

# 2008 BCSECCOM 93

December 19, 2007

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications

National Instrument 44-101 *Short Form Prospectus Distributions*, s. 8.1 – Qualification criteria and earnings coverage disclosure - Qualification - An issuer wants relief from the qualification criteria in NI 44-101 so it can file a short form prospectus - The issuer is a trust, all of whose voting securities are owned by a bank; the bank is qualified to file a short form prospectus under NI 44-101; the short form prospectus will qualify debt securities that entitle the holders to receive fixed distributions; the distributions are based on dividends paid on securities of the bank, which provides an undertaking relating to its dividend payments; the continuous disclosure materials of the bank will be incorporated by reference into the short form prospectus

*Securities Act*, ss. 169(4) & 11(1) – Confidentiality - An applicant wants to keep an application and order confidential for a limited amount of time after the order is granted - The record provides intimate financial, personal or other information; the disclosure of the information before a specific transaction would be detrimental to the person affected. The information will be made available after a specific date

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 11(1) and 169(4)

National Instrument 44-101, Part 2, s. 8.1, Items 6 and 11 of Form 44-101F1

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

and

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

and

In the Matter of

# 2008 BCSECCOM 93

The Bank of Nova Scotia and BNS Capital Trust

## MRRS Decision Document

### **Background**

The local securities regulatory authority or regulator (the “Decision Maker” and, collectively, the “Decision Makers”) in each of the Jurisdictions has received an application (the “Application”) from The Bank of Nova Scotia (the “Bank”) and BNS Capital Trust (the “Trust”) (collectively, the “Filers”) for a decision (the “Requested Relief”), pursuant to the securities legislation of the Jurisdictions (the “Legislation”), that:

- A. the Trust be exempted from the following requirements of the Legislation in connection with offerings of non-convertible Scotia BaTS (as defined herein):
  - (i) the requirements of Part 2, with the exception of section 2.8, of National Instrument 44-101 *Short Form Prospectus Distributions* (“NI 44-101”), which sets forth the eligibility requirements to enable an issuer to file a prospectus in the form of a short form prospectus; and
  - (ii) the disclosure requirements in Item 6 (Earnings Coverage Ratios) and Item 11 (Documents Incorporated by Reference), with the exception of Item 11.1(1)5, of Form 44-101F1 of NI 44-101 (“Form 44-101F1”) in respect of the Trust;
- B. the Trust is qualified to file a prospectus in the form of a short form prospectus in accordance with NI 44-101; and
- C. the Application and this MRRS decision document be held in confidence by the Decision Makers, subject to certain conditions.

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) the Ontario 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.

## 2008 BCSECCOM 93

### **Representations**

This decision is based on the following facts represented by the Filers:

#### **The Bank**

1. The Bank is a Schedule 1 chartered bank subject to the provisions of the *Bank Act* (Canada). The head office of the Bank is located at 1709 Hollis Street, Halifax, Nova Scotia B3J 1W1 and the Bank's corporate headquarters and executive offices are located at Scotia Plaza, 44 King Street West, Toronto, Ontario M5H 1H1.
2. The authorized share capital of the Bank consists of an unlimited number of: (i) common shares ("Bank Common Shares"); and (ii) preferred shares without nominal or par value ("Bank Preferred Shares").
3. The Bank Common Shares are listed on the Toronto Stock Exchange and the New York Stock Exchange.
4. The Bank is a reporting issuer, or the equivalent, in each of the Jurisdictions and is not in default of any requirement of the Legislation.
5. The Bank is qualified to use the short form prospectus system provided under NI 44-101.

#### **The Trust**

6. The Trust is a trust established under the laws of the Province of Ontario by Montreal Trust Company of Canada (the "Trustee"), as trustee, pursuant to an amended and restated declaration of trust dated March 1, 2000 (the "Declaration of Trust").
7. The beneficial interests of the Trust are divided into two classes of units, issuable in series, designated as Scotiabank Trust Securities ("Scotia BaTS") and Special Trust Securities ("Special Trust Securities" and, collectively with the Scotia BaTS, the "Trust Securities").
8. The Trust was established solely for the purpose of effecting offerings of Trust Securities in order to provide the Bank with a cost-effective means of raising capital for Canadian bank regulatory purposes by means of: (i) creating and selling the Trust Securities; and (ii) acquiring and holding assets which may consist of: (a) undivided co-ownership interests in one or more pools of Canada Mortgage and Housing Corporation ("CMHC") insured first mortgages on residential property situated in Canada; (b) certain mortgage-

## 2008 BCSECCOM 93

backed securities; (c) CMHC-insured first mortgages on residential property; and (d) to the extent that the assets of the Trust are not invested in the assets referred to above in (a), (b) or (c), money and certain debt obligations that are qualified investments under the *Income Tax Act* (Canada) for trusts governed by certain deferred income plans (collectively, “Trust Assets”). The Trust does not, and will not, carry on any operating activity other than in connection with such offerings.

