

# 2005 BCSECCOM 82

February 8, 2005

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications - 1996 Securities Act s. 48 Adviser - Exemption from s.34(1)(c) requirement to be registered as an adviser and the obligations of advisers in Part 5 of the Act and rules - A person who resides outside BC wants to advise BC residents. - The person is hired under a written agreement with a BC registered dealer or adviser to provide advice to the BC registrant and its BC clients; the person is registered or qualified to provide the advice in the jurisdiction in which they reside; under a written agreement with its BC clients or the person, the BC registrant accepts responsibility for all losses resulting from inappropriate advice provided by the person.

## **Applicable British Columbia Provisions**

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

**In the Matter of  
the Securities Legislation  
of British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia,  
New Brunswick, Newfoundland and Labrador, Prince Edward Island,  
Northwest Territory, Yukon and Nunavut (the Jurisdictions)**

**and**

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

**and**

**In the Matter of Berkshire Securities Inc. (the Filer)**

## **MRRS Decision Document**

## **Background**

- ¶ 1 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) that the requirement contained in the Legislation to be registered as an adviser (the Registration Requirement) does not apply to certain foreign and Canadian portfolio managers who provide investment counselling and portfolio management services to clients of the Filer in Jurisdictions where the portfolio managers are not registered (the Advisers).

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### ¶ 2 Under the Mutual Reliance Review System for Exemptive Relief Applications

- (a) the British Columbia Securities Commission is the principal regulator for this application, and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

### **Interpretation**

### ¶ 3 Defined terms contained in National Instrument 14-101 *Definitions* have the same meaning in this decision unless they are defined in this decision.

### **Representations**

### ¶ 4 This decision is based on the following facts represented by the Filer:

- (a) the Filer is a corporation incorporated under the Ontario Business Corporations Act; the head office of the Filer is located in Ontario;
- (b) the Filer is registered as an investment dealer or its equivalent under the Legislation, and is a member of the Investment Dealers Association of Canada;
- (c) the Filer provides investment counselling and portfolio management services to individual and institutional clients resident in the Jurisdictions and other jurisdictions where it is registered or otherwise qualified to provide such services;
- (d) the Filer intends to offer the investment counselling and portfolio management services of the Advisers to its clients (the Participating Clients) who wish to have exposure to capital markets located in a jurisdiction in which the Adviser has experience and expertise;
- (e) each Adviser is registered as a portfolio manager or investment counsel in a Canadian jurisdiction or otherwise licensed or qualified to provide investment counselling and portfolio management services in the foreign jurisdiction where its head office is located;
- (f) each of the Advisers provides investment counselling and portfolio management services to clients resident in the jurisdictions where its head office is located and in other jurisdictions where it is registered or otherwise qualified to provide such services;

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- (g) each Participating Client will enter into an investment management agreement (IMA) with the Filer which provides the Filer with complete discretionary authority to purchase and sell securities on behalf of the Participating Client, and authorizes the Filer to delegate its discretionary authority over all or a portion of the Participating Client's assets to the Advisers;
- (h) the Filer will enter into an agreement with each Adviser which will set out the obligations and duties of each party in connection with the investment counselling and portfolio management services provided to Participating Clients and under which the Advisers will agree to act as sub-advisers to the Filer for the benefit of Participating Clients; each Adviser will exercise discretionary authority over the assets of Participating Clients who wish to have exposure to capital markets located in jurisdictions in which the Adviser has experience and expertise;
- (i) the Filer will:
  - (i) make inquiries with each Participating Client to learn the essential facts about each Participating Client, to determine the general investment needs and objectives of, the appropriateness of recommendations made to and the suitability of proposed transactions for the Participating Client, and to otherwise comply with the "know your client" obligations under the Legislation, and will provide this information to each Adviser who exercises discretionary authority over the assets of a Participating Client; and
  - (ii) send to each Participating Client quarterly statements and performance reports prepared by the Filer;
- (j) the Filer will agree under the IMA to be responsible for any loss that arises out of the failure of an Adviser:
  - (i) to exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of the Filer and the Participating Client of the Filer for whose benefit the investment advice is, or portfolio management services are, to be provided, or
  - (ii) to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances,

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and acknowledges that it cannot be relieved by its clients from this responsibility (collectively, the Assumed Obligations);

- (k) a Participating Client will obtain all advice and give all instructions and directions through the Filer;
- (l) if there is any direct contact between a Participating Client and an Adviser, a representative of the Filer, duly registered to provide portfolio management or investment counselling services in the Jurisdiction where the Participating Client is resident, will be present at all times, either in person or by telephone;
- (m) the Advisers will not have any other contact with Participating Clients, except that:
  - (i) from time to time, written reports prepared by Advisers containing a commentary on markets in their respective jurisdictions may be delivered by the Filer to Participating Clients;
  - (ii) from time to time investment counsel or portfolio managers who are officers or employees of the Advisers may conduct presentations or seminars in the Jurisdictions regarding the status of the economies and capital markets in the jurisdictions where they are authorized to carry on business; in such cases, a registered representative of the Filer will be present at all times; and
  - (iii) promotional videos prepared by the Advisers may be made accessible to the public through the Filer's website; these videos will not provide specific performance information but will be designed to provide the investor with general information on the particular Adviser's investment approach;
- (n) each Adviser who provides investment counselling and portfolio management services with respect to the assets of a Participating Client would be considered an "adviser" under the Legislation and, in the absence of the requested relief, would be subject to the Registration Requirement;
- (o) none of the Legislation contains an exemption from the Registration Requirement that would be available to the Advisers who provide investment counselling and portfolio management services to Participating Clients.

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### **Decision**

- ¶ 5 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.
- ¶ 6 The decision of the Decision Makers under the Legislation is that the Registration Requirement does not apply to the Advisers who provide investment counselling and portfolio management services to Participating Clients, provided that:
- (a) the obligations and duties of each of the Advisers are set out in a written agreement with the Filer;
  - (b) the Filer contractually agrees with each Participating Client that the Filer will be responsible for the Assumed Obligations;
  - (c) the Filer cannot be, and at no time is, relieved of the Assumed Obligations by Participating Clients;
  - (d) the Filer is registered as an investment dealer or the equivalent in the jurisdictions where the Participating Clients are resident;
  - (e) in Manitoba, the relief is available only to Advisers who are not registered in any Canadian jurisdiction; and
  - (f) an Adviser will not have any direct and personal contact with a Participating Client residing in New Brunswick if the Adviser is not registered as an adviser in New Brunswick unless a registered representative of the Filer is present at all times in person.

L.E. Evans, CA  
Director, Capital Markets Regulation  
British Columbia Securities Commission