

## Headnote

National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* – issuer holds all of its properties through limited partnership – entity holds units in limited partnership which are exchangeable into and in all material respects the economic equivalent to the issuer’s publicly traded units – issuer may include entity’s indirect interest in issuer when calculating market capitalization for the purposes of using the 25% market capitalization exemption for certain related party transactions – relief granted subject to conditions

## Applicable Legislative Provisions

Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*, ss. 5.5(a), 5.7(1)(a) and 9.1

**Citation: Re Melcor Real Estate Investment Trust, 2019 ABASC 149**

**Date: 20191001**

In the Matter of  
the Securities Legislation of  
Alberta (the **Jurisdiction**)

and

In the Matter of  
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of  
Melcor Real Estate Investment Trust (the **Filer**)

Decision

## Background

The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) granting relief pursuant to section 9.1 of Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (**MI 61-101**) from the minority approval and formal valuation requirements under Part 5 of MI 61-101 relating to any related party transaction of the Filer entered into indirectly through Melcor REIT Limited Partnership (**Melcor LP**) or a subsidiary entity (as such term is defined in MI 61-101) of Melcor LP, if that transaction would qualify for the transaction size exemptions set out in sections 5.5(a) and 5.7(1)(a) of MI 61-101 if the indirect equity interest of Melcor Developments Ltd. (**Melcor**) or its subsidiaries in the Filer, held in the form of Class B LP Units of Melcor LP (the **Exchangeable LP Units**), were included in the calculation of the Filer’s market capitalization (the **Exemption Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

- (a) the Alberta Securities Commission is the principal regulator for the application; and
- (b) the Filer has provided notice that subsection 4.7(1)(c) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in Manitoba and New Brunswick.

### **Interpretation**

Terms defined in National Instrument 14-101 *Definitions*, M1 61-101 and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

### **Representations**

This 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 Alberta pursuant to a declaration of trust dated January 25, 2013, as amended, (the **Declaration of Trust**) with its principal and head office located in Edmonton, Alberta.
2. The Filer is a reporting issuer under the securities legislation of each of the provinces and territories of Canada and is not in default of securities legislation in any such jurisdiction.
3. The Filer invests in income-producing real property located in Canada comprised primarily of office, retail, industrial and land lease community properties, with a future growth strategy focused primarily on the acquisition of further commercial properties.

#### *Filer Units and Organization*

4. The Filer's trust units (**Trust Units**) are listed and posted for trading on the Toronto Stock Exchange (the **TSX**).
5. Exchangeable LP Units of Melcor LP are the economic equivalent of the Trust Units and are exchangeable on a one-for-one basis into Trust Units. Additionally, each Exchangeable LP Unit is accompanied by one special voting unit of the Filer (**Special Voting Unit**), which entitles the holder to voting rights in respect of the Filer that are in all respects equivalent to the voting rights such holder would have if they held a Trust Unit.
6. The Filer is authorized to issue an unlimited number of Trust Units and an unlimited number of Special Voting Units. As at August 31, 2019 there were 13,139,109 Trust Units and 14,899,325 Special Voting Units issued and outstanding.
7. Melcor LP is a limited partnership formed under the laws of Alberta and is governed by an amended and restated limited partnership agreement dated May 1, 2013 (the **Melcor LP Agreement**). Melcor LP's head office is located in Edmonton, Alberta. It is the operating entity through which the Filer conducts its business.

