

# 2005 BCSECCOM 214

April 4, 2005

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act s. 130 - Relief from certain self-dealing restrictions in Part 15 of the Act - A mutual fund wants relief from the principal trading prohibitions in s. 128 of the Act to enable persons having access to information concerning the investment program of the fund to purchase or sell securities comprising the portfolio of the mutual fund - the portfolio of the mutual fund is fixed; the portfolio is passively managed; the mutual fund will purchase the securities at a predetermined time and at no more than the ask price of the securities on the exchange where the securities are listed; independent directors of the mutual fund will approve all principal purchases

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 128, 130

In the Matter of  
the Securities Legislation  
of Ontario, British Columbia, Alberta, Saskatchewan, Newfoundland and  
Labrador, Nova Scotia and New Brunswick (the Jurisdictions)

and

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

and

In the Matter of Utility & Pipe Split Corp. (the Company)  
and Scotia Capital Inc. (the Filer)

## **MRRS Decision Document**

## **Background**

The local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions has received an application from the Company and the Filer for an exemption from the prohibition contained in the securities legislation of the Jurisdictions (the Legislation) prohibiting trading in portfolio securities by persons or companies having information concerning the trading programs of mutual funds (the Principal Trading Prohibitions), such that the Principal Trading Prohibitions shall not apply to the Filer in connection with its Principal Sales (as

## 2005 BCSECCOM 214

hereinafter defined) to, and Principal Purchases (as hereinafter defined) from, the Company (the Requested Relief);

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (i) the Ontario Securities Commission is the principal regulator for this application; and
- (ii) 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.

### **Representations**

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

### **The Company**

1. The Company was incorporated on February 28, 2005 under the *Business Corporations Act* (Ontario) and is authorized to issue an unlimited number of Class J Shares and an unlimited number of Class S Shares.
2. The Company has filed a preliminary prospectus dated March 2, 2005 (the "Preliminary Prospectus") with the securities regulatory authority in each of the provinces of Canada in respect of the offerings (the Offerings) of class A capital shares (the "Capital Shares") and class A preferred shares (the "Preferred Shares") to the public.
3. The Company is a passive investment company whose principal undertaking will be to invest the net proceeds of the Offerings in a portfolio (the "Portfolio") of common shares and units (the "Portfolio Securities") of nine publicly-listed utility and pipeline companies and income trusts, in order to generate fixed cumulative preferential distributions for the holders of the Preferred Shares and to enable the holders of Capital Shares to participate in any capital appreciation in the Portfolio Securities after payment of administrative and operating expenses of the Company. The Portfolio will consist of Atco Ltd., Emera Inc., Enbridge Inc., Fort Chicago Energy Partners L.P., Fortis Inc., Inter Pipeline Fund, Pembina Pipeline Income Fund, Terasen Inc. and TransCanada Corporation (collectively, the "Portfolio Companies"). It will be the policy of the Board of Directors of the Company to pay distributions on the Capital Shares in an amount equal to the distributions received by the Company on the Portfolio Securities minus the distributions payable on the Preferred Shares and all administrative and operating expenses of the Company.

## 2005 BCSECCOM 214

4. The Company is considered to be a mutual fund as defined in the Legislation, except in Québec. Since the Company does not operate as a conventional mutual fund, it has made application for a waiver from certain requirements of National Instrument 81-102 – Mutual Funds.
5. The Capital Shares and Preferred Shares will be retractable at any time at the option of the holder and redeemable at the option of the Company in the manner described in the Preliminary Prospectus.
6. It will be the policy of the Company to hold the Portfolio Securities and to not engage in any trading of the Portfolio Securities, except:
  - (i) to fund retractions or redemptions of Capital Shares and Preferred Shares;
  - (ii) following receipt of stock dividends on the Portfolio Securities;
  - (iii) in the event of a take-over bid for any of the Portfolio Securities;
  - (iv) if necessary, to fund any shortfall in distributions on the Preferred Shares;
  - (v) to meet obligations of the Company in respect of liabilities including extraordinary liabilities; or
  - (vi) certain other limited circumstances as described in the Preliminary Prospectus.
7. The Company intends to become a reporting issuer under the Legislation by filing a final prospectus (the “Final Prospectus”) relating to the Offerings. Prior to the filing of the Final Prospectus, the Articles of Incorporation of the Company will be amended so that the authorized capital of the Company will consist of an unlimited number of Capital Shares, an unlimited number of Preferred Shares, an unlimited number of Class B, Class C, Class D and Class E capital shares, issuable in series, an unlimited number of Class B, Class C, Class D and Class E preferred shares, issuable in series, an unlimited number of Class J Shares and an unlimited number of Class S Shares, each having the attributes set forth under the headings “Description of Share Capital” and “Details of the Offerings” commencing on page 15 of the Preliminary Prospectus.

