

# 2005 BCSECCOM 538

July 27, 2005

## Headnote

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act, ss. 48 and 76 - registration and prospectus requirements - Trades by a non-mutual fund in connection with its distribution reinvestment plan - The issuer is an investment trust; under its plan, income of the trust can be distributed to its investors through the automatic issuance of additional units to the investors; investors can elect to receive cash in lieu of additional trust units; no fee is paid by investors to participate in the plan

## Applicable British Columbia Provisions

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 34(1)(a), 48, 61 and 76

Multilateral Instrument 45-102 *Resale of Securities*, s. 2.6(3)

In the Matter of  
the Securities Legislation of  
Alberta, British Columbia, Saskatchewan, Manitoba, Ontario, Québec, Nova  
Scotia, New Brunswick, Newfoundland and Labrador, Prince Edward Island,  
Yukon, 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  
Sequoia Oil & Gas Trust (the Filer)

## 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 Filer for a decision under the securities legislation of the Jurisdictions (the Legislation) that the dealer registration requirement contained in the Legislation and the prospectus requirement contained in the Legislation (collectively, the Registration and Prospectus Requirements) shall not apply to the distribution of trust units of the Filer (Trust Units) to Participants (as defined below) under the Premium Distribution<sup>TM</sup>, Distribution Reinvestment and

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Optional Trust Unit Purchase Plan (the DRIP) of the Filer (the Requested Relief).

2. Under the Mutual Reliance Review System for Exemptive Relief Applications (the "MRRS"):
  - 2.1 the Alberta Securities Commission is the principal regulator for this application, and
  - 2.2 this MRRS decision document evidences the decision of each Decision Maker.

### **Interpretation**

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

### **Representations**

4. This decision is based on the following facts represented by the Filer:
  - 4.1 The Filer is an open-ended, unincorporated investment trust settled under the laws of Alberta under a trust indenture dated March 16, 2005.
  - 4.2 The Filer's head office is located in Calgary, Alberta.
  - 4.3 The Filer became a reporting issuer in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec and New Brunswick as a result of a plan of arrangement (the Arrangement) between Argo Energy Ltd. (Argo) and Lightning Energy Ltd. (Lightning) effective April 22, 2005 (Effective Date).
  - 4.4 Under the Arrangement the business of Argo and Lightning was reorganized as an income trust under the name Sequoia Oil & Gas Trust.
  - 4.5 The Filer, to the best of its knowledge, is not in default of any requirements of the Legislation.
  - 4.6 The Filer currently has in place a distribution reinvestment and optional cash payment plan (the Old DRIP) which enables eligible holders of Trust Units (Unitholders) who elect to participate in the Old DRIP to

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- 4.6.1 direct that cash distributions paid by the Filer be automatically applied to the purchase of Trust Units from treasury (the Distribution Reinvestment Option), and
- 4.6.2 make, at their discretion, additional cash payments (Optional Cash Payments), subject to a maximum of \$50,000 per financial year of the Filer and a minimum of \$2,000 per remittance (the Cash Payment Option).
- 4.7 Trust Units acquired through the Distribution Reinvestment Option or the Cash Payment Option are referred to as DRIP Units.
- 4.8 The Old DRIP will be superseded by the DRIP and all Unitholders who are enrolled in the Old DRIP at the time that the DRIP becomes effective will be automatically enrolled in the Distribution Reinvestment Option of the DRIP.
- 4.9 The DRIP will retain (with some modifications) the Distribution Reinvestment Option and Cash Payment Option but will also enable eligible Unitholders (Participants) who decide to reinvest Cash Distributions to authorize and direct the plan agent under the DRIP (the Plan Agent) to pre-sell through a designated broker (the Plan Broker), for their account, a number of Trust Units approximately equal to the number of DRIP Units issuable on such reinvestment, and to settle such pre-sales with the DRIP Units issued on the applicable distribution payment date in exchange for a cash payment equal to 102% of the reinvested Cash Distributions (the Premium Distribution™ Option).
- 4.10 The Plan Broker will be entitled to retain for its own account the difference between the proceeds realized in connection with the pre-sales of Trust Units and the cash payment to the Plan Agent in an amount equal to 102% of the reinvested Cash Distributions.
- 4.11 All DRIP Units purchased under the DRIP will be purchased by the Plan Agent directly from the Filer on the relevant distribution payment date at a price determined by reference to the Average Market Price (as defined in the DRIP).
- 4.12 Participants who choose to participate in the DRIP may elect either the Distribution Reinvestment Option or the Premium Distribution™ Option in respect of their Cash Distributions and may change their election as between the Distribution Reinvestment Option and the

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Premium Distribution™ Option, by providing written notice to the Plan Agent, in accordance with the terms of the DRIP.