8. Melcor REIT GP Inc. (**Melcor GP**), is a corporation incorporated under the laws of Alberta. It is the general partner of Melcor LP and is wholly owned by the Filer.
9. Melcor LP is not a reporting issuer in any jurisdiction and none of its securities are listed or posted for trading on any stock exchange or other market.
10. Under the Melcor LP Agreement, Melcor LP is authorized to issue:
  - (a) an unlimited number of units designated as Class A LP Units, of which 13,139,109 Class A LP Units were issued and outstanding as of August 31, 2019;
  - (b) an unlimited number of Exchangeable LP Units, of which 14,899,325 Exchangeable LP Units were issued and outstanding as of August 31, 2019;
  - (c) an unlimited number of units designated as Class C LP Units, of which 10,785,613 Class C LP Units were issued and outstanding as of August 31, 2019; and
  - (d) an unlimited number of general partnership units designated as Class A GP Units, of which 1 Class A GP Unit was issued and outstanding as of August 31, 2019.
11. All of the outstanding Class A LP Units are held by the Filer. All of the outstanding Exchangeable LP Units and Class C LP Units are held indirectly by Melcor, as they are held by Melcor REIT Holdings GP Inc., a wholly-owned subsidiary of Melcor (**Melcor Holdings**). All of the outstanding Class A GP Units are held by Melcor GP.
12. As of August 31, 2019, Melcor, indirectly through Melcor Holdings, held a 53% economic interest in the Filer comprised of 14,899,325 Exchangeable LP Units and 10,785,613 Class C LP Units. In addition, Melcor, indirectly through Melcor Holdings, held 14,899,325 Special Voting Units of the Filer. Melcor does not, directly or indirectly, hold any Trust Units. The Trust Units are widely held by the public.
13. Pursuant to the terms of an exchange agreement dated May 1, 2013 among the Filer, Melcor and Melcor LP (the **Exchange Agreement**), each Exchangeable LP Unit is exchangeable at the option of the holder for one Trust Unit of the Filer. Each Exchangeable LP Unit also has the same economic rights and entitlements to distributions as a Trust Unit of the Filer, and is accompanied by one Special Voting Unit which provides for the same voting rights in the Filer as a Trust Unit.
14. The Exchangeable LP Units may only be exchanged for Trust Units and are not listed and posted for trading on the TSX or any other stock exchange.
15. The Exchangeable LP Units represent part of the equity value of the Filer and provide the holder of the Exchangeable LP Units with economic rights which are, in all material respects, equivalent to the Trust Units. The effect of Melcor's exchange right is that Melcor will receive Trust Units upon the exchange of the Exchangeable LP Units. Moreover, the economic interests that underlie the Exchangeable LP Units are, and shall be, based solely upon the assets and operations held directly or indirectly by the operating entities of the Filer.

16. The Exchangeable LP Units are not transferable, except pursuant to an exchange of Exchangeable LP Units for Trust Units in accordance with the terms of the Exchange Agreement and provided:
- (a) such transfer is to an affiliate of the holder of the Exchangeable LP Units making the transfer and, so long as Melcor, Melcor REIT Holdings Limited Partnership or any of their affiliates is a holder of Exchangeable LP Units, to Melcor, Melcor REIT Holdings Limited Partnership or any of their affiliates (as affiliate is defined in the Melcor LP Agreement);
  - (b) the conditions of such transfer do not require the person acquiring such Exchangeable LP Units to make an offer to the registered holders of Trust Units to acquire Trust Units on the same terms and conditions under applicable securities laws if such Exchangeable LP Units, and all other outstanding Exchangeable LP Units, were converted into Trust Units at the then current exchange ratio in effect under the Exchange Agreement immediately prior to such transfer;
  - (c) the person acquiring such Exchangeable LP Units submits an identical and contemporaneous offer for Trust Units to the registered holders thereof (having regard to timing, price, proportion of securities sought to be acquired and any other conditions thereto), and acquires such Exchangeable LP Units along with a proportionate number of Trust Units actually tendered to such identical offer;
  - (d) such transfer will not cause, or create a significant risk that would cause, Melcor LP to be liable for any taxes under section 197(2) of the *Income Tax Act* (Canada) (the **Tax Act**);
  - (e) such transfer does not cause, or create a significant risk that would cause, the Filer to cease to qualify as a “real estate investment trust” under the Tax Act; and
  - (f) such transfer is not to an Excluded Person. The Melcor LP Agreement defines “Excluded Person” as a person (as person is defined in the Melcor LP Agreement) that is: (i) a “non-resident” for the purposes of the Tax Act or a “financial institution” as defined in subsection 142.2(1) of the Tax Act; (ii) a person, an interest in which is a “tax shelter investment” for the purposes of the Tax Act; (iii) a person which would acquire an interest in Melcor LP as a “tax shelter investment” for the purposes of the Tax Act; (iv) a partnership that is not a “Canadian partnership” within the meaning of the Tax Act; or (v) not described in subparagraphs (b)(i) through (b)(v) of the definition of “excluded subsidiary entity” in section 122.1(1) of the Tax Act.
17. Further, certain rights affecting Melcor or any affiliates or related parties of Melcor, including Melcor REIT Holdings Limited Partnership (collectively referred to as a **Melcor Limited Partner**) in its capacity as a holder of Exchangeable LP Units, as such rights are set out in the Declaration of Trust and the Exchange Agreement, are exclusive to the Melcor Limited Partner and are not transferable to a transferee of the Exchangeable LP Units that is not an affiliate of a Melcor Limited Partner.