## 2005 BCSECCOM 214

8. The Class J Shares are currently the only voting shares in the capital of the Company. At the time of filing the Final Prospectus, there will be 150 Class J Shares issued and outstanding. Utility & Pipe Split Holdings Corp. (“Holdings”) will own all of the issued and outstanding Class J Shares of the Company. The independent directors of the Company will own all the common shares of Holdings (the “Holdings Shares”).
9. All of the Class J Shares of the Company will be lodged in escrow with a Canadian trust company (“Trustco”) pursuant to an agreement dated the closing date of the Offerings among Holdings, Trustco and the Company, and all of the Holdings Shares will be lodged in escrow with Trustco pursuant to an agreement to be dated the closing date of the Offerings among the holders thereof, Holdings and Trustco (collectively, the “Escrow Agreements”). Under the Escrow Agreements, none of the Class J Shares or the Holdings Shares may be disposed of or dealt with in any manner until all of the Capital Shares and Preferred Shares have been retracted or redeemed, without the express consent, order or direction of the Commission, except that the Holdings Shares may be pledged to a Canadian chartered bank as collateral to secure a bona fide bank debt.
10. The Company has a Board of Directors which currently consists of three directors. All of the directors are employees of the Filer. Also, the offices of President/Chief Executive Officer and Chief Financial Officer/Secretary of the Company are held by employees of the Filer. At least two additional, independent directors will be appointed to the Board of Directors of the Company prior to the filing of the Final Prospectus.
11. The Portfolio Securities are listed and traded on the Toronto Stock Exchange (“TSX”).
12. The Company is not, and will not upon the completion of the Offerings be, an insider of any of the Portfolio Companies within the meaning of the Legislation.

### **The Offerings**

13. The net proceeds from the sale of the Capital Shares and Preferred Shares under the Final Prospectus, after payment of commissions to the Agents (as hereinafter defined), expenses of issue and carrying costs relating to the acquisition of the Portfolio Securities, will be used by the Company to: (i) pay the acquisition cost (including any related costs or expenses) of the Portfolio Securities; and (ii) pay the initial fee payable to the Filer for its services under the Administration Agreement (as hereinafter defined).

## 2005 BCSECCOM 214

14. The Final Prospectus will disclose the acquisition cost to the Company of the Portfolio Securities and selected financial information and dividend and trading history of the Portfolio Securities.
15. Application will be made to list the Capital Shares and Preferred Shares on the TSX.
16. All Capital Shares and Preferred Shares outstanding on a date approximately five years from the closing of the Offerings will be redeemed by the Company on such date (the “Redemption Date”).

### **Scotia Capital Inc. (the “Filer”)**

17. The Filer was incorporated under the laws of the Province of Ontario and is a direct, wholly-owned subsidiary of The Bank of Nova Scotia. The Filer 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 the TSX.
18. The Filer is the promoter of the Company and will be establishing a credit facility in favor of the Company in order to facilitate the acquisition of Portfolio Securities by the Company.
19. Pursuant to an agreement (the “Agency Agreement”) to be made between the Company and the Filer, BMO Nesbitt Burns Inc., National Bank Financial Inc., TD Securities Inc., HSBC Securities (Canada) Inc., Canaccord Capital Corporation, Desjardins Securities Inc., Dundee Securities Corporation, First Associates Investments Inc., Raymond James Ltd. and Wellington West Capital Inc. (collectively, the “Agents” and individually, an “Agent”), the Company will appoint the Agents, as its agents, to offer the Capital Shares and Preferred Shares of the Company on a best efforts basis and the Final Prospectus qualifying the Offering will contain a certificate signed by each of the Agents in accordance with the Legislation.
20. Pursuant to an administration agreement (the “Administration Agreement”) to be entered into between the Filer and the Company, the Company will retain the Filer to administer the ongoing operations of the Company and will pay the Filer a quarterly fee of 1/4 of 0.20 % of the market value of the Portfolio Securities held by the Company.
21. The Filer’s economic interest in the Company and in the material transactions involving the Company 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:

## 2005 BCSECCOM 214

- (a) agency fees with respect to the Offering;
- (b) an administration fee under the Administration Agreement;
- (c) commissions in respect of the acquisition of Portfolio Securities, the disposition of Portfolio Securities to fund a redemption, retraction or purchase for cancellation of the Capital Shares and Preferred Shares;
- (d) interest and reimbursement of expenses, in connection with the acquisition of Portfolio Securities; and
- (e) amounts in connection with Principal Sales and Principal Purchases (as described in paragraphs 22 and 27 below).

