

2003 BCSECCOM 799

Headnote

Mutual Reliance Review System for Exemptive Relief Applications – subdivided offering – relief granted from the prospectus requirement for market making trades, subject to conditions – relief granted from prohibition against trading in portfolio shares by persons having information about the trading programs of mutual funds in connection with certain principal trades

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 61, 76, 128 and 130

IN THE MATTER OF THE CANADIAN SECURITIES LEGISLATION OF THE PROVINCES OF BRITISH COLUMBIA, ALBERTA, SASKATCHEWAN, MANITOBA, ONTARIO, NEW BRUNSWICK, NOVA SCOTIA, NEWFOUNDLAND AND LABRADOR AND PRINCE EDWARD ISLAND

AND

IN THE MATTER OF THE MUTUAL RELIANCE REVIEW SYSTEM FOR EXEMPTIVE RELIEF APPLICATIONS

AND

IN THE MATTER OF BMO NESBITT BURNS INC. AND CYCLICAL SPLIT NT CORP.

MRRS DECISION DOCUMENT

WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in each of the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Newfoundland and Labrador and Prince Edward Island (the “Jurisdictions”) has received an application from Cyclical Split NT Corp. (the “Issuer”) and BMO Nesbitt Burns Inc. (“BMO Nesbitt Burns”) in connection with the distribution (the “Offering”) of capital shares (the “Capital Shares”) and preferred shares (the “Preferred Shares”) of the Issuer by BMO Nesbitt Burns and such other agents as may be appointed (collectively, the “Agents”), pursuant to a prospectus, for a decision under to the securities legislation of the Jurisdictions (the “Legislation”) that:

- (A) the requirement contained in the Legislation of each of the Jurisdictions to file and obtain a receipt for a preliminary prospectus and final prospectus shall not apply to Market Making Trades (as hereinafter

2003 BCSECCOM 799

defined) by BMO Nesbitt Burns in Capital Shares and Preferred Shares;
and

- (B) in the case of the Legislation of each of the Jurisdictions other than Manitoba and Prince Edward Island, the prohibitions contained therein prohibiting trading in portfolio shares by persons or companies having information concerning the trading programs of mutual funds (the “Principal Trading Prohibitions”) shall not apply to BMO Nesbitt Burns in connection with the Principal Purchases (as hereinafter defined);

subject to certain conditions;

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

AND WHEREAS, unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 Definitions;

AND WHEREAS the Issuer and BMO Nesbitt Burns have represented to the Decision Makers as follows:

1. BMO Nesbitt Burns was incorporated under the laws of Canada, is an indirect, majority-owned subsidiary of Bank of Montreal, is registered under the Legislation as a dealer in the categories of “broker” and “investment dealer” and is a member of the Investment Dealers Association of Canada and is a shareholder of TSX Group Inc. (the “TSX”).
2. BMO Nesbitt Burns is the promoter of the Issuer and will be establishing a credit facility in favour of the Issuer in order to facilitate the acquisition of the Portfolio Investments (as defined below) by the Issuer.
3. The Issuer was incorporated on October 24, 2003 under the laws of the Province of Ontario and is authorized to issue an unlimited number of Class A Shares.
4. The Issuer has filed with the Decision Maker of each province of Canada a preliminary prospectus dated October 27, 2003 and an amended and restated preliminary prospectus dated October 31, 2003 (collectively, the “Preliminary Prospectus”) in respect of the Offering of Capital Shares and Preferred Shares to the public in such provinces.

2003 BCSECCOM 799

5. The Issuer intends to become a reporting issuer under the Legislation by filing a final prospectus (the “Final Prospectus”) relating to the Offering. Prior to the filing of the Final Prospectus, the Articles of Incorporation of the Issuer will be amended so that the authorized capital of the Issuer will consist of an unlimited number of Capital Shares, an unlimited number of Preferred Shares, an unlimited number of Non-Voting Shares and an unlimited number of Class A Shares, having the attributes described in the Preliminary Prospectus.
6. Application will be made to list the Capital Shares and Preferred Shares on the TSX.
7. The Class A Shares will be the only voting shares in the capital of the Issuer. At the time of filing the Final Prospectus, there will be 100 Class A Shares issued and outstanding. All of the issued and outstanding Class A Shares of the Issuer will be owned by 1066918 Ontario Inc., the voting shares of which are owned equally by The CBFi Corporation (all of the common shares of which are owned by Bo Pelech, who will be appointed a director of the Issuer) and BMO Nesbitt Burns. All of the issued and outstanding Non-Voting Shares of the Issuer will be owned by BMO Nesbitt Burns.
8. The Issuer has a board of directors which currently consists of three directors, all of whom are employees of BMO Nesbitt Burns. The offices of President/Chief Executive Officer and Chief Financial Officer and Secretary of the Issuer are held by employees of BMO Nesbitt Burns. Prior to the filing of the final prospectus, two additional directors, each of whom will be independent, will be appointed to the Board of Directors.
9. Pursuant to an agency agreement (the “Agency Agreement”) to be made between the Issuer and BMO Nesbitt Burns and such other agents as may be appointed after the date of this application (collectively, the “Agents” and individually, an “Agent”), the Issuer will appoint the Agent(s), as its agent(s), to offer the Capital Shares and Preferred Shares of the Issuer on a best efforts basis.
10. The Issuer is considered to be a mutual fund as defined in the Legislation. Since the Issuer does not operate as a conventional mutual fund, it has concurrently herewith made an application for a waiver from certain requirements of National Instrument 81-102 – Mutual Funds.
11. The Issuer is a passive investment company whose principal undertaking will be to invest the net proceeds of the Offering in a portfolio of common