18. The Filer and Melcor are parties to a Development and Opportunities Agreement dated May 1, 2013 which gives the Filer a preferential right to acquire any interest of Melcor in investment properties that it owns prior to disposition of any such interest to third parties.
19. It is anticipated that the Filer may from time to time enter into transactions with certain related parties, including Melcor or any of its subsidiaries, indirectly through Melcor LP.
20. As a result of Melcor's indirect ownership of Exchangeable LP Units and Special Voting Units, transactions involving the Filer entered into indirectly through Melcor LP (or a subsidiary entity or other affiliate of Melcor) are related party transactions subject to MI 61-101.
21. If Part 5 of MI 61-101 applies to a related party transaction by an issuer and the transaction is not otherwise exempt:
  - (a) the issuer must obtain a formal valuation of the transaction in a form satisfying the requirements of MI 61-101 by an independent valuator; and
  - (b) the issuer must obtain approval of the transaction by disinterested holders of the affected securities of the issuer (together, requirements (a) and (b) are referred to as the **Minority Protections**).
22. A related party transaction that is subject to MI 61-101 may be exempt from the Minority Protections if, at the time the transaction is agreed to, neither the fair market value of the subject matter of, nor the fair market value of the consideration for, the transaction exceeds 25% of the issuer's market capitalization (the **Transaction Size Exemption**).
23. The Filer may not be entitled to rely on the Transaction Size Exemption available under the Legislation because, although the definition of market capitalization in MI 61-101 includes the value of equity securities of the issuer that are convertible into listed equity securities of the issuer, it does not contemplate securities of another entity that are exchangeable into equity securities of the issuer.
24. If the Exchangeable LP Units are not included in the market capitalization of the Filer, the equity value of the Filer will be understated by the value of Melcor's (indirect) limited partnership interest in Melcor LP, being approximately 53%. As a result, related party transactions of the Filer that are entered into indirectly through Melcor LP may be subject to the Minority Protections in circumstances where the fair market value of the transactions is effectively less than 25% of the fully diluted market capitalization of the Filer.
25. Section 1.4 of MI 61-101 treats an operating entity of an "income trust", as such term is defined in National Policy 41-201 *Income Trusts and Other Indirect Offerings* (**NP 41-201**), on a consolidated basis with its parent trust entity for the purpose of determining which entities are related parties of the issuer and which transactions MI 61-101 should apply to. Section 1.2 of NP 41-201 provides that references to an "income trust" refer to a trust or other entity (including corporate and non-corporate entities) that issues securities which provide for participation by the holder in net cash flows generated by an underlying business owned by that trust or other entity. Therefore, it is consistent with MI 61-101 that

securities of the operating entity, such as the Exchangeable LP Units, be treated on a consolidated basis for the purposes of the Transaction Size Exemption.

26. The inclusion of the Exchangeable LP Units when determining the Filer's market capitalization pursuant to MI 61-101 is consistent with the logic of including unlisted equity securities of the issuer which are convertible into listed securities of the issuer in determining an issuer's market capitalization in that both are securities that are considered part of the equity value of the issuer whose value is measured on the basis of the listed securities into which they are convertible are exchangeable.

