

2004 BCSECCOM 216

Headnote

Mutual Reliance Review System for Exemptive Relief Applications – relief from the registration and prospectus requirements in connection with the issuance of units to existing unit holders under a distribution reinvestment plan, subject to certain conditions – first trade in additional units deemed a distribution unless made in compliance with MI 45-102

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, ALBERTA, SASKATCHEWAN, MANITOBA, ONTARIO, QUÉBEC, NOVA SCOTIA, NEW BRUNSWICK, NEWFOUNDLAND AND LABRADOR, AND PRINCE EDWARD ISLAND AND

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

AND

IN THE MATTER OF CALLOWAY REAL ESTATE INVESTMENT TRUST

MRRS DECISION DOCUMENT

1. WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in each of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland and Labrador (the “Jurisdictions”) has received an application from Calloway Real Estate Investment Trust (the “Trust”) for a decision under 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 prospectus (the “Registration and Prospectus Requirements”) shall not apply to the distribution and resale of trust units of the Trust pursuant to a distribution reinvestment plan (the “Plan”);
2. AND WHEREAS under the Mutual Reliance Review System for Exemptive Relief Applications (the “System”), the Alberta Securities Commission is the principal regulator for this application;

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3. AND WHEREAS, unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 Definitions or in Agence nationale d'encadrement du secteur financier Notice 14-101;
4. AND WHEREAS the Trust has represented to the Decision Makers that:
 - 4.1 The Trust is an unincorporated closed-end real estate investment trust established under the laws of the Province of Alberta by a declaration of trust dated December 4, 2001, as amended and restated as of October 24, 2002 and as further amended and restated as of October 31, 2003.
 - 4.2 The beneficial interests in the Trust are divided into interests of one class, described and designated as "Trust Units". The Trust is authorized to issue an unlimited number of Trust Units of which 22,255,874 are presently issued and outstanding.
 - 4.3 The Trust became a reporting issuer or the equivalent in all Jurisdictions on October 24, 2002 on obtaining a receipt for its prospectus dated October 24, 2002. The last prospectus of the Trust was dated January 27, 2004 and filed in all of the Jurisdictions on January 27, 2004. The Trust is current on all filings required to be made under the Legislation.
 - 4.4 The Trust Units are listed and posted for trading on the Toronto Stock Exchange (the "TSX") under the symbol "CWT.UN".
 - 4.5 The Trust makes cash distributions of a proportionate share of its annual distributable cash flow ("Distributions") on a monthly basis paid on or about the 15th day of each month (the "Distribution Date") to unitholders of record ("Unitholders") on the last business day of the previous month (each a "Record Date").
 - 4.6 The Trust has adopted the Plan which, subject to obtaining all necessary regulatory approvals, will permit Unitholders, at their option, to reinvest Distributions by electing to purchase additional Units ("Plan Units") pursuant to the Plan and in accordance with a distribution reinvestment plan services agreement entered into between the Trust and Computershare Trust Company of Canada in its capacity as agent under the Plan (in such capacity, the "Plan Agent"). Unitholders who do not elect to purchase Plan Units pursuant to the Plan will continue to receive cash distributions.

