

IN THE MATTER OF  
THE SECURITIES LEGISLATION  
OF ALBERTA, MANITOBA AND ONTARIO

AND

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

AND

IN THE MATTER OF  
EXCALIBUR INVESTMENT STRATEGIES INC.

MRRS DECISION DOCUMENT

**WHEREAS** the Canadian securities regulatory authority or regulator (the "Decision Maker") in each of Alberta, Manitoba and Ontario (the "Jurisdictions") has received an application from Excalibur Investment Strategies Inc. ("Excalibur" or the "Applicant") for a decision pursuant to the securities legislation and securities directions of the Jurisdictions (the "Legislation") that the distribution of units of pooled fund trusts established or to be established by Excalibur not be subject to the dealer registration requirement and prospectus requirement, subject to certain conditions and that certain of the conflict of interest provisions contained in the applicable Legislation shall not apply to the distribution of units of pooled fund trusts established or to be established by Excalibur, subject to certain conditions.

**AND WHEREAS** pursuant to the Mutual Reliance Review System for Exemptive Relief Applications (the "System"), the Ontario Securities Commission is the principal regulator for this application;

**AND WHEREAS** the Applicant has represented to the Decision Makers that:

1. The Applicant is a corporation incorporated under the laws of the province of Ontario;
2. The Applicant established and manages the Excalibur Harvest Canadian Fund, a pooled fund, and will establish similar pooled funds from time to time (collectively, the "Funds") which it will also manage;
3. The Excalibur Harvest Canadian Fund is a trust formed under the laws of Ontario by a trust agreement dated as of September 15, 1999, and the other Funds will be similarly established;
4. TD Trust Company has been or will be appointed trustee of each of the Funds (the "Trustee") pursuant to the provisions of the applicable trust agreement;

5. The Toronto-Dominion Bank (the "Administrator") has been or will be engaged as the administrator and registrar and transfer agent of each of the Funds;
6. The Applicant, the Trustee and the Administrator are or will be collectively responsible for the administrative management of each of the Funds on a day-to-day basis;
7. The Applicant is registered under the Legislation of Ontario as a limited market dealer and is not in default under any requirement therein, and will coordinate the distribution of units of the Funds (the "Units");
8. The investment manager of the Funds is or will be C. Morgan Investment Counsel Inc. (the "Investment Manager"), a corporation incorporated under the laws of the Province of Ontario. The Investment Manager is registered in certain Jurisdictions as investment counsel. It has been or will be engaged to act as investment manager of each of the Funds and will be principally responsible for the investment management of the Funds' assets and supervision of the Advisor (defined below);
9. Harvest Capital Management Inc. (the "Advisor") is a corporation incorporated under the laws of the State of Delaware. The Advisor is registered with the Commodity & Futures Trading Commission ("CFTC") as a Commodity Trading Advisor ("CTA") and is also registered with the National Futures Association ("NFA"). The Advisor has been or will be engaged to undertake the day-to-day investment management of the assets of the Funds;
10. The assets in the Funds will be invested from time to time based on the objectives, policies, and restrictions of each of the Funds as set out in the applicable trust agreement and described in the offering memorandum of each of the Funds;
11. Units will not be offered by prospectus. However, an offering memorandum containing prescribed rights of action and rescission in accordance with the applicable Legislation will be delivered to prospective investors in respect of each of the Funds;
12. An unlimited number of Units will be offered to qualified members of the public by each of the Funds and will be distributed on a continuous basis;
13. Units will be non-transferable but will be redeemable in accordance with the procedures set out in the trust agreement of the particular fund;
14. None of the Funds is, will be, nor expects to become, a "reporting issuer" or the equivalent as such term is defined in the Legislation;
15. Each of the Funds is or will be a "mutual fund" as such term is defined in the Legislation and, as such, will be required to comply with the provisions of the Legislation with respect to the preparation and mailing to Unit-holders and filing with the Decision Makers of interim and annual financial statements;

16. Although the principals and directors of the Investment Manager and Advisor have experience in managing capital and pooled investment products, each of the Funds will have no prior operating history upon which prospective investors can evaluate their likely performance. The investment objective and investment strategy of each of the Funds is, however, similar to the proprietary investment program offered in the United States by the Advisor which has a five-year performance track record. The investment strategy of each of the Funds involves or will involve the commitment of 90% of the Fund's invested capital to a "core portfolio" of government securities and 10% to a proprietary "yield enhancement program". The only difference between the Funds is that the Excalibur Harvest Canadian Fund will have a "core portfolio" consisting exclusively of short-term Canadian treasury bills and bonds and the other Funds may have a different "core portfolio" of highly rated government securities. Each of the Funds will use the same "yield enhancement program" which involves an investment of up to 10% of the assets of each Fund, on a monthly basis, in options on U.S. Treasury Bond Futures;