#### *The Exemptions Sought*

27. Although the Exchangeable LP Units are not securities of a reporting issuer or of a class for which there is a published market, they are, as a result of the rights, privileges and restrictions attaching to such Exchangeable LP Units and the various material agreements relating to and governing the Exchangeable LP Units, equivalent to the Trust Units in all material respects on a per unit basis and, from the Filer's perspective, issuing Exchangeable LP Units through Melcor LP is equivalent to issuing Trust Units of the Filer.
28. The Exchangeable LP Units are equivalent to the Trust Units in all material respects, in that:
  - (a) they are exchangeable into Trust Units on a one-for-one basis at any time at the option of the holder as well as automatically exchanged into Trust Units on a one-for-one basis in certain circumstances, including in connection with a take-over bid, the transfer of all of substantially all of the Filer's assets and other similar circumstances;
  - (b) they have the same economic rights as Trust Units; and
  - (c) any additional rights attached to the Exchangeable LP Units either: (i) pre-exist the issuance of the Exchangeable LP Units under the Transaction and treat the Exchangeable LP Units and Trust Units on the same basis, or (ii) arise solely by virtue of the Exchangeable LP Units being limited partnership units and are customary rights associated with limited partnership units.
29. The Exchangeable LP Units entitle the holder to distributions from Melcor LP equal to any distributions paid to holders of Trust Units by the Filer. Under the Exchange Agreement, the Filer may not distribute rights, options, securities, evidence of indebtedness or assets to its Unitholders, unless the economic equivalent of such rights, options, securities, evidence of indebtedness or assets to be issued or distributed are simultaneously issued or distributed by Melcor LP to holders of Exchangeable LP Units.
30. Each Exchangeable LP Unit is accompanied by one Special Voting Unit of the Filer, which provides for the same voting rights in the Filer as a Trust Unit. Additionally, except as required by law and in certain circumstances in which the rights of a holder of Exchangeable LP Units are affected, holders of Exchangeable LP Units are not entitled to vote at a meeting of the holders of Exchangeable LP Units.

31. Melcor was granted additional rights at the time of the Filer's initial public offering, including pre-emptive rights, registration rights, board appointment rights and limited approval rights. These rights are independent of, and pre-exist, the issuance of any Exchangeable LP Units issued in reliance on the Exemption Sought and are based on ownership thresholds that treat Exchangeable LP Units and Trust Units on a combined basis. As a result, by acquiring Exchangeable LP Units rather than Trust Units, Melcor does not gain any additional or unique rights or benefits that it would not otherwise have. Any additional rights attached to the Exchangeable LP Units arise solely by virtue of the Exchangeable LP Units being limited partnership units and are customary or statutory rights associated with limited partnership units that do not confer any special benefit on the holders of Exchangeable LP Units. Other than the rights described above, the Exchangeable LP Units carry no other rights that would impact their value.
32. Other than in respect of matters affecting the rights, benefits or entitlements of the holders of Exchangeable LP Units or as required by law, a holder of Exchangeable LP Units does not, and shall not, have the right to exercise any votes in respect of matters to be decided by the partners of Melcor LP and the Exchangeable LP Units do not provide the holder thereof with an interest in any specific asset or property of Melcor LP.

### **Decision**

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted, provided that:

- (a) there be no material change to the terms of the Exchangeable LP Units and the Special Voting Units, including the exchange right associated therewith, as described above and in the Declaration of Trust, the Melcor LP Agreement and the Exchange Agreement, whether by amendment to such documents, contractual agreement or otherwise;
- (b) the applicable transaction is made in compliance with the rules and policies of the TSX or such other exchange upon which the Filer's securities trade;
- (c) the applicable transaction would qualify for the Transaction Size Exemption contained in MI 61-101 if the Exchangeable LP Units were considered an outstanding class of equity securities of the Filer that were convertible into Trust Units; and
- (d) any annual information form or equivalent of the Filer that is required to be filed in accordance with applicable Canadian securities laws contains the following disclosure, with any immaterial modifications as the context may require:

“Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (“**MI 61-101**”) provides a number of circumstances in which a transaction between an issuer and a related party may be subject to valuation and

minority approval requirements. An exemption from such requirements is available where the fair market value of the transaction does not exceed 25% of the market capitalization of the issuer. Melcor Real Estate Investment Trust has been granted exemptive relief from the requirements of MI 61-101 that, subject to certain conditions, permits it to be exempt from the minority approval and valuation requirements for transactions that would have a value of less than 25% of Melcor Real Estate Investment Trust's market capitalization, if exchangeable Class B LP Units of Melcor REIT Limited Partnership held indirectly by Melcor Developments Ltd. are included in the calculation of Melcor Real Estate Investment Trust's market capitalization. As a result, the 25% threshold, above which the minority approval and valuation requirements would apply, is increased to include the approximately 53% indirect exchangeable equity interest in Melcor Real Estate Investment Trust held indirectly by Melcor Developments Ltd. in the form of exchangeable Class B LP Units of Melcor REIT Limited Partnership.”

*“original signed by”*

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