

## **2004 BCSECCOM 389**

### **Headnote**

Mutual Reliance Review System for Exemptive Relief Application – relief granted to wholly-owned Canadian subsidiary of MJDS eligible U.S. issuer proposing to issue approved-rating debt, guaranteed by the U.S. parent, using a short form prospectus - relief granted in respect of (a) filing of current reports on Form 8-K of credit supporter whose contents are comprised solely of exhibits attaching the form of securities offered by the credit supporter in the United States and related documents; (b) incorporation by reference in short form prospectus of current reports on Form 8-K of credit supporter that do not relate to the financial condition of, or disclose a material change in the affairs of, the credit supporter; and (c) independent underwriter requirement for offerings subject to a minimum subscription amount of \$150,000 where dealer may underwrite up to 49% of offering, and offerings where a minimum of two thirds of the offering will be made to institutional investors and the dealer may underwrite up to 100% of the offering

### **Applicable British Columbia Provisions**

NI 33-105 Underwriting Conflicts, s. 5.1

NI 44 -101 Short Form Prospectus Distributions, s. 15.1 Form 44-101F3

NI 51-102 Continuous Disclosure Obligations, ss. 13.1 and 13.4

**IN THE MATTER OF THE SECURITIES LEGISLATION OF  
BRITISH COLUMBIA, ALBERTA, SASKATCHEWAN, MANITOBA,  
ONTARIO, QUÉBEC, NEW BRUNSWICK, NOVA SCOTIA,  
PRINCE EDWARD ISLAND AND NEWFOUNDLAND AND LABRADOR**

**AND**

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

**AND**

**IN THE MATTER OF MERRILL LYNCH & CO., INC.,  
MERRILL LYNCH CANADA FINANCE COMPANY AND  
MERRILL LYNCH CANADA INC.**

### **MRRS DECISION DOCUMENT**

WHEREAS the local securities regulatory authority or regulator (collectively, the “Decision Makers”) in each of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador (collectively, the “Jurisdictions”) has received

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an application from Merrill Lynch & Co., Inc. (“ML&Co.”), Merrill Lynch Canada Finance Company (the “Issuer”) and Merrill Lynch Canada Inc. (“ML Canada”) (collectively, the “Applicants”) for a decision pursuant to the securities legislation of each of the Jurisdictions (collectively, the “Legislation”) that the Applicants be exempted from the following requirements of the Legislation:

- (a) the provision of National Instrument 51-102 – *Continuous Disclosure Obligations* (“NI 51-102”) which would have the effect of requiring ML&Co. to file all of the current reports on Form 8-K that ML&Co. is required to file with the U.S. Securities and Exchange Commission (the “SEC”) with the Decision Makers (such exemption to be effected in Québec by a revision of the general order that will provide the same result as an exemption order);
- (b) section 13.2(2) of Form 44-101F3, which would require the Issuer to incorporate by reference into the Shelf Prospectus (as hereinafter defined) and the Supplements (as hereinafter defined), all documents of ML&Co. that would be required to be incorporated by reference in a Form S-3 or Form F-3 registration statement filed under the *Securities Act* of 1933 in the U.S.;
- (c) the provisions of Multilateral Instrument 52-109 – *Certification of Disclosure in Issuers’ Annual and Interim Filings* (“MI 52-109”) in their entirety; and
- (d) the requirement in National Instrument 33-105 – *Underwriting Conflicts* (“NI 33-105”) mandating a specified level of independent underwriter involvement in connection with the distribution of securities of a related issuer or a connected issuer of an underwriter (the “Independent Underwriter Requirement”);

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 unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 - *Definitions*;

AND WHEREAS the Applicants have represented to the Decision Makers that:

1. ML&Co. was incorporated under the laws of Delaware on March 27, 1973 and has been a reporting issuer in the Provinces of British Columbia, Alberta,

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Saskatchewan, Manitoba, Québec and Nova Scotia since October 22, 1999 (or earlier, in the case of certain of such Jurisdictions);

2. ML&Co. is a reporting company under the *Securities Exchange Act of 1934*, as amended (the “1934 Act”), and has filed with the SEC annual reports on Form 10-K and quarterly reports on Form 10-Q since it first became a reporting company, in accordance with the filing obligations set out in the 1934 Act;
3. ML&Co. is not registered or required to be registered under the *Investment Company Act of 1940*, as amended;
4. As at January 30, 2004, ML&Co. had approximately U.S.\$85.8 billion in long term debt outstanding, all of which is currently rated “A+” by Standard & Poor’s Rating Services, a division of the McGraw-Hill Companies, Inc., “Aa3” by Moody’s Investors Service, Inc., “AA(low)” by Dominion Bond Rating Service Limited and “AA-” by Fitch Ratings Ltd.;
5. In connection with takedowns under ML&Co.’s base shelf prospectus in the U.S., ML&Co. is required to file with the SEC a large number of current reports on Form 8-K (the “Non-Essential 8-Ks”) whose contents are comprised solely of exhibits attaching the form of securities for each such takedown, the consent and opinion of counsel relating thereto and other documentation, all of a non-financial nature, that may be required to be filed with the SEC in connection with such takedowns; the Non-Essential 8-Ks are publicly available on the SEC’s Internet website at [www.sec.gov](http://www.sec.gov);
6. The Issuer was incorporated under the laws of Nova Scotia on August 25, 1999 and is an indirect wholly-owned subsidiary of ML&Co. The Issuer does not have any subsidiaries;
7. The Issuer was incorporated solely for the purpose of undertaking financing activities, including the issuance of medium term notes (“Notes”), to raise funds for ML&Co.’s Canadian operations, and will not carry on any operating or other business activities;
8. The Issuer became a reporting issuer or the equivalent in the Jurisdictions by virtue of it filing a short form base shelf prospectus dated November 8, 1999 with the Decision Makers under the provisions of former National Policy 47 and former National Policy 44, in connection with the establishment in Canada of a medium term note program;
9. Neither ML&Co. nor the Issuer is in default of the Legislation;

