

# 2003 BCSECCOM 718

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications – relief from registration and prospectus requirements of the legislation to enable a Schedule III bank to have the same exemptions as Schedule I and II banks, subject to certain conditions

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 34, 44(2)(a), 45(2)(2), 45(2)(20), 45(2)(27), 46(a)(iv), 48, 61(1), 74(2)(1), 74(2)(4), 76

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

**MRRS DECISION DOCUMENT**

WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in each of the provinces of British Columbia, Alberta, Saskatchewan, Ontario, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador, and in each of the Northwest Territories, Nunavut Territory and Yukon Territory (the “Jurisdictions”) has received an application (the “Application”) from UBS AG (“UBS”) for a decision (the “Decision”) under the securities legislation of the Jurisdictions (the “Legislation”) that UBS is exempt from various registration, prospectus and filing requirements of the Legislation in connection with the banking activities to be carried on by UBS in the Jurisdictions;

AND WHEREAS under the Mutual Reliance Review System for Exemptive Relief Applications (the “System”), the Ontario Securities Commission (the “OSC”) is the principal regulator for this Application;

AND WHEREAS UBS has represented to the Decision Makers that:

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1. UBS is a corporation duly organized under the laws of Switzerland. UBS was formed on June 29, 1998 by the merger of Union Bank of Switzerland (founded in 1862) and Swiss Bank Corporation (founded in 1872). The principal offices of UBS are located in Zurich and Basel, Switzerland.
2. UBS is one of the world's leading financial services organizations and, together with its subsidiaries, provides a comprehensive range of financial services including commercial, retail and investment banking, lease and trade financing, wealth and asset management services, investment management services and trust services.
3. UBS is publicly listed, with its shares trading on the New York, Swiss and Tokyo stock exchanges. No individual or entity owns more than 10% of UBS' shares.
4. UBS has approximately 327 branches in Switzerland. UBS also operates branches in over 50 countries outside Switzerland.
5. In Canada, UBS has a wholly-owned subsidiary, UBS Bank (Canada), which is a Schedule II chartered bank under the *Bank Act* (Canada) (the "Bank Act").
6. As at December 31, 2002, UBS had total assets of CHF 1,181,118 million (approximately Cdn.\$1,194,346 million, based on a conversion using the Bank of Canada's noon spot rate on December 31, 2002).
7. UBS is not, and has no current intention of becoming, a reporting issuer or the equivalent in any Jurisdiction, nor are any of its securities listed on any stock exchange in Canada.
8. In June 1999, amendments to the Bank Act were proclaimed that permit foreign banks to operate directly in Canada through branches, rather than separate subsidiary Schedule II banks. Foreign banks permitted to carry on banking activities in Canada through branches will be designated in Schedule III to the Bank Act. The foreign bank branches will increase competition in the Canadian financial services market place to the benefit of Canadian consumers.
9. On May 16, 2003, UBS received approval from the Minister of Finance (Canada) to establish a full service foreign bank branch in Canada and, on May 30, 2003, received an order from the Office of the Superintendent of Financial Institutions approving the commencement and carrying on of business in Canada pursuant to sections 524 and 534 of the Bank Act.