2003 BCSECCOM 799

shares of Dofasco Inc., Brascan Corporation, Alcan Inc., Noranda Inc., Canadian Pacific Railway Ltd., Potash Corp of Saskatchewan Inc. and Domtar Inc. and income fund units of Fording Canadian Coal Trust (collectively, the “Portfolio Investments”) in order to generate fixed cumulative preferential dividends for holders of the Preferred Shares and to enable holders of the Capital Shares to participate in any capital appreciation in the Portfolio Investments and to benefit from any increase in the dividends and distributions paid on the Portfolio Investments. The purpose of the Issuer is to provide a vehicle through which different investment objectives with respect to participation in Portfolio Investments may be satisfied.

12. The Final Prospectus will disclose the acquisition cost to the Issuer of the Portfolio Investments and dividend, income fund distributions, and trading history of the Portfolio Investments.
13. The Portfolio Investments are listed and traded on the TSX.
14. The Issuer is not, and will not upon the completion of the Offering be, an insider of any of the issuers of the Portfolio Investments within the meaning of the Legislation.
15. BMO Nesbitt Burns does not have knowledge of a material fact or material change with respect to any of the Portfolio Investments that has not been generally disclosed.
16. BMO Nesbitt Burns’ economic interest in the Issuer and in the material transactions involving the Issuer are disclosed in the Preliminary Prospectus and will be disclosed in the Final Prospectus under the heading “Interest of Management and Others in Material Transactions” and include the following:
 - (a) agency fees with respect to the Offering;
 - (b) an administration fee under the Administration Agreement (as defined below);
 - (c) commissions in respect of the acquisition of Portfolio Investments, the disposition of Portfolio Investments to fund a redemption or retraction, or the purchase for cancellation, of the Capital Shares and Preferred Shares or if necessary, to fund a portion of the fixed dividends on the Preferred Shares;

2003 BCSECCOM 799

- (d) interest and reimbursement of expenses, in connection with the acquisition of Portfolio Investments; and
 - (e) amounts in connection with Principal Purchases (as described in paragraph 23 below).
- 17. The net proceeds from the sale of the Capital Shares and the Preferred Shares under the Final Prospectus, (after deducting the Agent(s)' fees, expenses of the issue and the Issuer's interest and other expenses relating to the acquisition of the Portfolio Investments) will be used by the Issuer to:
 - (a) pay the acquisition cost (including any related costs or expenses) of the Portfolio Investments; and
 - (b) pay the initial fee payable to BMO Nesbitt Burns for its services under the Administration Agreement (as defined below).
- 18. All Capital Shares and Preferred Shares outstanding on a date approximately five years from the closing of the Offering will be redeemed by the Issuer on such date (the "Redemption Date"). The Capital Shares and the Preferred Shares will be retractable at the option of the holder and redeemable at the option of the Issuer as described in the Preliminary Prospectus.
- 19. Pursuant to an agreement (the "Securities Purchase Agreement") to be entered into between the Issuer and BMO Nesbitt Burns, BMO Nesbitt Burns will purchase, as agent for the benefit of the Issuer, Portfolio Investments in the market on commercial terms or from non-related parties with whom BMO Nesbitt Burns and the Issuer deal at arm's length.
- 20. Under the Securities Purchase Agreement, BMO Nesbitt Burns may receive commissions at normal rates in respect of its purchase of Portfolio Investments, as agent on behalf of the Issuer, and the Issuer will pay any carrying costs or other expenses incurred by BMO Nesbitt Burns, on behalf of the Issuer, in connection with its purchase of Portfolio Investments as agent on behalf of the Issuer.
- 21. It will be the policy of the Issuer to hold the Portfolio Investments and to not engage in any trading of the Portfolio Investments, except:
 - (a) to fund retractions or redemptions of Capital Shares and Preferred Shares;