17. The initial offering period for each of the Funds (the applicable "Initial Offering Period") shall commence as of the date of the offering memorandum used in connection with the sale of Units of such Fund and each shall close (the applicable "Initial Closing Date") at 5:00 p.m. (Eastern Standard Time) on the date on which the applicable Fund has received and accepted subscriptions for a minimum of an aggregate of \$1,000,000, or 100,000 Units (the "Minimum Offering"); provided, however, that such applicable Initial Closing Date shall not occur later than the date which is 120 days from the date of commencement of the applicable Initial Offering Period. All subscription monies received by the Funds prior to completion of the applicable Initial Offering Period shall be held in escrow pending completion of the applicable Initial Offering Period. If a Fund does not accept subscriptions equal to at least the Minimum Offering prior to the completion of its Initial Offering Period, then all subscription monies will be returned to subscribers for Units of such Fund, together with any interest accrued thereon;

18. Units will be offered to residents in all provinces of Canada, except New Brunswick, Newfoundland and Prince Edward Island;

19. The minimum initial investment by a purchaser in any Fund (the "Initial Investment") will not be less than the minimum aggregate purchase amount prescribed by the Legislation of the applicable Jurisdiction (the "Prescribed Amount");

20. The Initial Investment will be made in reliance upon certain registration and prospectus exemptions contained in the Legislation;

21. Following its Initial Investment, it is proposed that a Unit-holder be permitted to acquire additional Units of such Fund (the "Additional Units") with an aggregate acquisition cost that is less than the Prescribed Amount by either:

(a) automatically reinvesting distributions otherwise receivable by the Unit-holder which are attributable to outstanding Units, unless otherwise requested by the Unit-holder; or

(b) subscribing and paying for Additional Units in cash.

22. Additional Units will be available for subscription on the last business day of each month (the "Monthly Valuation Day"). The price at which the Additional Units will be offered following the Initial Investment will be based on the net asset value of the applicable Fund as at the Monthly Valuation Day;

23. Each of the Funds will in each year distribute its net income for tax purposes and net realized gains, if any, to Unit-holders to such an extent that it will not be liable in any year for income tax under Part I of the *Income Tax Act* (Canada);

24. As stated, investment income and net realized capital gains distributed to Unit-holders of the Funds will be automatically reinvested in Additional Units of the class giving rise to the distribution unless the Unit-holder elects (from time to time) to receive such amounts in cash and provided that Excalibur, acting in its sole discretion, authorizes such reinvestment;

25. The issuance of Additional Units to an existing Unit-holder pursuant to the reinvestment by such Unit-holders of distributions receivable from the Funds as contemplated above will be made by each of the Funds in reliance upon the exemption from the prospectus requirement and dealer registration requirement and upon Ontario Rule 81-501 entitled "Mutual Fund Reinvestment Plans";

26. The Applicant is subject to certain conflict of interest provisions contained in the applicable Legislation, specifically (i) the requirement for a registrant to prepare, and file with the applicable Decision Maker, a statement of conflict policies and to provide a copy of such policies to its clients; (ii) the requirement that trade confirmations containing disclosure about the dealer's relationship with the issuer of the securities to which the confirmation relates be delivered by the dealer to the customer; and (iii) the prohibition on registrants from recommending that securities of an issuer that is related or connected to the registrant be sold, purchased or held, unless disclosure of the relationship of the registrant to the issuer is made to the customer (collectively, the "Conflict Provisions"); and

27. The Applicant acts in a similar capacity with respect to the Units and Additional Units as a mutual fund dealer or fully registered dealer with respect to associated mutual fund securities.

**AND WHEREAS** pursuant to 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 pursuant to the Legislation is that:

A. the prospectus requirement and dealer registration requirement do not apply to the purchase of Additional Units for cash provided that:

(a) this Decision, as it relates to the jurisdiction of a Decision Maker, shall terminate 90 days after the publication in final form of any legislation or rule of that Decision Maker regarding trades in securities of pooled funds;

(b) at the time of acquisition of Additional Units of a Fund, the Unit-holder who made the Initial Investment then owns Units of such Fund having an aggregate acquisition cost or aggregate net asset value of not less than the Prescribed Amount;

(c) at the time of the acquisition of Additional Units, the Applicant or any party assisting the Applicant in selling the Units is registered accordingly under the applicable Legislation of Ontario, and such registration is not in default therein;

(d) in accordance with the Legislation, each Fund files with the applicable Decision Maker a report in respect of all trades in Additional Units made by that Fund as if the trades in Additional Units were trades in Units and pays to the applicable Decision Maker the fees relating to such filing prescribed by the Legislation; and

B. the Conflict Provisions under the applicable Legislation shall not apply in respect of distributions of Units and Additional Units, provided that this Decision as it relates to the jurisdiction of a Decision Maker shall terminate 90 days after the publication in final form of any legislation or rule of that Decision Maker regarding underwriting conflicts and limited market dealers.

**DATED** at Toronto this 12<sup>th</sup> day of November, 1999.

*"J.A. Geller"      "Stephen N. Adams"*

#### Headnote

Mutual Reliance Review System for Exemptive Relief Applications - trades by pooled funds of additional units to existing unitholders exempted from dealer registration requirement and prospectus requirement, subject to certain conditions. Relief granted from certain conflict of interest provisions with respect to associated mutual fund securities.

#### Applicable Ontario Statutes

Securities Act, R.S.O. 1990, c.S.5, as am. ss. 25, 53 and 74(1).

#### Applicable Ontario Regulations

Regulations made under the Securities Act, R.R.O. 1990, Reg. 1015, as am. ss. 223, 226, 228, 230 and 233.