

# 2005 BCSECCOM 605

September 26, 2005

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Application – Securities Act s. 48 Dealer - Exemption from s. 34(1)(a) requirement to be registered as a dealer to trade securities and the obligations of dealers in Part 5 of the Act and rules - A BC registered dealer wants an exemption from delivering confirmation statements to clients. - The client's account is fully managed by the dealer; account fees paid by the client are based on the amount of assets, and not the trading activity in the account; trades in the account are only made on the client's adviser's instructions; the client agreed in writing that confirmation statements will not be delivered to them; confirmations are provided to the client's adviser; the client is sent monthly or quarterly statements that include the confirmation information.

Securities Act s. 48 Adviser - Exemption from s. 34(1)(c) requirement to be registered as an adviser and the obligations of advisers in Part 5 of the Act and rules - A person who resides outside BC wants to advise BC residents. - The person is hired under a written agreement with a BC registered dealer or adviser to provide advice to the BC registrant and its BC clients; the person is registered or qualified to provide the advice in the jurisdiction in which they reside; under a written agreement with its BC clients or the person, the BC registrant accepts responsibility for all losses resulting from inappropriate advice provided by the person.

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 34(1)(a) and (c) and 48

*Securities Rules*, B.C. Reg. 194/97, ss. 36 (1) and (2) and 80 (1)

**In the Matter of the Securities Legislation of British Columbia, Alberta,  
Saskatchewan, Manitoba, Ontario, Québec, Nova Scotia, Newfoundland and  
Labrador, Prince Edward Island, New Brunswick, Yukon Territory,  
Northwest Territories and Nunavut Territory**

**and**

**In the Matter of the Mutual Reliance Review System for  
Exemptive Relief Applications**

**and**

**In the Matter of BMO Nesbitt Burns Inc. and BMO Nesbitt Burns Ltee/Ltd.**

**MRRS Decision Document**

## 2005 BCSECCOM 605

### **Background**

- ¶ 1 The local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions has received an application from BMO Nesbitt Burns Inc. (the Ontario Filer) and BMO Nesbitt Burns Ltee/Ltd. (the Québec Filer, and together with the Ontario Filer, the Filer) for a decision under the securities legislation of the Jurisdictions (the Legislation) for an exemption from the requirement in the Legislation:
- (a) except in Ontario and Québec, to be registered as an adviser for certain portfolio managers (the Sub-Advisers) who provide investment counselling and portfolio management services to the Filer for the benefit of the Ontario Filer's clients (the Clients) who are resident in Jurisdictions where the Sub-Advisers are not registered (the Registration Relief); and
  - (b) that a registered dealer send to its clients a written confirmation of any trade in securities for transactions that the Filer conducts on behalf of its Clients with respect to transactions under the Filer's managed account programs (the Programs) (the Confirmation Relief).

### **Under the System**

- (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**

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

### **Representations**

- ¶ 3 This decision is based on the following facts represented by the Filer:
- 1. the Ontario Filer is an investment dealer, or equivalent, registered under the Legislation, is a member of the Investment Dealers Association of Canada (IDA) and has its the head office in Toronto, Ontario;
  - 2. the Québec Filer is registered as an unrestricted practice dealer under the Legislation in the province of Québec, is a member of the IDA and has its head office in Montreal, Québec;

## **2005 BCSECCOM 605**

3. the Filer is authorized to act as an adviser, without registering as an adviser, under exemptions in the Legislation;
4. the Filer offers to its Clients, from time to time, Programs that fall into two categories:
  - (a) accounts that will be fully managed by a portfolio manager of the Ontario Filer (the Internally Managed Programs), and
  - (b) accounts that will be managed by a Sub-Adviser that has entered into a sub-advisory agreement with the Filer whereby the Filer has given that Sub-Adviser discretionary authority to manage all or a portion of a Client's account (the Externally Managed Programs);
5. to participate in the Filer's Programs, the Client:
  - (a) enters into a written agreement (the Managed Account Agreement) with the Filer establishing an account and setting out the terms and conditions and the respective rights, duties and obligations of the Client and the Filer; and
  - (b) with the assistance of the Filer, completes an investment policy statement that outlines the Client's investment objectives and level of risk tolerance;
6. under the Managed Account Agreement:
  - (a) the Client grants full discretionary trading authority to the Filer and the Filer is authorized to make investment decisions and to trade in securities on behalf of the Client's account without obtaining the specific consent of the Client to individual trades;
  - (b) the Client participating in an Externally Managed Program authorizes the Filer to contract with Sub-Advisers to give the Sub-Advisers discretionary authority to manage all or a portion of the Client's account;
  - (c) the Client agrees to pay a fee calculated on the basis of the assets in the Client's account, which will be payable monthly or quarterly in arrears and will not be based on transactions effected in the Client's account; and
  - (d) unless otherwise requested, the Client waives receipt of trade confirmations as required under the Legislation;