- 4.13 DRIP Units purchased by the Plan Agent for the account of Participants under the Distribution Reinvestment Option will be held under the DRIP for the account of those Participants.
- 4.14 DRIP Units purchased by the Plan Agent for the account of Participants under the Premium Distribution™ Option will be transferred to the Plan Broker to settle pre-sales of Trust Units made by the Plan Broker on behalf of the Plan Agent for the account of such Participants in exchange for a cash payment equal to 102% of the reinvested Cash Distributions.
- 4.15 Under the Cash Payment Option, a Participant may, through the Plan Agent, purchase DRIP Units subject to any minimum or maximum thresholds specified in the DRIP:
  - 4.15.1 for every financial year of the Filer after the year ending December 31, 2005 (the 2005 Financial Year), the aggregate number of DRIP Units that may be purchased under the Cash Payment Option by all Participants in any financial year of the Filer will be limited to a maximum of 2% of the aggregate number of Trust Units issued and outstanding at the start of the financial year; and
  - 4.15.2 for the 2005 Financial Year, the aggregate number of DRIP Units that may be purchased under the Cash Payment Option by all Participants will be limited to a maximum of 2% of the aggregate number of Trust Units outstanding immediately after the Effective Date.
- 4.16 The DRIP Agent's charges for administering the DRIP and all commissions, services charges, or brokerage fees in connection with the purchases in the market pursuant to the DRIP will be payable by the Filer.
- 4.17 No commissions, brokerage fees or service charges will be payable by Participants in connection with the purchase of DRIP Units under the DRIP.
- 4.18 The Filer reserves the right to determine, for any distribution payment date, the number of DRIP Units that will be available for purchase

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under the DRIP. If the Filer determines that no DRIP Units will be available for purchase under the DRIP for a particular distribution payment date, or to the extent that the availability of DRIP Units is prorated in accordance with the terms of the DRIP, then Participants will receive the usual Cash Distribution for that distribution payment date.

- 4.19 A Participant may terminate its participation in the DRIP at any time by submitting a termination form to the Plan Agent, provided that a termination form received between a distribution record date and a distribution payment date will not become effective until after that distribution payment date.
- 4.20 Except in Alberta, Saskatchewan and New Brunswick, the distribution of DRIP Units under the DRIP cannot be made in reliance on exemptions from the Registration and Prospectus Requirements because the DRIP involves the reinvestment of distributable income and not the reinvestment of dividends, interest, earnings or surplus of the Filer.
- 4.21 The distribution of DRIP Units under the DRIP, other than the distribution of DRIP Units made pursuant to Optional Cash Payments during the 2005 Financial Year, can be made in reliance on exemptions from the Registration and Prospectus Requirements contained in the Legislation of Alberta, Saskatchewan and New Brunswick.
- 4.22 The distribution of the DRIP Units pursuant to Optional Cash Payments made during the 2005 Financial Year cannot be made in reliance on exemptions from the Registration and Prospectus Requirements contained in the Legislation of Alberta, Saskatchewan and New Brunswick because those exemptions restrict the aggregate number of securities issued pursuant to optional cash payments to not more than 2% of the issued and outstanding securities as at the commencement of each financial year. As the Filer only had one Trust Unit issued and outstanding at the commencement of the 2005 Financial Year, the Filer would only be able to issue 2% of one DRIP Unit pursuant to Optional Cash Payments made during the 2005 Financial Year in reliance on those exemptions.
- 4.23 Legislation in some of the Jurisdictions provides exemptions from the Registration and Prospectus Requirements for distributions made pursuant to reinvestment plans of mutual funds. Those exemptions

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are unavailable to the Filer since it does not fall within the definition of "mutual fund" contained in the Legislation of the relevant Jurisdictions.

