

## 2002 BCSECCOM 396

### **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications – relief from annual financial statement requirements, interim financial statement requirements, material change requirements, proxy requirements, insider reporting requirements, AIF requirement, Canadian GAAP requirement, Canadian GAAS reconciliation requirement and independent underwriter requirement in connection with wholly-owned Canadian subsidiary of MJDS eligible U.S. issuer proposing to issue approved-rating debt, guaranteed by U.S. parent, using a short form prospectus

### **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c.418, ss. 85, 87, 91, 119(2) (b)

*Securities Rules*, B.C. Reg 194/97, ss. 144, 145, 149, 184(2)

National Instrument 33-105 *Short Form Prospectus Distributions*, s. 15.1

National Instrument 44-101 *Underwriting Conflicts*, ss. 2.1, 5.1

### **IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH COLUMBIA, ALBERTA, SASKATCHEWAN, MANITOBA, ONTARIO, QUÉBEC, 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 MERRILL LYNCH & CO., INC., MERRILL LYNCH CANADA FINANCE COMPANY AND MERRILL LYNCH CANADA INC.**

### **MRRS DECISION DOCUMENT**

**WHEREAS** the local securities regulatory authority or regulator (the "Decision Maker") in each of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia, Newfoundland and Labrador and Prince Edward Island (the "Jurisdictions") has received an application from Merrill Lynch & Co., Inc. ("ML&Co"), Merrill Lynch Canada Finance Company (the "Issuer") and Merrill Lynch Canada Inc. ("ML Canada") (collectively, the "Applicants") for a decision pursuant to the securities legislation of the Jurisdictions (the "Legislation") that the Applicants be exempted from the following requirements of the Legislation:

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- (a) the requirement that the Issuer file and send to its security holders audited annual financial statements or annual reports, where applicable, and annual management's discussion and analysis ("MD&A") (collectively, the "Annual Financial Statement Requirements");
- (b) the requirement that the Issuer file and send to its security holders unaudited interim financial statements and interim MD&A (collectively, the "Interim Financial Statement Requirements");
- (c) the requirement that the Issuer issue and file press releases with respect to material changes and file material change reports (collectively, the "Material Change Requirements");
- (d) the requirement that the Issuer satisfy the shareholder communication, proxy and proxy solicitation requirements contained in National Policy 41 ("NP 41"), including the requirement to file an information circular or report in lieu thereof annually (the "Proxy Requirements");
- (e) the requirement that the insiders of the Issuer file insider reports (the "Insider Reporting Requirements");
- (f) the requirement that the Issuer file an annual information form with the Decision Makers in the provinces of Ontario, Québec and Saskatchewan (the "AIF Requirement");
- (g) the requirement pursuant to National Instrument 44-101 ("NI 44-101") to reconcile financial statements included in a prospectus and prepared in accordance with generally accepted accounting principles ("GAAP") of a foreign jurisdiction to Canadian GAAP (the "Canadian GAAP Requirement");
- (h) the requirement to provide, where financial statements are audited in accordance with generally accepted auditing standards ("GAAS") of a foreign jurisdiction, a statement by the auditor (a) disclosing any material differences in the form and content of the auditor's report as compared to a Canadian auditor's report and (b) confirming that the auditing standards of the foreign jurisdiction are substantially equivalent to Canadian GAAS (the "Canadian GAAS Reconciliation Requirement"); and
- (i) the requirement in National Instrument 33-105 ("NI 33-105") mandating a specified level of independent underwriter involvement in connection with the distribution of securities of a related issuer of an underwriter (the "Independent Underwriter Requirement").

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**AND WHEREAS** pursuant to the Mutual Reliance Review System for Exemptive Relief Applications (the "System"), the Ontario Securities Commission is the principal regulator for this application;

**AND WHEREAS** the Applicants have represented to the Decision Makers that:

1. ML&Co was incorporated under the laws of Delaware on March 27, 1973 and has been a reporting issuer in each of the Provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Québec and Nova Scotia for greater than 12 months, beginning in Nova Scotia on August 26, 1998 and most recently becoming a reporting issuer in Alberta as of October 22, 1999;
2. ML&Co is a reporting company under the *Securities Exchange Act* of 1934, as amended (the "1934 Act") and has filed with the Securities and Exchange Commission (the "SEC") annual and quarterly reports on Form 10-K and Form 10-Q, respectively, since the date it first became a reporting company, in accordance with the filing obligations set out in the 1934 Act;
3. As at January 16, 2002, ML&Co had approximately U.S.\$77.2 billion in long term debt outstanding, all of which is currently rated "AA-" by Standard & Poor's Corporation, "Aa3" by Moody's Investors Service, Inc., "AA(low)" by Dominion Bond Rating Service Limited and "AA" by Fitch IBCA, Inc.;
4. The Issuer was incorporated under the laws of Nova Scotia on August 25, 1999 and is an indirect wholly-owned subsidiary of ML&Co;
5. The Issuer was incorporated solely for the purpose of undertaking financing activities, including the issuance of medium term notes ("Notes"), to raise funds for ML&Co's Canadian operations, and will not carry on any operating or other business activities;
6. The Issuer became a reporting issuer or the equivalent in the Jurisdictions by virtue of filing a short form shelf prospectus dated November 8, 1999 with the Decision Makers in connection with the establishment in Canada of a medium term note program under the provisions of former National Policy 47 and former National Policy 44, which program was permitted to lapse on December 8, 2001;
7. ML Canada was continued and amalgamated under the laws of Canada on August 26, 1998, is an indirect wholly-owned subsidiary of ML&Co and is not a reporting issuer or the equivalent in any Canadian province;