## 2005 BCSECCOM 605

7. the Filer selects Sub-Advisers based on a variety of different criteria developed by the Filer for determining their suitability to manage Clients' accounts under the Externally Managed Programs;
8. in retaining the Sub-Advisers in respect of the Externally Managed Programs, the Filer complies with the requirements of section 7.3 of Ontario Securities Commission Rule 35-502 *Non-Resident Advisers* and accordingly:
  - (a) the obligations and duties of each Sub-Adviser are set out in a written agreement between the Sub-Adviser and the Filer;
  - (b) the Filer contractually agrees with each Client on whose behalf investment counselling or portfolio management services are to be provided by a Sub-Adviser to be responsible for any loss that arises out of the failure of the Sub-Adviser:
    - (i) to exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of the Filer and the Client(s) for whose benefit the investment counselling or portfolio management services are to be provided, or
    - (ii) to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances; and
  - (c) the Filer cannot be relieved by its Clients from its responsibility for loss under paragraph 8(b) above;
9. Sub-Advisers may or may not be resident in Canada; each Sub-Adviser that is resident in a province or territory of Canada will be registered as an adviser under the securities legislation of that province or territory; each Sub-Adviser that is not resident in Canada will be licensed or otherwise legally permitted to provide investment advice and portfolio management services under the applicable laws of the jurisdiction in which it resides;
10. it is not anticipated that there will typically be direct contact between a Client and a Sub-Adviser with respect to the Programs; in those circumstances where such contact occurs the registered representative of the Filer responsible for the Client's account will be present at all times in person or by telephone;
11. a Sub-Adviser that provides investment counselling or portfolio management services to the Filer for the benefit of its Clients is considered to be acting as an "adviser" under the Legislation; and, in the absence of the Registration

## 2005 BCSECCOM 605

Relief or an existing exemption, a Sub-Adviser would be subject to the adviser registration requirement;

12. Sub-Advisers who are not registered in Ontario will not be required to register as advisers under the *Securities Act* (Ontario) as they can rely on the exemption from registration in section 7.3 of Ontario Rule 35-502 *Non-Resident Advisers*;
13. no registration relief is needed for the Sub-Advisers in Quebec since the Sub-Advisers are not required to register as advisers in Quebec so long as the Filer is authorized to act as an adviser in Quebec and the relationships between the Sub-Advisers, the Filer and the Clients are as described in this Decision Document;
14. the Filer will send each Client participating in its Programs, who has waived receipt of trade confirmations, a statement of account not less than once a month;
15. the monthly statement of account will identify the assets being managed on behalf of that Client, including for each trade made during that month the information that the Filer would otherwise have been required to provide to that Client in a trade confirmation in accordance with the Legislation, except for the following information (the Omitted Information):
  - (a) the day and the stock exchange or commodity futures exchange upon which the trade took place;
  - (b) the fee or other charge, if any, levied by any securities regulatory authority in connection with the trade;
  - (c) the name of the salesman, if any, in the transaction;
  - (d) the name of the dealer, if any, used by the Filer as its agent to effect the trade; and
  - (e) if acting as agent in a trade upon a stock exchange the name of the person or company from or to or through whom the security was bought or sold; and
16. the Filer will maintain the Omitted Information with respect to a Client in its books and records and will make the Omitted Information available to the Client on request.

## 2005 BCSECCOM 605

### Decision

- ¶ 4 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

- (a) except in Ontario and Québec, the Registration Relief is granted provided that:
  - (i) the obligations and duties of the Sub-Adviser are set out in a written agreement between the Sub-Adviser and the Ontario Filer;
  - (ii) the Ontario Filer contractually agrees with each Client on whose behalf investment counselling or portfolio management services are to be provided by a Sub-Adviser to be responsible for any loss that arise out of the failure of the Sub-Adviser:
    - (1) to exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of the Filer and the Client(s) for whose benefit the investment counselling or portfolio management services are to be provided, or
    - (2) to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances;
  - (iii) the Ontario Filer is not relieved by its Clients from its responsibility for loss under paragraph (ii) above;
  - (iv) each Sub-Adviser that is resident in a province or territory of Canada will be registered as an adviser under the securities legislation of that province or territory;
  - (v) each Sub-Adviser that is not resident in Canada will be licensed or otherwise legally permitted to provide investment advice and portfolio management services under the applicable laws of the jurisdiction in which it resides;
  - (vi) a Sub-Adviser will not have any direct and personal contact with a Client residing in New Brunswick if the Sub-Adviser is not registered under the securities legislation of New Brunswick;

## **2005 BCSECCOM 605**

- (vii) in Manitoba, the Registration Relief is available only to Sub-Advisers who are not registered in any Canadian jurisdiction; and
- (b) the Confirmation Relief is granted provided that
  - (i) the Client has previously informed the Filer that the Client does not wish to receive trade confirmations for the Client's accounts under the Programs; and
  - (ii) in the case of each trade for an account under the Programs, the Filer sends to the Client the corresponding statement of account that includes the information referred to in paragraph 15.

L.E. Evans, CA  
Director