

## **2004 BCSECCOM 463**

### **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications – relief from certain self-dealing provisions in connection with a fund-of-fund structure - Top funds permitted to invest in private underlying fund under common management, subject to certain conditions

### **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 121(2)(b), 121(3), 123, 126(a), 126(d), 130

**IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH  
COLUMBIA, ALBERTA, SASKATCHEWAN, ONTARIO, NOVA SCOTIA  
AND NEWFOUNDLAND AND LABRADOR**

**AND**

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

**AND**

**IN THE MATTER OF BURGUNDY ASSET MANAGEMENT LTD.  
("BURGUNDY")**

**AND**

**IN THE MATTER OF BURGUNDY AMERICAN EQUITY FUND,  
BURGUNDY BALANCED INCOME FUND, BURGUNDY FOUNDATION  
TRUST FUND, BURGUNDY PARTNERS EQUITY RSP FUND,  
BURGUNDY PARTNERS' FUND, BURGUNDY PARTNERS' RSP FUND  
AND OTHER MUTUAL FUNDS MANAGED BY BURGUNDY FROM  
TIME TO TIME IN A SIMILAR MANNER (EACH, A "TOP FUND",  
COLLECTIVELY, THE "TOP FUNDS")**

### **MRRS DECISION DOCUMENT**

WHEREAS the local securities regulatory authority or regulator (the "Decision Maker") in each of British Columbia, Alberta, Saskatchewan, Ontario, Nova Scotia and Newfoundland and Labrador (the "Jurisdictions") has received an application from Burgundy (sometimes referred to herein as the "Manager") as manager of the Top Funds for a decision by each Decision Maker under the securities legislation of the Jurisdictions (the "Legislation") that the following provisions of the Legislation (the "Applicable Requirements") shall not apply to

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the Top Funds or Burgundy, in respect of each Top Fund's investment in securities of the Private Funds (as defined in Schedule 'A') and, in all Jurisdictions except Ontario, in securities of the Other Burgundy Funds (as defined in Schedule 'A'):

1. the restrictions contained in the Legislation that prohibit a mutual fund from knowingly making or holding an investment in a person or company in which the mutual fund, alone or together with one or more related mutual funds, is a substantial securityholder; and
2. the requirements contained in the Legislation that a management company or, in British Columbia, a mutual fund manager, file a report of every transaction of purchase or sale of securities between a mutual fund it manages and any related person or company and any transaction in which, by arrangement other than an arrangement relating to insider trading in portfolio securities, a mutual fund is a joint participant with one or more of its related persons or companies.

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, unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 Definitions;

AND WHEREAS the Manager has represented to the Decision Makers that:

1. Burgundy is the manager of the Top Funds, the Other Burgundy Funds and the Private Funds.
2. The Top Funds and the Other Burgundy Funds are open-end mutual fund trusts established under the laws of the Province of Ontario.
3. Units of the Top Funds and Other Burgundy Funds are currently qualified for distribution under a simplified prospectus and annual information form dated July 9, 2003 (the "Prospectus") filed in each of the Jurisdictions.
4. On June 9, 2004, a pro forma simplified prospectus and pro forma annual information form in respect of the Top Funds and the Other Burgundy Funds was filed in the Province of Ontario only under SEDAR Project No. 658715. Burgundy is not seeking to renew the Prospectus in any province other than Ontario. As of July 9, 2004, units of the Top Funds and Other Burgundy Funds are being sold to investors in provinces other than Ontario solely in the private placement market pursuant to applicable exemptions from the

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prospectus and dealer registration requirements. However, the Top Funds and the Other Burgundy Funds continue to be reporting issuers in each of the Jurisdictions subject to the provisions of the Legislation, including National Instrument 81-102 – Mutual Funds (“NI 81-102”).