9. The Trust is a reporting issuer, or the equivalent, in each of the Jurisdictions and is not in default of any requirement of the Legislation.
10. On May 11, 2001, the Decision Makers granted an MRRS decision document to the Bank and the Trust (the “Continuous Disclosure Relief”) exempting the Trust from most of the continuous disclosure requirements under the Legislation upon certain conditions, including that the Bank provide its financial statements to holders of Scotia BaTS and file its financial statements and Annual Information Form (“AIF”) on the Trust’s SEDAR profile.
11. The Trust completed a public offering of Scotia BaTS – Series 2000-1 pursuant to a prospectus dated March 28, 2000.
12. The Trust proposes to undertake a public offering of Scotia BaTS – Series 2008-1 in early 2008 (the “Offering”).

### Scotia BaTS – Series 2008-1

13. Holders of Scotia BaTS – Series 2008-1 will be entitled to receive fixed, semi-annual non-cumulative distributions (each, an “Indicated Yield”) on the basis described below (the “Distributions”). Each semi-annual payment date for the Indicated Yield in respect of the Scotia BaTS – Series 2008-1 (a “Distribution Date”) will be either a “Regular Distribution Date” or a “Distribution Diversion Date”. A Distribution Date will be a “Distribution Diversion Date”, with the result that the Indicated Yield will not be paid in respect of the Scotia BaTS – Series 2008-1 but, instead, the Trust will pay the net distributable funds of the Trust to the Bank as holder of the Special Trust Securities if: (i) the Bank has failed in the period to be described in the prospectus for the Offering (the “Prospectus”) to declare regular dividends on the Bank Preferred Shares; or (ii) no Bank Preferred Shares are then outstanding and the Bank has failed in the period to be described in the Prospectus to declare regular dividends on the Bank Common Shares. In all other cases, a Distribution Date will be a Regular Distribution Date, in which case holders of Scotia BaTS – Series 2008-1 will be entitled to receive the Indicated Yield and the Bank, as holder of the Special Trust Securities, will be entitled to receive the net

## 2008 BCSECCOM 93

distributable income, if any, of the Trust remaining after payment of the Indicated Yield. The Bank Preferred Shares and the Bank Common Shares are hereinafter collectively referred to as the “Bank Dividend Restricted Shares”.

14. Under a share exchange agreement to be entered into among the Bank, the Trust and a party acting as exchange trustee (the “Series 2008-1 Share Exchange Agreement”), the Bank will agree, for the benefit of holders of Scotia BaTS – Series 2008-1, that in the event that the Trust fails on any Regular Distribution Date to pay the Indicated Yield on the Scotia BaTS – Series 2008-1 in full, the Bank will not pay dividends on the Bank Dividend Restricted Shares until a specified period of time has elapsed, unless the Trust first pays such Indicated Yield (or the unpaid portion thereof) to holders of Scotia BaTS – Series 2008-1. Accordingly, it is in the interest of the Bank to ensure, to the extent within its control, that the Trust complies with its obligation to pay the Indicated Yield on each Regular Distribution Date.
15. Pursuant to the terms of the Scotia BaTS – Series 2008-1 and the Series 2008-1 Share Exchange Agreement, the Scotia BaTS – Series 2008-1 will be automatically exchanged, without the consent of the holder, for a new series of newly issued Non-cumulative Bank Preferred Shares (the “New Series of Bank Preferred Shares”) upon the occurrence of certain stated events relating to the solvency of the Bank or actions taken by the Superintendent of Financial Institutions (the “Superintendent”) in respect of the Bank.
16. The New Series of Bank Preferred Shares will not be convertible into Bank Common Shares.
17. The Trust may, subject to regulatory approval, on a date to be described in the Prospectus that is more than 10 years after the issue date for the Scotia BaTS – Series 2008-1 and on any Distribution Date thereafter, redeem the Scotia BaTS – Series 2008-1. The price payable in respect of any such redemption will include an early redemption compensation component (such price being the “Early Redemption Price”) in the event of a redemption of Scotia BaTS – Series 2008-1 prior to a date to specified in the Prospectus (the “Early Redemption Date”). The price payable in all other cases will be \$1,000 per Scotia BaTS – Series 2008-1 together with any unpaid Indicated Yield thereon (the “Redemption Price”).
18. The Bank will covenant under the Series 2008-1 Share Exchange Agreement, that the Bank will maintain direct ownership of 100% of the outstanding Special Trust Securities. Subject to regulatory approval, the Scotia BaTS – Series 2008-1 will constitute Tier 1 capital of the Bank.

