

2005 BCSECCOM 240

April 6, 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 trust; the issuer's security holders receive fixed distributions guaranteed by a bank, trust company or insurance company; the continuous disclosure materials of the guarantor will be filed and provided to security holders of the trust

Applicable British Columbia Provisions

National Instrument 51-102 *Continuous Disclosure Obligations*, Part 6 and s. 13.1

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

and

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

and

In the Matter of
The Toronto-Dominion Bank and
TD Capital Trust
(the Trust, and Collectively with the Bank, the Filer)

MRRS Decision Document

Background

- ¶ 1 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) that the requirement under the Legislation to prepare and file an annual information form (an AIF) shall not apply to the Trust for financial years ending on or after December 31, 2004 (the Requested Relief), subject to certain terms and conditions.

2005 BCSECCOM 240

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

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

Representations

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

The Toronto-Dominion Bank

- 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 requirement of the Legislation;
- 2. the authorized share capital of the Bank consists of an unlimited number of common shares (Bank Common Shares), of which 660,059,993 common shares were outstanding as at February 28, 2005, and an unlimited number of Non-cumulative Class A Preferred Shares, issuable in series (Bank Preferred Shares), of which the following series were outstanding as at February 28, 2005: 16,065 Series I; 16,383,935 Series J; 14,000,000 Series M and 8,000,000 Series N;
- 3. the Bank Common Shares are listed and posted for trading on the Toronto Stock Exchange (the TSX) and the New York and Tokyo stock exchanges;

TD Capital Trust

- 4. the Trust is a closed-end trust established under the laws of Ontario by TD Trust Company (now The Canada Trust Company) (the Trustee), as trustee, pursuant to a declaration of trust made as of February 14, 2000 (the Declaration of Trust); the Trust is a reporting issuer in each of the provinces and territories of Canada that provide for a reporting issuer regime by virtue of the filing of a (final) prospectus dated March 14, 2000 (the Prospectus) in respect of the initial public offering (the Offering) of TD CaTS – Series 2009

2005 BCSECCOM 240

(as defined below); to its knowledge, the Trust is not in default of any applicable requirement of the Legislation;

5. the beneficial interests of the Trust are divided into two classes of units, issuable in series, designated as Capital Trust Securities (TD CaTS) and Special Trust Securities (Special Trust Securities and, collectively with TD CaTS, Trust Securities); the outstanding securities of the Trust consist of: (i) 900,000 Capital Trust Securities – Series 2009 (TD CaTS – Series 2009), which are listed and posted for trading on the Toronto Stock Exchange; and (ii) 260,000 Special Trust Securities;
6. the Trust was established solely for the purpose of effecting the Offering and possible future offerings of securities in order to provide the Bank with a cost effective means of raising capital for Canadian bank regulatory purposes; the Trust does not and will not carry on any operating activity other than in connection with the Offering and any future offerings;
7. the business objective of the Trust is to acquire and hold assets (the Trust Assets) primarily from the Bank or its affiliates 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-backed securities; (c) CMHC - insured first mortgages on residential property; and (d) to the extent that the proceeds of 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;

TD CaTS

8. subject to paragraph 9 below, each TD CaTS – Series 2009 entitles the holder (TD CaTS Holders) to receive a fixed cash distribution (a Distribution) payable by the Trust on the last day of June and December of each year (each such day, a Distribution Date and each period from the Distribution Date to and including the next Distribution Date, a Distribution Period);
9. TD CaTS Holders are not entitled to receive Distributions in respect of a particular Distribution Date if the Bank has not declared regular cash dividends on its preferred shares or, if no such shares are then outstanding, on the Bank Common Shares (in accordance with the Bank's ordinary dividend practice in effect from time to time) in the most recent month in which the Bank ordinarily declares dividends from time to time in respect of such shares

2005 BCSECCOM 240

occurring prior to the commencement of the Distribution Period ending on such Distribution Date;