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10. Upon approval of the Bank Act Application, UBS established and commenced operation of a Schedule III foreign bank branch under the Bank Act.
11. The operations of UBS' foreign bank branch will primarily consist of commercial lending, origination of structured products, equity derivatives and fixed income derivatives, and wealth management services and the offering of UBS' products to private clients.
12. UBS will only accept deposits from:
  - (a) Her Majesty in right of Canada or in right of a province or a territory, an agent of Her Majesty in either of those rights, including a municipal or public body empowered to perform a function of government in Canada, or an entity controlled by Her Majesty in either of those rights;
  - (b) the government of a foreign country or any political subdivision of that country, an agency of the government of a foreign country or any political subdivision of that country, or an entity that is controlled by the government of a foreign country or any political subdivision of that country;
  - (c) an international agency of which Canada is a member, including the Inter-American Development Bank, the Asian Development Bank, the Caribbean Development Bank, the European Bank for Reconstruction and Development and any other international regional bank of which Canada is a member, and an international agency of which Canada is a member that is a member of the World Bank Group;
  - (d) a financial institution (that is, (i) a bank or an authorized foreign bank under the Bank Act, (ii) a body corporate to which the *Trust and Loan Companies Act* (Canada) applies, (iii) an association to which the *Cooperative Credit Associations Act* (Canada) applies or a central cooperative credit society for which an order has been made under subsection 473(1) of that Act, (iv) an insurance company or a fraternal benefit society incorporated or formed under the *Insurance Companies Act* (Canada), (v) a trust, loan or insurance corporation incorporated by or under an Act of the legislature of a province or territory in Canada, (vi) a cooperative credit society incorporated and regulated by or under an Act of the legislature of a province or territory in Canada, (vii) an entity that is incorporated or formed by or under an Act of Parliament or of the legislature of a province or territory in Canada and that is primarily engaged in dealing in securities, including portfolio management and

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investment counselling, and is registered to act in such capacity under the applicable Legislation, and (viii) a foreign institution (that is, an entity that is, (A) engaged in the business of banking, the trust, loan or insurance business, the business of a cooperative credit society or the business of dealing in securities or is otherwise engaged primarily in the business of providing financial services, and (B) incorporated or formed otherwise than by or under an Act of Parliament or of the legislature of a province or territory in Canada);

- (e) a pension fund that is maintained in respect of a pension plan registered for income tax purposes and that has total assets under administration of more than \$100 million at the time the first deposit transaction is made;
- (f) a mutual fund that is regulated under an Act of the legislature of a province or territory in Canada or under the laws of a jurisdiction outside Canada and the assets of which are managed by a person that has total assets under their management of more than \$10 million at the time the first deposit transaction is made;
- (g) an entity that, at the time the first deposit transaction is made, has for the fiscal year immediately preceding that deposit transaction, gross revenues of more than \$5 million;
- (h) any other entity, where the deposit facilitates the provision of the following services by the bank to the entity, namely,
  - (i) lending money;
  - (ii) dealing in foreign exchange; or
  - (iii) dealing in securities, other than debt obligations of the bank; or
- (i) any other person if the deposit (as defined in the Bank Act) is not less than \$150,000,

as may be amended by the Bank Act from time to time (collectively referred to for purposes of this Decision as “Authorized Customers”).

13. UBS will execute unsolicited trades orders through registered dealers as agent for a person or company and will also engage in trades of the types described in section 1.1 of Rule 32-502 of the OSC and sections 1.1 and 1.2 of Rule 32-503 of the OSC.

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14. The only advising activities which UBS intends to undertake will be incidental to its primary business and it will not advertise itself as an adviser or allow itself to be advertised as an adviser in the Jurisdictions.
15. The Legislation applicable in each Jurisdiction currently refers to either “Schedule I and Schedule II banks”, “banks”, “savings institutions” or “financial institutions” in connection with certain exemptions, but no reference is made in any of the Legislation to entities listed under Schedule III to the Bank Act. Since UBS’ foreign bank branch will not be listed under Schedule I or II of the Bank Act, but rather under Schedule III to the Bank Act, the existing exemptions relating to the registration, prospectus and filing requirements will not be available to it.
16. In order to ensure that UBS, as an entity listed under Schedule III to the Bank Act, will be able to provide banking services to businesses in the Jurisdictions, it requires similar exemptions enjoyed by banking institutions listed under Schedules I and II to the Bank Act to the extent that the current exemptions applicable to such banking institutions are relevant to the banking business to be undertaken by UBS in the Jurisdictions.