## 2008 BCSECCOM 93

19. As long as any Scotia BaTS – Series 2008-1 are outstanding and are held by any person other than the Bank, the Trust may only be terminated with the approval of the Bank as holder of the Special Trust Securities and with the approval of the Superintendent: (i) upon the occurrence of a Special Event (to be defined in the Prospectus) prior to a date to be specified in the Prospectus; or (ii) for any reason on a date to be specified in the Prospectus or any other Distribution Date thereafter. Holders of each series of outstanding Trust Securities will rank *pari passu* in the distribution of the property of the Trust in the event of a termination of the Trust after the discharge of any creditor claims. As long as any Scotia BaTS – Series 2008-1 are outstanding and held by any person other than the Bank, the Bank will not approve the termination of the Trust unless the Trust has sufficient funds to pay the Early Redemption Price in the case of a termination prior to the Early Redemption Date, or the Redemption Price in the case of a termination at any other time.
20. The Scotia BaTS – Series 2008-1 will be non-voting except in limited circumstances and Special Trust Securities will entitle the holder thereof to vote.
21. Except to the extent that Distributions are payable to holders of Scotia BaTS – Series 2008-1, and other than in the event of a termination of the Trust (as set forth in the Declaration of Trust), holders of Scotia BaTS – Series 2008-1 will have no claim or entitlement to the income of the Trust or its assets.
22. Pursuant to an administration agreement entered into between the Trustee and the Bank, as amended and restated, the Trustee has delegated to the Bank certain of its obligations in relation to the administration of the Trust. The Bank, as administrative agent, provides advice and counsel with respect to the administration of the day-to-day operations of the Trust and other matters as may be requested by the Trustee from time to time.
23. The Trust may, from time to time, issue further series of Scotia BaTS, the proceeds of which would be used to acquire additional Trust Assets.
24. It is expected that the Scotia BaTS – Series 2008-1 will receive an approved rating from an approved rating organization, as defined in NI 44-101.
25. At the time of the filing of any prospectus in connection with offerings of Scotia BaTS (including the Offering):
  - (i) the Scotia BaTS will be non-convertible within the meaning of NI 44-101;

## 2008 BCSECCOM 93

- (ii) the prospectus will be prepared in accordance with the short form prospectus requirements of NI 44-101, except as varied by this decision or as permitted by the Legislation;
- (iii) the Trust will comply with all of the filing requirements and procedures set out in NI 44-101 except as varied by this decision or as permitted by the Legislation;
- (iv) the prospectus will incorporate by reference the documents that would be required to be incorporated by reference under Item 11 of Form 44-101F1 if the Bank were the issuer of such securities;
- (v) the Bank will satisfy the criteria in section 2.2 of NI 44-101 if the word “issuer” is replaced with “Bank”;
- (vi) the prospectus disclosure required by Item 11 (other than Item 11.1(1)5) of Form 44-101F1 in respect of the Trust will be addressed by incorporating by reference the Bank’s public disclosure documents referred to in paragraph 25(iv) above; and
- (vii) the Continuous Disclosure Relief, as amended, supplemented or replaced from time to time, is in effect.

### **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, provided that:

- (i) the Trust and the Bank, as applicable, comply with paragraph 25 above;
- (ii) the Bank remains the direct or indirect beneficial owner of all of the outstanding Special Trust Securities;
- (iii) the Bank, as holder of the Special Trust Securities, will not propose changes to the terms and conditions of any outstanding Scotia BaTS offered and sold pursuant to a short form prospectus of the Trust filed under this decision that would result in such Scotia BaTS being exchangeable for securities other than Bank Preferred Shares;

## 2008 BCSECCOM 93

- (iv) the Trust is not required to, and does not, file its own AIF and annual financial statements in a Jurisdiction;
- (v) the Trust has minimal assets, operations, revenues or cash flows other than those related to the issuance, administration and repayment of the Trust Securities;
- (vi) the Trust issues a news release and files a material change report in accordance with Part 7 of NI 51-102, as amended, supplemented or replaced from time to time, in respect of any material change in the affairs of the Trust that is not also a material change in the affairs of the Bank;
- (vii) the Trust is an electronic filer under NI 13-101;
- (viii) the Trust is a reporting issuer in at least one jurisdiction of Canada;
- (ix) the Trust has filed with the securities regulatory authority in each jurisdiction in which it is a reporting issuer all periodic and timely disclosure documents that it is required to have filed in that jurisdiction: (i) under all applicable securities legislation; (ii) pursuant to an order issued by the securities regulatory authority; or (iii) pursuant to an undertaking to the securities regulatory authority; and
- (x) the securities to be distributed: (i) have received an approved rating on a provisional basis; (ii) are not the subject of an announcement by an approved rating organization, which the Trust is or ought reasonably to be aware, that the approved rating given by the organization may be downgraded to a rating category that would not be an approved rating; and (iii) have not received a provisional or final rating lower than an approved rating from any approved rating organization.

The further decision of the Decision Makers under the Legislation is that the Application and this decision shall be held in confidence by the Decision Makers until the earlier of the date that a preliminary short form prospectus is filed in respect of the offering of Scotia BaTS – Series 2008-1 and January 31, 2008.

Jo-Anne Matear, Assistant Manager  
Ontario Securities Commission