

# 2005 BCSECCOM 429

June 17, 2005

## Headnote

Mutual Reliance Review System for Exemptive Relief Applications - Issuer granted relief to calculate the income test for the purposes of assessing the significance of a proposed acquisition using net operating income rather than income from continuing operations (the Alternative Income Test). In addition, the issuer is permitted to base the Alternative Income Test on previously filed *pro forma* financial statements rather than historical financial statements

## Applicable British Columbia Provisions

National Instrument 44-101, ss. 1.2, 1.3 and 15.1

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, The  
Yukon, The Northwest Territories and Nunavut (the “Jurisdictions”)

and

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

and

In the Matter of Sunrise Senior Living Real Estate Investment Trust (the “Filer”)

## MRRS Decision Document

## Background

The local securities regulatory authority or regulator (the “Decision Maker”) in each of the applicable Jurisdictions has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the “Legislation”) granting:

- (a) in Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Newfoundland and Québec an exemption from sections 8.3(2)(c) and 8.3(4)(c) of NI 51-102 to permit the Filer to utilize the 2003 Pro Forma Financial Statements (as defined in paragraph 9(d) herein), to perform the calculations for the applicable “income test” for the Proposed Acquisition (as defined

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in paragraph 14 herein) and any other acquisition of a business by the Filer (directly or indirectly), from time to time, until the earlier of (i) March 31, 2006 or (ii) the date that the Filer produces and publicly files financial statements that reflect income for twelve months of operations, and

- (b) in all the Jurisdictions, an exemption from sections 1.2(2)3 and 1.2(3)3 of NI 44-101 to permit the Filer to utilize the 2003 Pro Forma Financial Statements to perform the calculations for the applicable “income test” for the Proposed Acquisition (the “Requested Relief”).

Under the Mutual Reliance Review System for Exemptive Relief Applications (the “MRRS”):

- (a) the Ontario Securities Commission is the principal regulator for this application, and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

### **Interpretation**

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

### **Representations**

The decision is based on the following facts represented by the Filer:

#### The Filer:

1. The Filer is an unincorporated open-ended real estate investment trust established under the laws of the Province of Ontario pursuant to a declaration of trust dated August 13, 2004, as amended and restated by a declaration of trust made as of November 11, 2004.
2. The Filer is a reporting issuer, or the equivalent, in Alberta, Saskatchewan, Manitoba, Ontario, Québec, Nova Scotia, Newfoundland and Labrador, New Brunswick, Prince Edward Island, the Yukon, the Northwest Territories, Nunavut, and British Columbia and is currently not in default of any applicable requirements under the securities legislation thereunder.
3. On December 13, 2004, the Filer filed a final prospectus (the “Prospectus”) in each of the provinces and territories of Canada in connection with an offering of units (the “Offering”), qualifying 24,624,290 units for total gross proceeds of \$246,242,900.

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4. On December 23, 2004, the Filer closed the Offering (the “Closing”).
5. On January 10, 2005, the Filer closed the underwriters’ over-allotment option and issued an additional 2,462,429 units for additional gross proceeds of \$24,624,290 (for total gross proceeds from the Offering of \$270,867,190).
6. The Filer’s units are listed on the Toronto Stock Exchange.
7. The financial year end of the Filer is December 31.
8. At the date of this application, the Filer is eligible to file a prospectus in the form of a short form prospectus pursuant to NI 44-101 as it has a “current AIF” (as defined in NI 44-101) and its market capitalization on April 26, 2005 was over \$300,000,000.

### The Financial Statements:

9. The Prospectus includes the following financial information for the Filer:
  - (a) an audited balance sheet of the Filer as at August 13, 2004 with the auditors’ report thereon;
  - (b) a consolidated statement of forecasted net income for the Filer for the three-month periods ending March 31, 2005, June 30, 2005, September 30, 2005 and December 31, 2005 and for the year ending December 31, 2005 with the auditors’ report thereon;
  - (c) pro forma consolidated financial statements of the Filer as at August 31, 2004 and for the eight-month period ended August 31, 2004 with a compilation report thereon; and
  - (d) pro forma consolidated financial statements of the Filer for the year ended December 31, 2003 with a compilation report thereon (the “2003 Pro Forma Financial Statements”).
10. On March 31, 2005, the Filer filed audited consolidated financial statements as at and for the period ended December 31, 2004 (the “2004 Financial Statements”). The 2004 Financial Statements relate to the period from the Filer’s formation on August 13, 2004 to the end of its first fiscal year (December 31, 2004), but reflect only nine days of operations, namely, from December 23, 2004 (the date of the Closing) to December 31, 2004 (the Filer’s fiscal year end).