### **The Principal Trades**

22. Pursuant to an agreement (the “Securities Purchase Agreement”) to be entered into between the Company and the Filer, the Filer will purchase, as agent for the benefit of the Company, Portfolio Securities in the market on commercial terms or from non-related parties with whom the Filer and the Company deal at arm’s length. Subject to receipt of all necessary regulatory approvals, the Filer may, as principal, sell Portfolio Securities to the Company (the “Principal Sales”). The aggregate purchase price to be paid by the Company for the Portfolio Securities (together with carrying costs and other expenses incurred in connection with the purchase of Portfolio Securities) will not exceed the net proceeds from the Offerings.
23. Under the Securities Purchase Agreement, the Filer may receive commissions at normal market rates in respect of its purchase of Portfolio Securities, as agent on behalf of the Company, and the Company will pay any carrying costs or other expenses incurred by the Filer, on behalf of the Company, in connection with its purchase of Portfolio Securities as agent on behalf of the Company. In respect of any Principal Sales made to the Company by the Filer as principal, the Filer may realize a financial benefit to the extent that the proceeds received from the Company exceed the aggregate cost to the Filer of such Portfolio Securities. Similarly, the proceeds received from the Company may be less than the aggregate cost to the Filer of the Portfolio Securities and the Filer may realize a financial loss, all of which is disclosed in the Preliminary Prospectus and will be disclosed in the Final Prospectus.
24. The Preliminary Prospectus discloses and the Final Prospectus will disclose that any Principal Sales will be made in accordance with the rules of the

## 2005 BCSECCOM 214

applicable stock exchange and the price paid by the Filer (inclusive of all transaction costs, if any) will not be greater than the price which would have been paid (inclusive of all transaction costs, if any) if the acquisition had been made through the facilities of the principal stock exchange on which the Portfolio Securities are listed and posted for trading at the time of the purchase from the Filer.

25. The Filer will not receive any commissions from the Company in connection with the Principal Sales and all Principal Sales will be approved by the independent directors of the Company. In carrying out the Principal Sales, the Filer shall deal fairly, honestly and in good faith with the Company.
26. For the reasons set forth in paragraphs 22 and 23 above, and the fact that no commissions are payable to the Filer in connection with the Principal Sales, in the case of the Principal Sales, the interests of the Company and the shareholders of the Company may be enhanced by insulating the Company from price increases in respect of the Portfolio Securities.
27. In connection with the services to be provided by the Filer to the Company pursuant to the Administration Agreement, the Filer may sell Portfolio Securities to fund retractions of Capital Shares and Preferred Shares prior to the Redemption Date and upon liquidation of the Portfolio Securities in connection with the final redemption of Capital Shares and Preferred Shares on the Redemption Date. These sales will be made by the Filer as agent on behalf of the Company, but in certain circumstances, such as where a small number of Capital Shares and Preferred Shares have been surrendered for retraction, the Filer may purchase Portfolio Securities as principal (the "Principal Purchases") subject to receipt of all regulatory approvals.
28. In connection with any Principal Purchases, the Filer 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. The Preliminary Prospectus discloses and the Final Prospectus will disclose that the Filer may realize a gain or loss on the resale of such securities.
29. The Administration Agreement will provide that the Filer must take reasonable steps, such as soliciting bids from other market participants or such other steps as the Filer, in its discretion, considers appropriate after taking into account prevailing market conditions and other relevant factors, to enable the Company to obtain the best price reasonably available for the Portfolio Securities so long as the price obtained (net of all transaction costs, if any) by the Company from the Filer is at least as advantageous to the Company as the

## 2005 BCSECCOM 214

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.

30. The Filer will not receive any commissions from the Company in connection with Principal Purchases and all Principal Purchases will be approved by the independent directors of the Company. In carrying out the Principal Purchases, the Filer shall deal fairly, honestly and in good faith with the Company.
31. At the time of making Principal Sales and/or Principal Purchases, the Filer will not have any knowledge of a material fact or material change with respect to the Portfolio Companies that has not been generally disclosed.

### **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.

Robert L. Shirriff  
Commissioner

Wendell S. Wigle  
Commissioner

ONTARIO SECURITIES COMMISSION