

2005 BCSECCOM 307

May 9, 2005

Headnote

Mutual Reliance Review System for Exemptive Relief Applications - National Instrument 51-102, s. 13.1 *Continuous Disclosure Obligations* - an issuer wants relief from the requirement to file an annual information form - the issuer is a subsidiary of a bank, trust company or insurance company; the issuer's security holders receive fixed distributions; if those distributions are not paid, the securities are automatically converted to preferred shares of the bank, trust company or insurance company; the continuous disclosure materials of the parent will be filed and provided to security holders of the issuer

Applicable British Columbia Provisions

National Instrument 51-102, s. 13.1 *Continuous Disclosure Obligations*

In the Matter of
the Securities Legislation
of British Columbia, Alberta, Manitoba, Nova Scotia, Newfoundland and
Labrador, Yukon and Nunavut (the Jurisdictions)

and

In the Matter of
the Mutual Reliance Review System For Exemptive Relief Applications

and

In the Matter of the Bank of Nova Scotia (the Bank) and Scotia Mortgage
Investment Corporation (SMIC and collectively with the Bank, the Filer)

MRRS Decision Document

Background

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) for an exemption from the requirement for SMIC to prepare and file an annual information form (an AIF) for financial years ending on or after October 31, 2005 (the Requested Relief), subject to certain terms and conditions.

2005 BCSECCOM 307

Under the Mutual Reliance Review System (MRRS) for Exemptive Relief Applications

- (a) the British Columbia Securities Commission is the principal regulator for this application, and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

Interpretation

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

Representations

The decision is based on the following facts represented by the Filer:

The Bank of Nova Scotia

- 1. the Bank is a Canadian chartered bank governed by the *Bank Act* (Canada) (the Bank Act); the Bank is a reporting issuer in each of the Jurisdictions and is not, to its knowledge, in default of any of the requirements of the Legislation;
- 2. the authorized capital of the Bank consists of: (i) an unlimited number of common shares without par value (Bank Common Shares) and (ii) an unlimited number of preferred shares, issuable in series without par value (Preferred Shares);
- 3. the Bank Common Shares are listed and posted for trading on the Toronto Stock Exchange (the TSX) and The New York Stock Exchange;

Scotia Mortgage Investment Corporation

- 4. SMIC is a corporation governed by the *Trust and Loan Companies Act* (Canada) (the Act); SMIC is a reporting issuer in each of the Jurisdictions and is not, to its knowledge, in default of any requirement of the Legislation;
- 5. the outstanding securities of SMIC consist of: (i) 62,500 common shares, all of which are held by the Bank; and (ii) 250,000 Bank Originated Over-Collateralized Mortgage Securities, each consisting of one non-cumulative Preferred Share Class A of SMIC (the Scotia BOOMS) that were distributed in a public offering under a prospectus dated October 23, 1997;
- 6. the Scotia BOOMS are listed and posted for trading on the TSX;
- 7. the business objective of SMIC is to acquire and hold Canada Mortgage and Housing-insured residential first mortgages acquired primarily from the Bank

2005 BCSECCOM 307

and its affiliates (the Mortgage Assets); the Scotia BOOMS provide the Bank with a cost-effective means of raising capital for Canadian bank regulatory purposes;

Scotia BOOMS

8. each Scotia BOOMS entitles the holder (a Scotia BOOMS Holder) to receive a fixed cash distribution of \$65.70 per annum payable semi-annually by SMIC (each such distribution, the Indicated Yield) on the last day of April and October of each year (an Indicated Yield Payment Date);
9. on the occurrence of certain adverse tax events (a Tax Event) before October 31, 2007, the Scotia BOOMS will be exchangeable, at the option of the Bank without the consent of the holders (the Bank Tax Event Exchange Right), for a formula-determined number of Bank Common Shares;
10. on and after October 31, 2007, each Scotia BOOMS will be exchangeable, at the option of the Scotia BOOMS Holder, for a formula-determined number of Bank Common Shares in accordance with the terms of a Bank Share Exchange Agreement (the Bank Share Exchange Agreement) made between the Bank, SMIC and Montreal Trust Company of Canada (now Computershare Trust Company of Canada), as trustee for the Scotia BOOMS Holders;
11. on and after October 31, 2007, each Scotia BOOMS will be exchangeable, at the option of the Bank, for a formula-determined number of Bank Common Shares in accordance with the Bank Share Exchange Agreement;
12. each Scotia BOOMS will be automatically exchanged without the consent of the holder for non-cumulative Preferred Shares Series Z of the Bank (Series Z Shares) if: (i) SMIC fails to declare and pay or set aside for payment when due the declared Indicated Yield on any Indicated Yield Payment Date; (ii) the Bank fails to declare and pay or set aside for payment when due any declared dividend on any issue of its non-cumulative preferred shares; (iii) the Superintendent of Financial Institutions (Canada) (the Superintendent) takes control of the Bank under the Bank Act or of SMIC under the Act or proceedings are commenced for the winding up of the Bank or SMIC under the *Winding-Up and Restructuring Act* (Canada); (iv) the Superintendent has determined that the Bank has a Tier 1 risk-based capital ratio of less than 5.0% or a total risk-based capital ratio of less than 8.0%; or (v) the Superintendent, by order, directs the Bank to act under subsection 485(3) of the Bank Act, or directs SMIC to act under subsection 473(3) of the Act, to increase its capital or to provide additional liquidity and either the Bank or SMIC, as the case may be, elects to cause the exchange as a consequence of the issuance of such order or either the Bank or SMIC, as the case may be, does not comply with