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10. ML Canada was continued and amalgamated under the laws of Canada on August 26, 1998 and is an indirect wholly-owned subsidiary of ML&Co. ML Canada is not a reporting issuer in any of the Jurisdictions;
11. ML Canada is registered as a dealer in the categories of “broker” and/or “investment dealer” under the Legislation of each of the Jurisdictions and is a member of the Investment Dealers Association of Canada;
12. The Issuer proposes to renew its existing medium term note program pursuant to National Instrument 44-101 – *Short Form Prospectus Distributions* (NI 44-101) and National Instrument 44-102 – *Shelf Distributions* (collectively, the “Shelf Requirements”) to raise a fixed amount in Canada which is currently expected to be Cdn. \$5,000,000,000 (or the equivalent thereof in one or more non-Canadian currencies) through the issuance of Notes (each such offering of Notes, an “Offering” and all such offerings of Notes, collectively, the “Offering”) from time to time over a twenty-four month period in New Brunswick and a twenty-five month period in each of the other Jurisdictions;
13. The Notes will be fully and unconditionally guaranteed by ML&Co. as to payment of principal, interest and all other amounts due thereunder. All Notes will have an “approved rating” (as defined in NI 44-101) and will be rated by a recognized security evaluation agency in one of the categories determined by the Autorité des marchés financiers du Québec (an “Approved Rating”);
14. In connection with the Offering:
  - (a) a short form base shelf prospectus (the “Shelf Prospectus”) and a pricing supplement or supplements (each a “Supplement” and, together with the Shelf Prospectus, the “Prospectus”) will be prepared pursuant to the Shelf Requirements, with the disclosure required by item 12 of Form 44-101F3 being addressed by incorporating by reference certain of ML&Co.’s public disclosure documents, including ML&Co.’s annual report on Form 10-K, and the disclosure required by Item 7 of Form 44-101F3 being addressed by including fixed charge coverage ratio disclosure with respect to ML&Co. in accordance with U.S. requirements;
  - (b) the Prospectus will include all material disclosure concerning the Issuer;
  - (c) the Prospectus will (i) incorporate by reference disclosure made in ML&Co.’s most recent annual report on Form 10-K filed under the 1934 Act, together with its most recent quarterly report on Form 10-Q and all current reports on Form 8-K that relate to the financial condition of, or

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disclose a material change in the affairs of, ML&Co., and filed subsequent to the filing of ML&Co.'s most recent annual report on Form 10-K under the 1934 Act and (ii) state that purchasers of the Notes will not receive separate continuous disclosure information regarding the Issuer;

- (d) the consolidated annual and interim financial statements of ML&Co. and its subsidiaries to be included in or incorporated by reference into the Prospectus will be prepared in accordance with U.S. GAAP (as defined in National Instrument 52-107 – *Acceptable Accounting Principles, Auditing Standards and Reporting Currency* (“NI 52-107”)) and will otherwise comply with the requirements of U.S. law, and, in the case of ML&Co.'s audited annual financial statements, such financial statements will be audited in accordance with U.S. GAAS (as defined in NI 52-107);
  - (e) ML&Co. will fully and unconditionally guarantee payment of the principal and interest on the Notes, together with any other amounts that may be due under any provisions of the trust indenture relating to the Notes, which provides that ML&Co. will make any payment or performance under the indenture promptly upon demand and, in any event, within 15 days of any failure by the Issuer to punctually make any payment or performance in respect of the Notes;
  - (f) the Notes will have an Approved Rating; and
  - (g) ML&Co. will sign the Shelf Prospectus as credit supporter;
15. The Issuer is considered to be a “related issuer” and a “connected issuer” (as such terms are defined in NI 33-105) of ML Canada for the Offering because both ML Canada and the Issuer are indirect wholly-owned subsidiaries of ML&Co.;
16. The Issuer proposes to offer the Notes from time to time through one of three alternative underwriting arrangements, the first being provided for in NI 33-105 and the other two being Offerings made through:
- (a) a syndicate structure pursuant to which ML Canada will act as an underwriter in respect of up to 49% of the Offering (based on either the dollar value of the Offering or the total management fees for the Offering, as applicable) (a “49% Underwriting”) and subject to the following conditions: (i) the minimum subscription for each subscriber under the Offering will be \$150,000; (ii) one or more independent underwriters will underwrite, in the aggregate, at least 51% of the