AND WHEREAS under the System, this MRRS Decision Document evidences the Decision of each of the Decision Makers;

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 under the Legislation is that in connection with the banking business to be carried on by UBS in the Jurisdictions as a branch designated on Schedule III to the Bank Act:

1. UBS is exempt from the requirement under the Legislation, where applicable, to be registered as an underwriter with respect to trading in the same types of securities in respect of which an entity listed under Schedule I or II to the Bank Act may act as an underwriter without being required to be registered under the Legislation as an underwriter.
2. UBS is exempt from the requirement under the Legislation to be registered as an adviser where the performance of the service as an adviser is solely incidental to its primary banking business.
3. A trade of a security to UBS, where UBS purchases the security as principal, shall be exempt from the registration and prospectus requirements of the

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Legislation of the Jurisdiction in which the trade takes place (the “Applicable Legislation”) provided that:

- (i) the forms that would have been filed and the fees that would have been paid under the Applicable Legislation if the trade had been made, on an exempt basis, to an entity listed on Schedule I or II to the Bank Act purchasing as principal (referred to in this Decision as a “Schedule I or II Bank Exempt Trade”) are filed and paid in respect of the trade to UBS; and
  - (ii) the first trade in a security acquired by UBS pursuant to this Decision is deemed a distribution or primary distribution to the public under the Applicable Legislation unless the conditions in subsections 2 or 3, as applicable, of section 2.5 of Multilateral Instrument 45-102 – Resale of Securities are satisfied.
4. The execution of an unsolicited order to purchase or sell through a registered dealer by UBS as agent for a person or company and the trade by such person or company in placing the unsolicited order with UBS shall be exempt from the registration requirements of the Legislation of the Jurisdiction in which the trade takes place provided that UBS does not actively promote or market an order execution access service.
5. Provided UBS only trades the types of securities referred to in this paragraph with Authorized Customers or any other person if the trade is in a security which has an aggregate acquisition cost to the purchaser of \$150,000 or more, trades of bonds, debentures or other evidences of indebtedness of or guaranteed by UBS shall be exempt from the registration and prospectus requirements of the Legislation.
6. Evidences of deposit issued by UBS to Authorized Customers, as permitted under the Bank Act, shall be exempt from the registration and prospectus requirements of the Legislation.

THE FURTHER DECISION of the Decision Maker in Ontario is that:

- A. Subsection 25(1)(a) of the *Securities Act* (Ontario) R.S.O. 1990 c. S.5 (as amended) (the “Ontario Act”) does not apply to a trade by UBS:
  - (i) of a type described in subsection 35(1) of the Ontario Act or section 151 of the Regulations made under the Ontario Act; or
  - (ii) the securities described in subsection 35(2) of the Ontario Act.

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- B. Subsection 25(1)(a) and section 53 of the Ontario Act do not apply to a trade by UBS in:
- (i) a security of a mutual fund, if the security is sold to a pension plan, deferred profit sharing plan, retirement savings plan or other similar capital accumulation plan maintained by the sponsor of the plan for its employees, and
    - (a) the employees deal only with the sponsor in respect of their participation in the plan and the purchase of the security by the plan, or
    - (b) the decision to purchase the security is not made by or at the direction of the employee, or
  - (ii) the security of a mutual fund that
    - (a) is administered by a body corporate to which the *Trust and Loan Companies Act* (Canada) applies or a trust, loan or insurance corporation incorporated by or under an Act of the legislature of a province or territory in Canada,
    - (b) consists of a pool of funds that
      - (A) results from, and is limited to, the combination or commingling of funds of pension or other superannuation plans registered under the *Income Tax Act* (Canada), and
      - (B) is established by or related to persons or companies that are associates or affiliates of or that otherwise do not deal at arm's length with the promoters of the mutual fund except the trust, loan or insurance corporation that administers the fund, and
    - (c) is managed, in whole or in part, by a person who is registered or who is exempt from registration under the Ontario Act.

Dated October 21, 2003.

Robert L. Shirriff

Robert W. Davis