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Headnote

Mutual Reliance Review System for Exemptive Relief Applications – relief to revoke and replace previous order to permit labour sponsored investment fund corporation to pay certain distribution costs out of fund assets

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, s. 171

National Instrument 81-105 *Mutual Fund Sales Practices*, ss. 2.1, 9.1

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

AND

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

AND

IN THE MATTER OF TUSCARORA ENERGY GROWTH FUND INC.

MRRS DECISION DOCUMENT

WHEREAS the local securities regulatory authority or regulator (the "Decision Maker") in each of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Saskatchewan, Yukon, Ontario, Northwest Territories and Nunavut (the "Jurisdictions") granted Tuscarora Energy Growth Fund Inc. (the "Fund") relief pursuant to section 9.1 of National Instrument 81-105 ("NI 81-105") from the prohibition contained in section 2.1 of NI 81-105 against the making of certain payments by the Fund to participating dealers in connection with the distribution of Class A Shares, Series I and Class A Shares, Series II of the Fund on January 9, 2002 (the "Prior Decision");

AND WHEREAS the Decision Maker has received an application from the Fund for a decision under the securities legislation of the Jurisdictions (the "Legislation") revoking and replacing the Prior Decision;

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AND WHEREAS the Fund plans to offer to the public Class A Shares, Series III of the Fund; the Prior Decision does not provide relief for the Fund to make certain payments to participating dealers in connection with the proposed distribution of Class A Shares, Series III;

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 the Fund and Front Street Capital Inc. (the "Manager"), the manager of the Fund, have represented to the Decision Makers as follows:

1. The Fund is a corporation incorporated under the *Canada Business Corporations Act*. It is registered as a labour-sponsored venture capital corporation under the *Income Tax Act* (Canada).
2. The Fund is a mutual fund as defined in the legislation of each of the Jurisdictions. The Fund filed a prospectus dated January 31, 2002 (the "Prospectus") in each of the Jurisdictions in connection with the offering to the public of Class A Shares, Series I and Class A Shares, Series II in the capital of the Fund. An amendment to the Prospectus dated July 3, 2002 (the "Amendment"), in a form of a slipsheet, has been filed in each of the Jurisdictions in connection with the proposed offering to the public of Class A Shares, Series III (collectively, the "Class A Shares").
3. The authorized capital of the Fund consists of an unlimited number of Class A Shares and an unlimited number of Class B Shares in the capital of the Fund. As at June 21, 2002, there were 875,837.121 Class A Shares, Series I, 483,050.412 Class A Shares, Series II and 100 Class B Shares outstanding.
4. The Manager and The Newspaper Guild of Canada/Communications Workers of America, as the sponsor, formed and organized the Fund.
5. The Fund pays directly to participating dealers certain costs associated with the distribution of its Class A Shares, Series I and Class A Shares, Series II. These costs are:
 - (i) with respect to the distribution of Class A Shares, Series I and Class A Shares, Series II,
 - (a) a sales commission of 6% of the selling price for each Class A Share, Series I or Series II, subscribed for (the "6% Sales Commission"), and

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- (b) a service fee of 0.5% annually of the net asset value of the Class A shares, Series I or Series II, held by the clients of the sales representatives of the dealers (the "Series I and Series II Service Fee").
 - (ii) with respect to the holding by investors of Class A Shares, Series I, a commission of 4% of the selling price of each Series I share held, in lieu of service fees payable before the eighth anniversary of the date of issue of such Series I shares (the "Trailing Commission").
- 6. The Fund proposes that any sales commission associated with the distribution of Class A Shares, Series III (the "Series III Sales Commission") will be paid by the investors.
- 7. The Fund proposes to pay directly to participating dealers associated with the distribution of its Class A Shares, Series III, a service fee of 1.25% annually of the net asset value of the Class A Shares, Series III, held by the clients of the sales representatives of the dealers (the "Series III Service Fee").
- 8. The Fund may also pay for the reimbursement of co-operative marketing expenses (the "Co-op Expenses") incurred by certain dealers in promoting sales of the Class A Shares, pursuant to co-operative marketing agreements the Fund may enter into with such dealers.
- 9. All of the costs associated with the distribution of Class A Shares, including the 6% Sales Commission and the Trailing Commission (together, the "Sales Commissions"), the Series I and Series II Service Fee, the Series III Service Fee and the Co-op Expenses (collectively, the "Distribution Costs") and the Series III Sales Commission are fully disclosed in the Prospectus as amended by the Amendment (the "Amended Prospectus"). The fact that the Fund intends to pay certain of these costs out of the assets of the Fund is also disclosed.
- 10. For accounting purposes, the Fund will:
 - (i) defer and amortize the amount paid or payable in respect of the 6% Sales Commission to retained earnings on a straight line basis over eight years,
 - (ii) defer and amortize the amount paid or payable in respect of the Trailing Commission to income on a straight line basis over eight years, and
 - (iii) expense the Series I and Series II Service Fee, the Series III Service Fee and Co-op Expenses in the fiscal period when incurred.

