

2003 BCSECCOM 835

Headnote

Mutual Reliance Review System for Exemptive Relief Applications - application for relief from the registration and prospectus requirements in connection with the distribution and resale of units of the applicant trust pursuant to a distribution reinvestment plan – relief granted subject to 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. 34(1)(a), 48, 61, 76

Multilateral Instrument 45-102 *Resale of Securities*

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

AND

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

AND

IN THE MATTER OF STRATEGIC ENERGY FUND

MRRS DECISION DOCUMENT

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, Newfoundland and Labrador, Yukon, Nunavut and Northwest Territories (the “Jurisdictions”) has received an application from Strategic Energy Fund (the “Fund”) for a decision, under the securities legislation of the Jurisdictions (the “Legislation”), that the requirement 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 final prospectus (the “Registration and Prospectus Requirements”) shall not apply to certain trades in units of the Fund under a distribution reinvestment plan (the “Plan”);

AND WHEREAS under the Mutual Reliance Review System for Exemptive Relief Applications (“System”), the Ontario Securities Commission is the principal regulator for this application;

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AND WHEREAS, unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 Definitions or in Québec Commission Notice 14-101;

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

1. The Fund is an investment trust established under the laws of the Province of Ontario pursuant to a trust agreement dated February 14, 2002, as amended and restated as of October 10, 2003.
2. The beneficial interest in the net assets and net income of the Fund is divided into trust units (the "Trust Units"). The Fund is authorized to issue an unlimited number of Trust Units of which 3,379,876 Trust Units were issued and outstanding as at December 2, 2003.
3. The Fund became a reporting issuer or the equivalent thereof in each of the Jurisdictions on April 11, 2002 on obtaining a receipt for its prospectus dated April 11, 2002. The last prospectus of the Fund was dated October 27, 2003 and filed in all of the Jurisdictions on October 27, 2003. To its knowledge, the Fund is not in default of any requirements of the Legislation.
4. The Fund is a "qualifying issuer" within the meaning of Multilateral Instrument 45-102 Resale of Securities ("MI 45-102");
5. The Fund is not a "mutual fund" as defined in the Legislation because the holders of Trust Units (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 part of the net assets of the Fund as contemplated in the definition of "mutual fund" contained in the Legislation.
6. The Trust Units are listed and posted for trading on the Toronto Stock Exchange (the "TSX") under the symbol "SEF.UN".
7. The Fund makes periodic cash distributions (the "Distributions") to holders of Trust Units (the "Unitholders") (each such date being a "Distribution Date") on the last business day of each month.
8. The Fund has adopted the Plan so that, subject to obtaining all necessary regulatory approvals, distributions may be automatically reinvested, at the election of each Unitholder, to purchase additional Trust Units (the "Plan Units") on each Unitholder's behalf under the Plan in accordance with the provisions of a distribution Plan service agreement (the "Plan Agreement") to be entered into among the Fund and Computershare Trust Company of Canada

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(the “Plan Agent”).

9. Participation in the Plan is restricted to Unitholders who are residents of Canada.
10. Under the terms of the Plan, a Unitholder will be able to elect to reinvest his or her share of Distributions from the Fund in Plan Units on a monthly basis by giving notice to the Plan Agent, through the Unitholder’s investment advisor or other participant (a “CDS Participant”) in CDS through which it holds its Trust Units, of the Unitholder’s decision to participate in the Plan. The Distributions due to Unitholders who have elected to participate (the “Plan Participants”) will be automatically reinvested on their behalf by the Plan Agent to purchase Plan Units from the Fund or in the market in the manner described below:
 - (a) if the weighted average trading price of the Trust Units on the TSX (or such other stock exchange on which the Trust Units are listed, if the Trust Units are no longer listed on the TSX) for the 10 trading days immediately preceding the relevant Distribution Date, plus applicable commissions and brokerage charges, (the “Market Price”) is less than the Net Asset Value per Trust Unit (as determined in accordance with the Plan Agreement) on the Distribution Date, the Plan Agent shall apply the Distribution either to purchase Plan Units in the market or from treasury as described below; or
 - (b) if the Market Price is equal to or greater than the Net Asset Value per Trust Unit on the relevant Distribution Date, the Plan Agent shall apply the Distribution to purchase Plan Units from the Fund through the issue of new Trust Units at a purchase price equal to the higher of (i) the Net Asset Value per Trust Unit on the relevant Distribution Date and (ii) 95% of the Market Price on the relevant Distribution Date.

Purchases of Plan Units in the market under subparagraph (a) above will be made by the Plan Agent on an orderly basis during the 10 trading day period following the Distribution Date and the price paid for those Plan Units shall not exceed 115% of the Market Price of the Trust Units on the relevant Distribution Date. On the expiry of such 10 day period, the unused part, if any, of the Distributions attributable to the Plan Participants will be used to purchase Plan Units from the Fund at a purchase price equal to the higher of (i) the Net Asset Value per Trust Unit on the relevant Distribution Date and (ii) 95% of the Market Price on the relevant Distribution Date.

11. The Plan Agent will be purchasing Plan Units only in accordance with the

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mechanisms described in the Plan and, accordingly, there is no opportunity for a Plan Participant or the Plan Agent to speculate on changes in the Net Asset Value per Unit.

