

# 2005 BCSECCOM 351

April 21, 2005

## Headnote

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act, ss. 48 and 76 - requirements to be registered as a dealer for a trade and to file a prospectus for a distribution - 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 DRIP Participants (as defined below) under a distribution reinvestment plan (the DRIP)(the Requested Relief).

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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-end, unincorporated investment trust settled under the laws of Alberta under a trust indenture (the Trust Indenture) dated March 16, 2005 (the Settlement Date).
  - 4.2 The Filer’s head office is located in Calgary, Alberta.
  - 4.3 The Filer will become a reporting issuer in certain of the Jurisdictions as a result of a plan of arrangement between Argo Energy Ltd. (Argo) and Lightning Energy Ltd. (Lightning) (the Arrangement).
  - 4.4 Argo and Lightning will hold a special meeting of holders of common shares of Argo and holders of common shares of Lightning on April 21, 2005 for the purpose of approving the Arrangement after which the Arrangement will require approval of the Court of Queen's Bench of Alberta.
  - 4.5 The Filer has applied to list the Trust Units on the Toronto Stock Exchange (the TSX).
  - 4.6 Under the Trust Indenture, the Filer is authorized to issue an unlimited number of Trust Units, of which there will be approximately 22,774,000 Trust Units issued and outstanding immediately after the date on which the Arrangement becomes effective (the Effective Date).
  - 4.7 The mandate of the Filer is to generate stable monthly cash distributions to Unitholders (Distributions).

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- 4.8 The Filer proposes to implement, concurrent with the Arrangement becoming effective, the DRIP to permit Unitholders, excluding those who are non-residents of Canada, at their discretion, to automatically reinvest Distributions, if any, paid on their Trust Units in additional Trust Units as an alternative to receiving Distributions. In addition, the DRIP will permit participants in the DRIP (DRIP Participants) to make additional optional cash payments (Optional Cash Payments) to acquire additional Trust Units, subject to a minimum of \$2,000 per Optional Cash Payment and to a maximum of \$50,000 per financial year of the Filer per DRIP Participant. (The Trust Units so acquired either by reinvestment or Optional Cash Payment are referred to as DRIP Units.)
- 4.9 Distributions due to DRIP Participants will be paid to Olympia Trust Company in its capacity as the Trust's agent under the DRIP (the DRIP Agent) and applied by the DRIP Agent to the purchase of DRIP Units, which will be held under the DRIP for the account of the appropriate DRIP Participants.
- 4.10 The DRIP Agent's charges for administering the DRIP and all commissions, service charges, or brokerage fees in connection with the purchases in the market pursuant to the DRIP will be payable by the Filer. No commissions, service charges or brokerage fees will be payable by DRIP Participants in connection with the purchase of DRIP Units under the DRIP.
- 4.11 DRIP Units will be acquired by the DRIP Agent at a price calculated based on 95% of the treasury purchase price (the Treasury Purchase Price), being the arithmetic average of the daily volume weighted average trading prices of the Trust Units on the TSX for the trading days in the period of successive trading days commencing on the second business day after the distribution record date and ending on the second business day immediately prior to the distribution payment date (provided, however, that if such period exceeds 10 trading days, then the 10 successive trading days preceding the second business day prior to the distribution payment date) on which at least a board lot of Trust Units is traded, appropriately adjusted for certain capital changes (including Trust Unit subdivisions, Trust Unit consolidations, certain rights offerings and certain distributions).

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- 4.12 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 issued pursuant to Optional Cash Payments will be limited to 2% of the number of Trust Units issued and outstanding at the start of such financial year.
- 4.13 A DRIP Participant may terminate its participation in the DRIP at any time by written notice to the DRIP Agent.
- 4.14 Upon termination of the DRIP or termination of a DRIP Participant's participation in the DRIP, the DRIP Participant(s) will receive a certificate for all the whole DRIP Units held in their accounts, a cash payment for any fraction of a DRIP Unit and return of any uninvested Optional Cash Payments. Any fractional DRIP Unit interest will be paid based on the closing market price of a Trust Unit on the TSX on the effective date of termination of the DRIP or the date on which notice of termination is received by the DRIP Agent, as the case may be.
- 4.15 Except in Alberta, Saskatchewan and New Brunswick, the distribution of DRIP Units pursuant to 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.
- 4.16 The distribution of DRIP Units pursuant to 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.
- 4.17 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 such exemptions require that in any financial year of an issuer the aggregate number of securities issued pursuant to optional cash payments not exceed 2% of the issued and outstanding securities as at the commencement of each financial year and since the 2005 Financial Year commenced on the Settlement Date, whereon the Filer only

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had one Trust Unit issued and outstanding, the Filer would only be able to issue 2% of one DRIP Unit pursuant to Optional Cash Payments made during the 2005 Financial Year.

- 4.18 In addition, Legislation in some of the Jurisdictions provides exemptions from the Registration and Prospectus Requirements for distributions made pursuant to reinvestment plans of mutual funds. Such exemptions are unavailable to the Filer since it is a royalty trust and does not fall within the definition of a “mutual fund” contained in the Legislation of the relevant Jurisdictions.

### **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 except in Alberta, Saskatchewan and New Brunswick, the Requested Relief is granted provided that:
- (a) at the time of the trade or distribution, the Filer is a reporting issuer or the equivalent in at least one of the Jurisdictions and is not in default of any requirements of the Legislation,
  - (b) no sales charge is payable by DRIP Participants in connection with the purchase of DRIP Units under the DRIP,
  - (c) The Filer has caused to be sent to the DRIP 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:
    - (A) 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
    - (B) instructions on how to exercise the Withdrawal Right,

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- (d) in every financial year of the Filer, except for the 2005 Financial Year, the aggregate number of DRIP Units issued pursuant to Optional Cash Payments shall not exceed 2% of the aggregate number of Trust Units outstanding at the start of that financial year, and
  - (e) the aggregate number of DRIP Units issued pursuant to Optional Cash Payments 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(e) of this decision is satisfied,
- 6.3 The first trade of DRIP Units shall be deemed a distribution or primary distribution to the public in the Jurisdictions, other than Alberta and Saskatchewan, unless:
  - (a) 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
  - (b) in Québec:
    - (i) at the time of the first trade, the Filer is and has been a reporting issuer in Québec for the four months immediately preceding the trade 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 Québec immediately before the Arrangement will be included,
    - (ii) no unusual effort is made to prepare the market or to create a demand for the DRIP Units,

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- (iii) 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 first trade, and
- (iv) the vendor of the DRIP Units, if in a special relationship with the Trust, has no reasonable grounds to believe that the Trust is in default of any requirement of the securities legislation in Québec,

6.4 The first trade of 2005 Optional DRIP Units shall be deemed a distribution or primary distribution to the public in Alberta and Saskatchewan, unless the MI 45-102 Conditions are satisfied.

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

Stephen P. Sibold, Q.C., Chair  
Alberta Securities Commission