10. the Bank has covenanted, pursuant to the Bank Share Exchange Agreement (as defined below) that, if on the Distribution Date the Trust fails to pay in full Distributions on the TD CaTS to which TD CaTS Holders are entitled, the Bank will not declare dividends of any kind on its preferred shares and the Bank Common Shares until a specific period of time has elapsed from the Distribution Date;
11. upon the occurrence of certain adverse tax events or events relating to the treatment of TD CaTS for capital purposes prior to June 30, 2005, TD CaTS Series - 2009 will be redeemable, at the option of the Trust and with the approval of the Superintendent of Financial Institutions (Canada) (the Superintendent), in whole (but not in part) for a cash amount;
12. on June 30, 2005 and on any subsequent Distribution Date, the TD CaTS - Series 2009 will be redeemable in whole (but not in part) for a cash amount, at the option of the Trust and subject to the approval of the Superintendent;
13. on June 30, 2010, and on any subsequent Distribution Date, each TD CaTS - Series 2009 will be exchangeable (the Holder Exchange Right), at the option of the holder (TD CaTS - Series 2009 Holders), for one non-cumulative redeemable Class A First Preferred Share, Series A1 of the Bank (a Bank Preferred Share Series A1) in accordance with the terms set forth in a Bank Share Exchange Trust Agreement made as of March 21, 2000 (the Bank Share Exchange Agreement) between the Bank, the Trust and CIBC Mellon Trust Company, as trustee for the TD CaTS - Series 2009 Holders;
14. each TD CaTS will be automatically exchanged (the Automatic Exchange Right) without the consent of the holder, for one Bank Preferred Share Series A1 if: (i) an application for a winding-up order in respect of the Bank pursuant to the *Winding-up and Restructuring Act* (Canada) is filed by the Attorney General of Canada or a winding-up order in respect of the Bank pursuant to that Act is granted by a court; (ii) the Superintendent has taken control of the Bank or its assets pursuant to the Bank Act; (iii) the Superintendent advises the Bank in writing that the Superintendent is of the opinion that the Bank has a risk-based Tier 1 Capital ratio of less than 5.0% or a risk-based Total Capital ratio of less than 8.0%; or (iv) the Superintendent directs the Bank pursuant to the Bank Act to increase its capital or to provide additional liquidity and the Bank elects to cause the exchange as a consequence of the issuance of such direction or the Bank does not comply with such direction to the satisfaction of the Superintendent within the time specified in such direction;

2005 BCSECCOM 240

15. the Bank Preferred Shares Series A1 will be convertible after specified dates, at the option of the Bank and subject to regulatory approvals, into Bank Common Shares;
16. beginning on June 30, 2010, and on each subsequent Distribution Date, the Bank Preferred Shares Series A1 will be convertible, at the option of the holder, into Bank Common Shares, except under certain circumstances;
17. as set forth in the Declaration of Trust, TD CaTS are non-voting except in certain limited circumstances and Special Trust Securities entitle the holders to vote;
18. except to the extent that Distributions are payable to TD CaTS Holders and, other than in the event of termination of the Trust (as set forth in the Declaration of Trust), TD CaTS Holders have no claim or entitlement to the income of the Trust or the Trust Assets;
19. in certain circumstances (as described in paragraph 14 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 TD CaTS - Series 2009 will be automatically exchanged for Bank Preferred Shares Series A1 without the consent of TD CaTS Holders; as a result, TD CaTS Holders will have no claim or entitlement to the Trust Assets, other than indirectly in their capacity as preferred shareholders of the Bank;
20. TD CaTS Holders may not take any action to terminate the Trust;
21. disclosure with respect to the Trust is provided in a note to the Bank's audited annual financial statements and the Bank's Financial Statements are sent to holders of TD CaTS at the same time and in the same manner as if the holders of TD CaTS were holders of Bank Common Shares;
22. by an MRRS Decision Document dated May 16, 2001 (the Previous Decision), the Trust is exempt from certain continuous disclosure requirements of the Legislation, subject to certain conditions;
23. since the date of the Previous Decision, the Trust 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.

2005 BCSECCOM 240

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, effective March 31, 2005, 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 the Trust are either TD CaTS or Special Trust Securities;
- (d) the rights and obligations of holders of additional TD CaTS are the same in all material respects as the rights and obligations of the holders of TD CaTS at the date hereof;
- (e) the Bank or its affiliates are the beneficial owners of all Special Trust Securities;

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

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