

2007 BCSECCOM 138

March 20, 2007

Headnote

Mutual Reliance Review System for Exemptive Relief Applications – Securities Act s. 130 – A mutual fund and its registered portfolio manager want relief from section 121(2)(b) of the Act so that the fund can invest in and hold securities of an issuer in which the mutual fund, alone or together with related mutual funds, has a significant interest – The investment fund is not a reporting issuer; details of the investment have been disclosed to the investors in the fund; the investment does not adversely affect the liquidity of the fund; the investment is in an issuer whose securities are listed on a Canadian stock exchange; the decision to make and hold the investment represents the business judgment of responsible persons uninfluenced by considerations other than the best interests of the fund

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 121(2)(b), 130

In the Matter of
the Securities Legislation of
British Columbia and Alberta
(the Jurisdictions)

and

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

and

In the Matter of
McElvaine Investment Management Ltd.
(the Manager)

and

The McElvaine Investment Trust
(the Trust)

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and

The McElvaine Limited Partnership
(the Partnership)

(collectively, the Filers)

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 Filers for a decision under the securities legislation of each Jurisdiction (the Legislation) that the Trust and the Partnership (together, the Funds) are exempt from the restriction prohibiting mutual funds from making or holding an investment in or to a person in which the mutual fund, alone or together with one or more related mutual funds, is a substantial security holder (the Requested Relief);

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

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

Representations

- ¶ 3 This decision is based on the following facts represented by the Filers:
- 1. the Manager is registered in British Columbia as an adviser in the category of portfolio manager and investment counsel;
 - 2. the Manager is the manager, portfolio advisor and promoter of the Trust and the portfolio manager and promoter of the Partnership; McElvaine Services Ltd., a wholly-owned subsidiary of the Manager, is the general partner of the Partnership; RBC Dexia Investor Services Trust is the trustee of the Trust, and the custodian of both the Trust and the Partnership;
 - 3. neither of the Funds is a reporting issuer in the Jurisdictions or any other Canadian province or territory;

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4. the securities of the Funds are only sold to investors in reliance on exemptions from the registration and prospectus requirements, primarily to high net worth individual and corporate investors;
5. according to publicly available information, Rainmaker Income Fund (the Issuer) is a reporting issuer in each of British Columbia, Alberta, Ontario and Quebec and its units are listed on the Toronto Stock Exchange;
6. Tim McElvaine, a director and officer of the Manager, is also a trustee of the Issuer;
7. as at February 14, 2007, the Trust holds 1,580,000 units of the Issuer and the Partnership holds 1,670,000 units of the Issuer; based on publicly available information, the units held on behalf each of the Trust and the Partnership represent approximately 9.3% and 9.9%, respectively, of the outstanding units of the Issuer, and together represent approximately 19.2% of the outstanding units of the Issuer; as at January 31, 2007, units of the Issuer represented approximately 5.2% of the total net asset value of the portfolio of the Trust and approximately 6.2% of the total net asset value of the portfolio of the Partnership;
8. because both Funds are managed by the Manager, they are related mutual funds of each other under the Legislation;
9. without the Requested Relief, the Funds will be prohibited from making or holding an investment in units of the Issuer for so long as they collectively hold more than 20% of the outstanding units of the Issuer;
10. the Manager has concluded that the investment by the Funds in units of the Issuer does not adversely affect the liquidity of the Funds for redemption purposes;
11. the Manager believes that the investment by the Funds in the Issuer is in the best interests of each of the Funds and represents the business judgment of responsible persons uninfluenced by considerations other than the best interests of the Funds; and
12. the details of the investment by the Funds in units of the Issuer and of Tim McElvaine's role as a trustee of the Issuer have been and will be disclosed to investors in the Funds through the Manager's disclosure regarding conflicts of interest, the financial statements of the Funds and the offering memorandum of each Fund.

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Decision

- ¶ 4 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 is that the Requested Relief is granted.

Martin Eady, CA
Director, Corporate Finance
British Columbia Securities Commission