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11. Due to the structure of the Fund, the most tax efficient way for the Distribution Costs to be financed is for the Fund to pay them directly.

12. For Class A Shares, Series I and Class A Shares, Series II, gross investment amounts will be contributed to the Fund in respect of each subscription. This is to ensure that the entire subscription amount contributed by the investor is counted for the purpose of the applicable federal tax credits in connection with the purchase of Class A Shares, Series I and Class A Shares, Series II. For Class A Shares, Series III, investment amounts, net of commission paid by the investor directly, will be contributed to the Fund in respect of each subscription.

13. The Manager, or its affiliate, is the only member of the organization of the Fund, other than the Fund, available to pay the Distribution Costs. The Manager does not have sufficient resources to pay the Distribution Costs and, unless the requested discretionary relief is granted, would be obliged to finance these costs through borrowings.

14. Any loans obtained by the Manager to finance the Distribution Costs would result in the Manager increasing the management fee chargeable to the Fund, by an amount equal to the borrowing costs incurred by the Manager plus an amount required to compensate the Manager for any risks associated with fluctuations in the net asset value of the Fund and, therefore, fluctuations in the Manager's fee. Requiring compliance with section 2.1 of NI 81-105 would cause the expenses of the Fund to increase above those contemplated in the Amended Prospectus.

15. Requiring the Manager to pay the Distribution Costs while granting an exemption to other labour funds permitting such funds to pay similar Distribution Costs directly, would put the Fund at a permanent and serious competitive disadvantage with its competitors.

16. The Fund undertakes to comply with all other provisions of NI 81-105. In particular, the Fund undertakes that all Distribution Costs paid by it will be compensation permitted to be paid to participating dealers under NI 81-105.

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;

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THE DECISION of the Decision Makers pursuant to the Legislation is that the Prior Decision 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 pursuant to section 9.1 of NI 81-105 is that the Fund shall be exempt from section 2.1 of NI 81-105 to permit the Fund to pay the Distribution Costs, provided that:

- (a) the Distribution Costs are otherwise permitted by, and paid in accordance with, NI 81-105;
- (b) the Distribution Costs are accounted for in the Fund's financial statements in the manner described in paragraph 10 above;
- (c) the summary section of the Amended Prospectus has full, true and plain disclosure describing the commission structure of Class A Shares, Series I as a 10% initial sales commission, plus service fees after eight years. This section is placed within the first 10 pages of the Amended Prospectus;
- (d) the Amended Prospectus includes full, true and plain disclosure explaining the services and value that the participating dealers would provide to investors in return for the service fees payable to them;
- (e) the summary section of the Amended Prospectus includes full, true and plain disclosure explaining to investors that, for the Class A Shares, Series I and the Class A Shares, Series II:
 - (i) they pay the Sales Commissions indirectly, as the Fund pays these Sales Commissions using investors' subscription proceeds; and
 - (ii) a portion of the net asset value of the Fund is comprised of a deferred commission, rather than investment assets;
- (f) this Decision shall cease to be operative with respect to a Decision Maker on the date that a rule replacing or amending section 2.1 of NI 81-105 comes into force.

DATED July 24, 2002

Kerry D. Adams

Harold P. Hands

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