- 4.24 Participants in the DRIP must be existing Unitholders of the Trust and as such have either received their Trust Units pursuant to the Arrangement or purchased the Trust Units through an exchange recognized by the securities regulatory authorities. Unitholders who received their Trust Units pursuant to the Arrangement received a copy of the information circular regarding the Arrangement, which provided prospectus level disclosure with respect to the Trust and the Trust Units. In addition, as the Trust is a reporting issuer and is subject to continuous disclosure requirements in certain of the Jurisdictions, disclosure with respect to the Trust is publicly available on SEDAR at [www.sedar.com](http://www.sedar.com). As a result, all Unitholders have access to the information required to be filed pursuant to the Legislation for a reporting issuer.

### **Decision**

5. 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.
6. The decision of the Decision Makers under the Legislation is that:
- 6.1 in British Columbia, Manitoba, Ontario, Québec, Nova Scotia, Newfoundland and Labrador, Prince Edward Island, Yukon, Northwest Territories and Nunavut, the Requested Relief is granted provided that:
- 6.1.1 at the time of the trade or distribution, the Filer is a reporting issuer (or the equivalent, where applicable) in Québec and in at least one of the other Jurisdictions and is not in default of any requirements of the Legislation,
- 6.1.2 no sales charge is payable by Participants in connection with the purchase of DRIP Units under the DRIP,
- 6.1.3 the Filer has caused to be sent to the Participant to whom the DRIP Units are traded, not more than 12 months before the trade, a copy of the DRIP which contains a statement describing:

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- 6.1.3.1 their right to withdraw from the DRIP and to make an election to receive cash instead of DRIP Units on the making of a distribution by the Filer (the Withdrawal Right), and
  - 6.1.3.2 instructions on how to exercise the Withdrawal Right,
- 6.1.4 in every financial year of the Filer, except for the 2005 Financial Year, the aggregate number of DRIP Units issued pursuant to the Cash Payment Option shall not exceed 2% of the aggregate number of Trust Units outstanding at the start of that financial year, and
- 6.1.5 the aggregate number of DRIP Units issued pursuant to the Cash Payment Option in the 2005 Financial Year shall not exceed 2% of the aggregate number of Trust Units issued and outstanding immediately after the Effective Date,
- 6.2 in Alberta, Saskatchewan and New Brunswick, the Requested Relief is granted for DRIP Units issued pursuant to Optional Cash Payments in the 2005 Financial Year (the 2005 Optional DRIP Units) provided that the condition in section 6.1.5 of this decision is satisfied,
- 6.3 the first trade or alienation of DRIP Units shall be deemed a distribution or primary distribution to the public in the Jurisdictions unless:
  - 6.3.1 except in Québec, the conditions set out in paragraphs 1 through 5 of subsection 2.6(3) of Multilateral Instrument 45-102 *Resale of Securities* (the MI 45-102 Conditions) are satisfied, and
  - 6.3.2 in Québec:
    - 6.3.2.1 at the time of the alienation, the Filer is and has been a reporting issuer in Québec for the four months immediately preceding the alienation and is not in default of any of the requirements of securities legislation in Québec, and, for the purpose of determining the period of time that the Filer has been a reporting issuer in Québec, the period of time that Argo or Lightning was a reporting issuer in

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Québec immediately before the Arrangement will be included,

- 6.3.2.2 no unusual effort is made to prepare the market or to create a demand for the DRIP Units that are the subject of the alienation,
- 6.3.2.3 no extraordinary commission or other consideration is paid to a person or company other than the vendor of the DRIP Units in respect of the alienation, and
- 6.3.2.4 the vendor of the DRIP Units, if in a special relationship with the Filer, has no reasonable grounds to believe that the Filer is in default of any requirement of the securities legislation in Québec.

Glenda A. Campbell, Q.C., Vice-Chair  
Alberta Securities Commission

Stephen R. Murison, Vice-Chair  
Alberta Securities Commission