker with the jurisdiction to make the Suitability Exemption Decision has been met;

THE DECISION of the Suitability Exemption Decision Makers, pursuant to the Legislation, is that the Suitability Requirements of the Legislation shall not apply to FRS Co. as a result of FRS Co., purchasing or selling Non-Mutual Fund Securities for a Plan Participant, through a Component Plan, pursuant to and in accordance with the above Registration Exemption Decision, provided that, in the circumstances of each such purchase or sale:

- C. the Plan Participant has given the corresponding acknowledgement or has been sent the corresponding notice, referred to in the applicable paragraph 21, 22 or 23 of the Registration Exemption Decision; and
- D. FRS Co. does not make any recommendation or give any investment advice to the Plan Participant with respect to the purchase or sale.

December 20, 2003

David M. Gilkes