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- 4.7 Participation in the Plan is restricted to Unitholders and beneficial owners of Trust Units who are residents of Canada.
- 4.8 A registered holder of Trust Units may elect to participate in the Plan by completing an authorization form and sending it to the Plan Agent. Beneficial owners of Trust Units may elect to participate in the Plan by notifying the Plan Agent via the applicable participant ("CDS Participant") in the Canadian Depository for Securities Limited ("CDS") depository service.
- 4.9 Distributions due to participants in the Plan ("Plan Participants") will be paid to the Plan Agent and applied to purchase Plan Units directly from the Trust.
- 4.10 The price of Plan Units purchased with Distributions will be 97% of the volume weighted average of the trading price for the Trust Units on the TSX for the ten (10) trading days immediately preceding the relevant Distribution Date.
- 4.11 The Unitholder equity of the Trust as at December 31, 2003 was approximately \$106,000,000. The closing price of the Units on December 31, 2003 as traded on the TSX was \$13.75. The Trust paid cumulative distributions of \$1.0549 per Unit during the 2003 calendar year. As such it is anticipated that the amount of Distributions that may be reinvested in Plan Units will be small relative to the Unitholder equity in the Trust.
- 4.12 Plan Participants who beneficially own their Units through a CDS Participant may terminate their participation in the Plan by written notice to their CDS Participant, who will in turn notify CDS. CDS will notify the Plan Agent each month of the number of Trust Units participating in the Plan through CDS. Registered Unitholders may terminate their participation in the Plan by written notice to the Plan Agent.
- 4.13 No commissions or brokerage fees will be payable on the purchase of Plan Units and administrative costs will be borne by the Trust.
- 4.14 The Trust reserves the right to suspend or terminate the Plan at any time in its sole discretion, upon not less than 30 days' notice to (i) the Plan Participants who are registered Unitholders, (ii) CDS and (iii) the Plan Agent.

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- 4.15 Subject to the approval of the TSX, the Trust may amend the Plan at any time and may, in consultation with the Plan Agent, adopt additional rules and regulations to facilitate the administration of the Plan.
- 4.16 The distribution of the Plan Units by the Trust pursuant to the Plan cannot be made in reliance on certain registration and prospectus exemptions contained in the Legislation for the reinvestment of dividends, interest or distributions of capital gains, earnings or surplus, as the Plan involves the reinvestment of Distributions of all distributable cash flow of the Trust which may not fall into any of these categories.
- 4.17 Additionally, the distribution of Plan Units by the Trust pursuant to the Plan cannot be made in reliance on certain registration and prospectus exemptions contained in the Legislation for the reinvestment plans of mutual funds as the Trust is not a “mutual fund” within the definition in the Legislation 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 Trust.
- 5. AND WHEREAS under the System, this MRRS Decision Document evidences the decision of each of the Decision Makers (collectively, the “Decision”);
- 6. 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;
- 7. THE DECISION of the Decision Makers under the Legislation is that the Registration and Prospectus Requirements contained in the Legislation shall not apply to the trades of Plan Units to the Plan Agent for the account of Plan Participants pursuant to the Plan provided that:
 - 7.1 at the time of the trade the Trust is a reporting issuer or the equivalent under the Legislation and is not in default of any requirements of the Legislation;
 - 7.2 no sales charge is payable in respect of the distributions of Plan Units from treasury;

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- 7.3 the Trust has caused to be sent to the person or company to whom the Plan Units are traded, not more than 12 months before the trade, a statement describing:
 - 7.3.1 their right to withdraw from the Plan and to make an election to receive cash instead of Plan Units on the making of a distribution by the Trust; and
 - 7.3.2 instructions on how to exercise the right referred to in 7.3.1;
- 7.4 except in Québec, the first trade in Plan Units acquired pursuant to this Decision will be a distribution or primary distribution to the public under the Legislation unless the conditions of subsection 2.6(3) of Multilateral Instrument 45-102 *Resale of Securities* are satisfied; and
- 7.5 in Québec, the first trade (alienation) in Plan Units acquired pursuant to this Decision will be a distribution unless:
 - 7.5.1 at the time of the first trade, the Trust is a reporting issuer in Québec and is not in default of any of the requirements of securities legislation in Québec;
 - 7.5.2 no unusual effort is made to prepare the market or to create a demand for the Plan Units;
 - 7.5.3 no extraordinary commission or consideration is paid to a person or company in respect of the trade; and
 - 7.5.4 if the seller of the Plan Units is an insider of the Trust, the seller has reasonable grounds to believe that the issuer is not in default of any of requirement of the Legislation of Québec.

DATED this 2nd day of April, 2004

Stephen P. Sibold, Q.C., Chair

James A. Millard, Q.C., Member