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11. The Filer has not produced or publicly filed any other pro forma consolidated financial statements since the filing of the Prospectus.
12. The Filer has not been in existence for 12 months and does not have a complete financial year for which audited financial statements have been prepared.
13. The Filer does not have financial results for any 12-month period from which consolidated income from continuing operations of the Filer's businesses can be derived other than the 2003 Pro Forma Financial Statements.

### The Proposed Acquisition:

14. An indirect wholly-owned operating subsidiary of the Filer has entered into a purchase and sale agreement (the "Purchase Agreement") dated as of April 28, 2005 with Carlyle/Sunrise Lincoln Park, L.P., Carlyle/Sunrise Westlake Village, L.P., and CRP Oak Leaf, L.P. (collectively, the "Sellers"), pursuant to which the Filer, indirectly, has conditionally agreed to acquire from the Sellers three senior living facilities located in Chicago, Illinois; Westlake Village, California; and Raleigh, North Carolina (the "Proposed Acquisition") for a total gross purchase price of approximately US\$75.4 million (approximately C\$95 million), subject to customary adjustments.
15. The closing of the Proposed Acquisition is scheduled to occur as early as June 10, 2005.

### Application of Significant Acquisitions Tests:

16. Pursuant to section 8.3(2)(c) of NI 51-102, the determination of whether an acquisition is a "significant acquisition" based on the required income test is determined using the issuer's audited financial statements for the most recently completed financial year ended before the date of the acquisition.
17. Pursuant to section 8.3(4)(c) of NI 51-102, the determination of whether an acquisition is a "significant acquisition" based on the optional income test is determined based upon the issuer's consolidated income from continuing operations for the later of: (i) the most recently completed financial year, without giving effect to the acquisition; or (ii) the 12 months ended on the last day of the most recently completed interim period of the issuer, without giving effect to the acquisition.

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18. Pursuant to section 1.2(2)3 of NI 44-101, the determination of whether an acquisition is a “significant acquisition” based on the required income test is determined using the issuer’s audited financial statements for the most recently completed financial year ended before the date of the acquisition.
19. Pursuant to section 1.2(3)3 of NI 44-101, the determination of whether an acquisition is a “significant acquisition” based on the optional income test is determined based upon the issuer’s consolidated income from continuing operations for the later of: (i) the most recently completed financial year, without giving effect to the acquisition; or (ii) the 12 months ended on the last day of the most recently completed interim period of the issuer for which financial statements are included in the short form prospectus, without giving effect to the acquisition.
20. Applying the requirements prescribed by section 8.3(2) of NI 51-102 and section 1.2(2) of NI 44-101 using the 2004 Financial Statements and the financial statements of the Proposed Acquisition for the year ended December 31, 2004, the results are as follows:

*Asset Test:*

$$\frac{\$90,630,800 \text{ (Consolidated Assets of the Proposed Acquisition)}}{\$577,268,000 \text{ (Consolidated Assets of the Filer)}} = 15.7\%$$

*Investment Test:*

$$\frac{\$93,115,935 \text{ (Consolidated Investment in the Proposed Acquisition Inclusive of Transaction Costs)}}{\$577,268,000 \text{ (Consolidated Assets of the Filer)}} = 16.1\%$$

*Income Test:*

$$\frac{\$176,037 \text{ (Income From Continuing Operations of the Proposed Acquisition)}}{\$277,000 \text{ (Loss From Continuing Operations of the Filer)}} = 63.6\%$$

21. Based on the foregoing results, the application of section 8.3(2)(c) of NI 51-102 and section 1.2(2)3 of NI 44-101 requiring the Filer to perform the calculations for the required income test by relying on the prescribed financial statements referenced in paragraphs 16 and 18 is not indicative of significance in respect of the Proposed Acquisition, as such prescribed financial statements (being the 2004 Financial Statements) are reflective of only nine days of operations.

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22. If the Requested Relief is granted and the Filer is permitted to apply the income test under section 8.3(2)(c) of NI 51-102 and section 1.2(2)3 of NI 44-101 using the 2003 Pro Forma Financial Statements and the financial statements of the Proposed Acquisition for the year ended December 31, 2004, the result would be as follows:

*Income Test:*

$$\frac{\$176,037 \text{ (Income From Continuing Operations of the Proposed Acquisition)}}{\$5,813,000 \text{ (2003 Pro Forma Income From Continuing Operations of the Filer)}} = 3.0\%$$

**Decision**

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 Requested Relief is granted provided that the Filer includes in each document where disclosure regarding an acquisition is required, or would be required in the absence of the Requested Relief, disclosure of the fact that the Requested Relief has been granted.

Charlie MacCready, Assistant Manager  
Ontario Securities Commission