2005 BCSECCOM 307

such order to the satisfaction of the Superintendent within the time specified therein;

13. the Series Z Shares will be convertible on and after October 31, 2007, at the option of the holder, into Bank Common Shares;
14. the Scotia BOOMS may be redeemed by SMIC for cash in the following circumstances: (i) on October 31, 2007 and periodically thereafter; or (ii) on the occurrence of a Tax Event on or after October 31, 2002 and before October 31, 2007, subject to the Bank Tax Event Exchange Right;
15. the Scotia BOOMS are non-voting except as required by applicable law;
16. except to the extent that the Indicated Yield is payable to Scotia BOOMS Holders and other than in the event of liquidation of SMIC, Scotia BOOMS Holders have no claim or entitlement to the income of SMIC or the Mortgage Assets;
17. in certain circumstances (as described in paragraph 12 above), including at a time when the Bank's financial condition is deteriorating or proceedings for the winding-up of the Bank have been commenced, the Scotia BOOMS will be automatically exchanged for preferred shares of the Bank without the consent of Scotia BOOMS Holders and, as a result, Scotia BOOMS Holders will have no claim or entitlement to the assets of SMIC, other than indirectly in their capacity as preferred shareholders of the Bank;
18. Scotia BOOMS Holders may not take any action to wind-up or dissolve SMIC except as provided by law;
19. the Bank and SMIC have entered into an Advisory Agreement under which the Bank provides advice and counsel with respect with certain matters to SMIC and provides certain employees to serve as officers of SMIC to administer the day-to-day operations of SMIC;
20. the Mortgage Assets of SMIC are serviced by the Bank and Scotia Mortgage Corporation (SMC) under a Mortgage Sales and Servicing Agreement entered into among SMIC, the Bank and SMC;
21. SMIC has not requested relief for the purposes of filing a short form prospectus pursuant to National Instrument 44-101 - Short Form Prospectus Distributions (NI 44-101) (including, without limitation, any relief which would allow SMIC to use the Bank's AIF as a current AIF of SMIC) and no

2005 BCSECCOM 307

such relief is provided by this Order from any of the requirements of NI 44-101;

22. because of the terms of the Scotia BOOMS, the Bank Share Exchange Agreement and the various covenants of the Bank, information about the affairs and financial performance of the Bank, as opposed to that of SMIC, is meaningful to Scotia BOOMS Holders; the Bank's filings and the delivery of the same material delivered to shareholders of the Bank will provide Scotia BOOMS Holders and the general investing public with all information required in order to make an informed decision relating to an investment in Scotia BOOMS; information regarding the Bank is relevant both to an investor's expectation of being paid the Indicated Yield on the Scotia BOOMS as well as the return of the investor's principal;
23. under the MRRS Decision Document dated March 13, 2002 (the Previous Decision), SMIC is exempt from certain continuous disclosure requirements of the Legislation, subject to certain conditions;
24. since the date of the Previous Decision, SMIC has become subject to the requirement contained in National Instrument 51-102 *Continuous Disclosure Obligations* to prepare and file an AIF, which requirement did not exist in the Jurisdictions at the time the Previous Decision was issued.

Decision

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 under the Legislation is that the Requested Relief is granted, for so long as:

- (a) the Bank remains a reporting issuer under the Legislation;
- (b) the Bank prepares and files an AIF with each of the Decision Makers under the Legislation on an annual basis;
- (c) all outstanding securities of SMIC are either Scotia BOOMS or common shares;
- (d) the rights and obligations of holders of additional series of Scotia BOOMS are the same in all material respects as the rights and obligations of the holders of Scotia BOOMS at the date hereof; and

2005 BCSECCOM 307

(e) the Bank or its affiliates are the beneficial owners of all outstanding common shares of SMIC;

and provided that if a material change occurs in the affairs of SMIC, this Order shall expire 30 days after the date of that change.

Martin Eady, CA
Director, Corporate Finance
British Columbia Securities Commission