12. The investment objectives of the Fund are to provide Unitholders with superior rates of return, principally in the form of long term capital appreciation, and a cost-effective method of reducing investment risk through a diversification strategy focused on investment opportunities within the Canadian energy sector. The Fund will invest a portion of its funds with the objective of providing Unitholders with periodic cash distributions. Accordingly, the Net Asset Value per Unit should be less volatile than that of a typical equity fund, and the potential for significant changes in the Net Asset Value per Unit over short periods of time is considered to be moderate.
13. The amount of Distributions that may be reinvested in Plan Units issued from treasury is small relative to the Unitholders' equity in the Fund. The potential for dilution arising from the issuance of Units by the Fund at the Net Asset Value per Unit on a Distribution Date is not significant.
14. The Plan is open to participation by all Unitholders other than Unitholders who are non-residents of Canada, so that any Unitholder can ensure protection against potential dilution, albeit insignificant, by electing to participate in the Plan.
15. As all Trust Units, including those issued under the Plan, are issued in the book-entry only form and are held in CDS, Plan Participants will not be entitled to receive certificates representing Plan Units purchased or issued under the Plan. Each Plan Participant shall receive from his or her CDS Participant reports of the Plan Units purchased for the Plan Participant's account in respect of each Distribution and the cumulative total of all Plan Units purchased for that account.
16. The Fund will not issue fractional Trust Units under the Plan. A cash adjustment for any fractional Plan Unit will be paid by the Plan Agent on a monthly basis to the Plan Participant via the applicable CDS Participant through whom a Plan Participant holds Trust Units.
17. The Plan Units purchased under the Plan in the market or from the Fund will be allocated on a *pro rata* basis to the Plan Participants.
18. No commissions, service charges or brokerage fees are payable by Plan Participants in connection with the Plan. Administrative costs associated with the operation of the Plan will be borne by the Fund.

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19. The Plan also allows Plan Participants to make cash payments (“Optional Cash Payments”) which will be invested in Trust Units by the Plan Agent. Plan Participants may invest a minimum of \$100 per Optional Cash Payment with a maximum of \$20,000 per calendar year per Plan Participant. Optional Cash Payments will be invested on the same basis and at the same time as Distributions. The aggregate number of Plan Units issued in a calendar year pursuant to Optional Cash Payments will be limited to 2% of the Trust Units outstanding at the commencement of that calendar year.
20. Optional Cash Payments must be received by the Plan Agent at least three business days prior to a Distribution Date, in order to be invested in Plan Units. Optional Cash Payments received less than three business days prior to a Distribution Date will be held by the Plan Agent until the next Distribution Date.
21. The Manager may terminate the Plan in its sole discretion, upon not less than 30 days’ notice to (i) the Plan Participants via the CDS Participants through which the Plan Participants hold their Trust Units, and (ii) the Plan Agent. The Manager may also amend, modify or suspend the Plan at any time in its sole discretion, provided that it gives notice of that amendment, modification or suspension to Unitholders in accordance with the Plan Agreement. The Manager may also, in consultation with the Plan Agent adopt additional rules and regulations to facilitate the administration of the Plan subject to the approval of the TSX.
22. The Manager may, in its sole discretion, and upon at least 90 days’ notice to the Plan Agent, remove the Plan Agent and appoint any person or entity licensed to carry on the business of a trustee in Ontario as the Plan Agent. The Plan Agent may resign as agent under the Plan upon at least 90 days’ notice to the Manager and upon delivery to the Manager of all documents and monies being held by the Plan Agent on the Fund’s behalf pursuant to the Agreement.
23. A Plan Participant may terminate its participation in the Plan by providing at least five business days’ written notice, via the CDS Participant through which it holds the Trust Units, to the Plan Agent.
24. The distribution of the Plan Units by the Fund under the Plan cannot be made in reliance on certain registration and prospectus exemptions contained in the Legislation as the Plan involves the reinvestment of income distributed by the Fund and not the reinvestment of dividends, interest, capital gains or distributions out of earnings and surplus of the Fund.

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25. The distribution of Plan Units by the Fund under the Plan cannot be made in reliance on registration and prospectus exemptions contained in the Legislation for distribution reinvestment plans of mutual funds, as the Fund is not a “mutual fund” as defined in the Legislation.

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 trades of Plan Units by the Fund to the Plan Participants under the Plan shall not be subject to the Registration and Prospectus Requirements of the Legislation provided that:

- (a) at the time of the trade the Fund is a reporting issuer or the equivalent under the Legislation and is not in default of any requirements of the Legislation;
- (b) no sales charge is payable in respect of the distributions;
- (c) the Fund 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:
 - (i) their right to elect to participate in the Plan on a monthly basis to receive Plan Units instead of cash on the making of a distribution of income by the Fund; and
 - (ii) instructions on how to exercise the election referred to in (i);
- (d) in the financial year during which the trade takes place, the aggregate number of Plan Units issued pursuant to the Cash Payment Option of the Plan before the trade plus the aggregate number of Plan Units issued in the trade, shall not exceed 2% of the aggregate number of Trust Units outstanding at the commencement of that financial year;
- (e) except in Québec, the first trade in Plan Units acquired pursuant to this Decision in a Jurisdiction shall be deemed a distribution or primary distribution to the public under the Legislation unless the conditions set out in subsection 2.6(3) of MI 45-102 are satisfied; and

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- (f) in Québec, the first trade (alienation) in Plan Units acquired pursuant to this Decision will be a distribution unless:
 - (i) at the time of the first trade, the Fund is a reporting issuer in Québec and is not in default of any of the requirements of securities legislation in Québec;
 - (ii) no unusual effort is made to prepare the market or to create a demand for the Plan Units;\
 - (iii) no extraordinary commission or other consideration is paid in respect of the trade; and
 - (iv) if the seller of the Plan Units is an insider of the Fund, the seller has no reasonable grounds to believe that the Fund is in default of any of the requirements of securities legislation in Québec.

DATED this 12th day of December, 2003.

Paul Moore

Robert W. Davis