2003 BCSECCOM 799

- (b) to fund the payment of the fixed dividends on the Preferred Shares;
or
 - (c) in certain other limited circumstances as described in the Preliminary Prospectus.
- 22. Pursuant to an administration agreement (the “Administration Agreement”) to be entered into, the Issuer will retain BMO Nesbitt Burns to administer the ongoing operations of the Issuer and will pay BMO Nesbitt Burns an administration fee equal to:
 - (a) a monthly fee of 1/12 of 0.15% of the market value of the Portfolio Investments; and
 - (b) any interest income earned by the Issuer from time to time excluding interest earned on any investment of surplus dividends or distributions received on the Portfolio Investments.
- 23. In connection with the services to be provided by BMO Nesbitt Burns to the Issuer pursuant to the Administration Agreement, BMO Nesbitt Burns may sell Portfolio Investments to fund retractions of Capital Shares and Preferred Shares prior to the Redemption Date, to fund the fixed dividends on Preferred Shares, and upon liquidation of the Portfolio Investments in connection with the final redemption of Capital Shares and Preferred Shares on the Redemption Date. These sales will be made by BMO Nesbitt Burns as agent on behalf of the Issuer. Subject to the receipt of the relief requested hereby, in certain circumstances such as where a small number of Capital Shares and Preferred Shares have been surrendered for retraction, BMO Nesbitt Burns may also purchase Portfolio Investments as principal (the “Principal Purchases”).
- 24. In connection with any Principal Purchases, BMO Nesbitt Burns will comply with the rules, procedures and policies of the applicable stock exchange of which it is a member and in accordance with orders obtained from all applicable securities regulatory authorities.
- 25. The Administration Agreement will provide that BMO Nesbitt Burns must take reasonable steps, such as soliciting bids from other market participants or such other steps as BMO Nesbitt Burns, in its discretion, considers appropriate after taking into account prevailing market conditions and other relevant factors, to enable the Issuer to obtain the best price reasonably available for the Portfolio Investments so long as the

2003 BCSECCOM 799

price obtained (net of all transaction costs, if any) by the Issuer from BMO Nesbitt Burns is more or at least as advantageous to the Issuer as the price which is available (net of all transaction costs, if any) through the facilities of the applicable stock exchange at the time of the trade.

26. BMO Nesbitt Burns will not receive any commissions from the Issuer in connection with Principal Purchases and, in carrying out the Principal Purchases, BMO Nesbitt Burns shall deal fairly, honestly and in good faith with the Issuer.
27. BMO Nesbitt Burns will be a significant maker of markets for Capital Shares and Preferred Shares, although it is not anticipated that BMO Nesbitt Burns will be appointed the registered pro-trader by the TSX with respect to the Issuer. As a result, BMO Nesbitt Burns will, from time to time, purchase and sell Capital Shares and Preferred Shares as principal and trade in such securities as agent on behalf of its clients, the primary purpose of such trades (the “Market Making Trades”) being to provide liquidity to the holders of Capital Shares and Preferred Shares. All trades made by BMO Nesbitt Burns as principal will be recorded daily by the TSX.
28. As BMO Nesbitt Burns indirectly owns 50% of the Class A Shares of the Issuer, BMO Nesbitt Burns controls the Issuer and consequently, each Market Making Trade will be a “distribution” or “distribution to the public” within the meaning of the Legislation.
29. By virtue of BMO Nesbitt Burns’ relationship with the Issuer, including the fact that three of the directors and officers of the Issuer are employees of BMO Nesbitt Burns and BMO Nesbitt Burns is the promoter of the Issuer, the Issuer is a connected issuer (or equivalent) and/or related issuer (or equivalent) of BMO Nesbitt Burns under the Legislation.

AND WHEREAS under the MRRS this Decision Document evidences the decision of each Decision Maker (collectively, the “Decision”);

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 pursuant to the Legislation is that:

- A. The Prospectus Requirements shall not apply to the Market Making Trades by BMO Nesbitt Burns in the Capital Shares and Preferred Shares

2003 BCSECCOM 799

provided that at the time of each Market Making Trade, BMO Nesbitt Burns and its affiliates do not beneficially own or have the power to exercise control or direction over a sufficient number of voting securities of the issuers of the Portfolio Investments, securities convertible into voting securities of the issuers of the Portfolio Investments, options to acquire voting securities of the issuers of the Portfolio Investments, or any other securities which provide the holder with the right to exercise control or direction over voting securities of the issuers of the Portfolio Investments which in the aggregate, permit BMO Nesbitt Burns to affect materially the control of the issuers of the Portfolio Investments and without limiting the generality of the foregoing, the beneficial ownership of or the power to exercise control or direction over securities representing in the aggregate 20% or more of the votes attaching to all the then issued and outstanding voting securities of the issuers of the Portfolio Investments shall, in the absence of evidence to the contrary, be deemed to affect materially the control of the issuers of the Portfolio Investments; and

- B. In each of the Jurisdictions other than Manitoba and Prince Edward Island, the Principal Trading Prohibitions shall not apply to BMO Nesbitt Burns in connection with the Principal Purchases.

DATED on this 24th day of November, 2003.

H. Lorne Morphy

Robert W. Korthals