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Offering (based on either the dollar value of the Offering or the total management fees for the Offering as applicable), will participate in the structuring and pricing of the distribution of such Offering and in the due diligence activities performed by the underwriters for the distribution, and will sign a certificate in the form prescribed by Section 21.2 of Form 44-101F3; (iii) each Supplement will, to the extent not disclosed in the Prospectus, identify the independent underwriters and disclose their role in structuring and pricing the applicable Offering and in the due diligence activities performed by the underwriters for the Offering; and (iv) the Prospectus (including, for greater certainty, any Prospectus Supplement) will contain, on the front page and in the body of such document, the information listed in Appendix C of National Instrument 33-105 as required information for the front page and body of such document; or

- (b) an arrangement whereby ML Canada will underwrite up to 100% of the Offering (an “ML Majority Underwriting”), subject to the following conditions: (i) the minimum subscription for each subscriber under the Offering will be \$150,000; (ii) a minimum of 66  $\frac{2}{3}$ % of the Offering will be made to institutional investors; (iii) each Supplement will, to the extent not disclosed in the Prospectus, identify the independent underwriters, if applicable, and disclose their role in structuring and pricing the applicable Offering and in the due diligence activities performed by the underwriters for the Offering; and (iv) the Prospectus (including, for greater certainty, any Prospectus Supplement) will contain, on the front page and in the body of such document, the information listed in Appendix C of National Instrument 33-105 as required information for the front page and body of such document;

- 17. If the Issuer is offering the Notes through an ML Majority Underwriting, the initial offering price of the Notes will be determined by market comparisons in both the secondary and primary market for medium term notes at the time of pricing; secondary market levels on comparable offerings will be obtained from other dealers and investors and final pricing of the Notes will be based on the secondary market bid spread (being the difference in yield between comparable medium term notes trading in the secondary market and the current Government of Canada bond) plus, in appropriate circumstances, a new issue premium plus the current Government of Canada bond yield;
- 18. Other than the proceeds of the Offering, which are intended for general corporate purposes (including ML&Co.’s Canadian operations), the only financial benefits which ML Canada will receive as a result of either a 49% Underwriting or a ML Majority Underwriting are the normal arm’s length underwriting commissions and reimbursement of expenses associated with a

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public offering in Canada and, because the net proceeds from the sale of Notes may be loaned to or otherwise invested in various affiliates of the Issuer or ML&Co., ML Canada may also receive inter-company financing;

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 in connection with the Offering is that the exemption in subsection 13.4(2) of NI 51-102 shall apply to the Issuer so long as the Issuer files with the Decision Makers copies of all of the documents required to be filed by ML&Co. with the SEC except for the Non-Essential 8-Ks, which the Issuer shall not be required to file with the Decision Makers.

THE FURTHER DECISION of the Decision Makers is that the provision of section 13.2(2) of Form 44-101F3 which would require the Issuer to incorporate by reference into the Prospectus (including, for greater certainty, the Supplements) all documents that would be required to be incorporated by reference in a Form S-3 or Form F-3 registration statement filed under the *Securities Act* of 1933 in the U.S. shall not apply to the Issuer, provided that the Issuer will be required to incorporate by reference into the Prospectus (including, for greater certainty, any Supplement) all current reports on Form 8-K relating to the financial condition of, or disclosing a material change in the affairs of, ML&Co., which are filed by ML&Co. with the SEC, together with ML&Co.’s most recent annual report on Form 10-K filed under the 1934 Act and its most recent quarterly report on Form 10-Q.

THE FURTHER DECISION of the Decision Makers, other than the Decision Makers in British Columbia and Québec, is that the requirements of MI 52-109 shall not apply to the Issuer, provided that the Issuer is in compliance with the requirements and conditions set out section 13.4 of NI 51-102, other than to the extent such requirements and conditions would require the Issuer to file the Non-Essential 8-Ks with the Decision Makers.

THE FURTHER DECISION of the Decision Makers, other than the Decision Makers in Saskatchewan and Manitoba, pursuant to the Legislation is that the Independent Underwriter Requirement contained in NI 33-105 (or, in the case of Québec, the Independent Underwriter Requirement contained in sections 236.1 and 237.1 of the Regulation Concerning Securities and the requirements of

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Décision générale No. 2003-C-0047 dated February 11, 2003) shall not apply to ML Canada in respect of the 49% Underwritings and the ML Majority Underwritings, provided that:

- (a) the independent underwriters participate in each proposed 49% Underwriting as stated in paragraph 16(a) hereof;
- (b) the Issuer complies with paragraph 16(b) hereof in connection with each ML Majority Underwriting; and
- (c) the Issuer complies with paragraphs 13 and 19 hereof.

DATED this 25<sup>th</sup> day of June, 2004.

Erez Blumberger  
Assistant Manager, Corporate Finance