5. The Private Funds are, or will be, pooled funds established under the laws of the Province of Ontario and will be sold in the private placement market pursuant to applicable prospectus and dealer registration exemptions.
6. The Private Funds are not reporting issuers under the Legislation and, accordingly, are not governed by NI 81-102. However, other than in respect of section 7.1 of NI 81-102 (which relates to incentive fees charged directly to investors), each Private Fund complies with NI 81-102.
7. Burgundy offers investment management services to high net worth individuals, pension funds, endowment funds, foundations and institutions under the terms of an investment counsel agreement which grants Burgundy full discretionary authority over the client's account (“Investment Counsel Agreement”). The only investors in a Top Fund are clients of Burgundy who have entered into an Investment Counsel Agreement. Burgundy does not charge or receive any management or other fee from the Top Funds, the Other Burgundy Funds or the Private Funds. Burgundy’s sole form of compensation with respect to the Top Funds, the Other Burgundy Funds and the Private Funds is the negotiable management fee it charges its clients under the Investment Counsel Agreement. The incentive fee, if any, is charged in respect of a Private Fund by Burgundy pursuant to the Investment Counsel Agreement with a client and is not charged to any Top Fund that invests in a Private Fund.
8. Each Top Fund wishes to actively manage its investments in any Private Fund and/or Other Burgundy Fund with discretion to buy and sell securities of the Private Fund and/or Other Burgundy Fund, selected in accordance with the Top Fund’s investment objective, as well as alter its holdings in any Private Fund and/or Other Burgundy Fund in which it invests.
9. Given the relative size of some of the Top Funds, Burgundy believes that investing in securities of the Private Funds and Other Burgundy Funds, which have acquired or will acquire asset classes that are in accordance with a Top Fund’s investment objective, provides a more efficient and cost-effective manner of achieving diversification than the direct purchase of securities.
10. Except to the extent evidenced by this Decision and specific approvals granted by the Decision Makers pursuant to NI 81-102, the investments by a Top Fund

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in the Private Funds and Other Burgundy Funds will comply with the investment restrictions of the Legislation and NI 81-102.

11. In the absence of this Decision, the Top Funds would be prohibited from knowingly making or holding an investment in a Private Fund and, in every Jurisdiction except Ontario, an Other Burgundy Fund, in which a Top Fund, alone or together with one or more related mutual funds, is a substantial securityholder.
12. In the absence of this Decision, Burgundy would be required to file a report of every transaction of purchase or sale by a Top Fund of securities of a Private Fund and, in every Jurisdiction except Ontario, of securities of the Other Burgundy Funds.
13. A Top Fund's investment in securities of a Private Fund and/or Other Burgundy Fund will represent the business judgement of responsible persons uninfluenced by considerations other than the best interests of a Top Fund.

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;

THE DECISION of the Decision Makers under the Legislation is that the Applicable Requirements shall not apply so as to prevent the Top Funds from making and holding investments in securities of a Private Fund, and in every Jurisdiction except Ontario, in securities of Other Burgundy Funds, or require Burgundy to file a report relating to the purchase or sale of such securities,

PROVIDED IN EACH CASE THAT:

1. The Decision shall only apply if, at the time a Top Fund makes or holds an investment in a Private Fund and/or Other Burgundy Fund, the following conditions are satisfied:
  - (a) the Top Fund's investments in securities of a Private Fund and/or Other Burgundy Fund are made in accordance with the provisions of section 2.5 of NI 81-102, except to the extent the Top Fund has been granted specific exemptions therefrom by the Decision Makers;

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- (b) each Private Fund is, or will be, organized or created under the laws of Canada or the laws of a Province of Canada;
- (c) each Private Fund meets the definition of mutual fund as defined in the Legislation;
- (d) where securities of a Top Fund are offered for sale pursuant to a simplified prospectus and annual information form, the simplified prospectus of that Top Fund will disclose in its investment objective the ability to invest in pooled fund securities and will also disclose the information specified in paragraph (g) below under Item 8, Part B of Form 81-101F1;
- (e) the Private Funds and Other Burgundy Funds will, at all times, be in compliance with NI 81-102, except section 7.1 thereof in respect of incentive fees, if any, which are charged in respect of a Private Fund by Burgundy pursuant to the Investment Counsel Agreement with a client;
- (f) Burgundy does not charge an incentive fee to a Top Fund that invests in a Private Fund; and
- (g) if available, unitholders of a Top Fund may obtain, upon request, a copy of the offering memorandum (or other similar document) of a Private Fund and the audited annual financial statements and semi-annual financial statements of a Private Fund.

DATED July 30, 2004.

Robert L. Shirriff

H. Lorne Morphy

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### **SCHEDULE 'A'**

#### **Private Funds**

Burgundy Japan Fund

Burgundy Smaller Companies Fund

Burgundy Small Cap Value Fund

and other pooled funds managed by Burgundy from time to time in a similar manner.

#### **Other Burgundy Funds**

Burgundy Bond Fund

Burgundy Canadian Equity Fund

Burgundy European Equity Fund

Burgundy European Foundation Fund

Burgundy Focus Canadian Equity Fund

Burgundy Money Market Fund

Burgundy T-Bill Fund

Burgundy U.S. Money Market Fund

Burgundy U.S. T-Bill Fund

and other mutual funds managed by Burgundy from time to time in a similar manner.