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8. ML Canada is registered as a dealer in the categories of "broker" and/or "investment dealer" under the securities legislation of each of the Jurisdictions (and each of the territories of Canada) and is a member of the Investment Dealers Association of Canada;
9. The Issuer proposes to establish a new medium term note program to raise up to Cdn. \$2,000,000,000 in Canada through the issuance of Notes (the "Offering") from time to time over a twenty-five month period pursuant to NI 44-101 and National Instrument 44-102 (collectively, the "Shelf Requirements");
10. The Notes will be fully and unconditionally guaranteed by ML&Co as to payment of principal, interest and all other amounts due thereunder. All Notes will have an approved rating (as defined in NI 44-101) and will be rated by a recognized security evaluation agency in one of the categories determined by the Commission des valeurs mobilières du Québec (an "Approved Rating");
11. ML&Co satisfies the criteria set forth in paragraph 3.1(a) of National Instrument 71-101 ("NI 71-101") and is eligible to use the multi-jurisdictional disclosure system ("MJDS") described therein for the purpose of distributing investment grade rated debt ("Approved Debt") in Canada based on compliance with U.S. prospectus requirements with certain additional Canadian disclosure and with the benefit of the relief from compliance with certain continuous and timely disclosure, shareholder communication, proxy solicitation and insider reporting requirements afforded to MJDS issuers;
12. Except for the fact that the Issuer is not incorporated under U.S. law, the Offering would, in substance, comply with the alternative eligibility criteria for offerings of Approved Debt under the MJDS as set forth in paragraph 3.2(a) of NI 71-101;
13. In connection with the Offering:
  - (a) a short form base shelf prospectus and a prospectus supplement or supplements (the "Prospectus") will be prepared pursuant to the Shelf Requirements, with the disclosure required by item 12 of Form 44-101F3 being addressed by incorporating by reference ML&Co's public disclosure documents, including ML&Co's annual report on Form 10-K, and the disclosure required by Item 7 of Form 44-101F3 being addressed by fixed charge coverage ratio disclosure with respect to ML&Co in accordance with U.S. requirements;
  - (b) the Prospectus will include all material disclosure concerning the Issuer;

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- (c) the Prospectus will incorporate by reference disclosure made in ML&Co's most recent annual report on Form 10-K filed under the 1934 Act, together with its most recent quarterly report on Form 10-Q and current reports on Form 8-K relating to results of operations and interim financial information filed subsequently under the 1934 Act, will incorporate by reference any documents of the foregoing type filed after the date of the Prospectus and prior to termination of the Offering and will state that purchasers of the Notes will not receive separate continuous disclosure information regarding the Issuer;
  - (d) the consolidated annual and interim financial statements of ML&Co and its subsidiaries that will be included in or incorporated by reference into the Prospectus are prepared in accordance with U.S. GAAP and otherwise comply with the requirements of U.S. law, and in the case of audited annual financial statements, such financial statements are audited in accordance with U.S. GAAS;
  - (e) ML&Co will fully and unconditionally guarantee payment of the principal and interest on the Notes, together with any other amounts that may be due under any provisions of the trust indenture relating to the Notes, such that the Note holders shall be entitled to receive payment from ML&Co within 15 days of any failure by the Issuer to make a payment as stipulated;
  - (f) the Notes will have an Approved Rating; and
  - (g) ML&Co will sign the Prospectus as credit supporter;
14. ML&Co will undertake to file with the Decision Makers all documents that it files under sections 13 (other than sections 13(d), (f) and (g) which relate, inter alia, to holdings by ML&Co of securities of other public companies) and 15(d) of the 1934 Act (provided that the 8-Ks to be filed will include only such reports relating to results of operations and material changes of ML&Co) until such time as the Notes are no longer outstanding;
15. In the circumstances, if the Issuer were to effect the Offering under the MJDS, it would be unnecessary for it to reconcile to Canadian GAAP its financial statements included in or incorporated by reference into the Prospectus in connection with the Offering and to provide a statement from its auditor pursuant to the GAAS Reconciliation Requirement;
16. The Issuer is considered to be a "related issuer" and is also a "connected issuer" (as such terms are defined in NI 33-105) of ML Canada in connection

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with the Offering because both ML Canada and the Issuer are indirect wholly-owned subsidiaries of ML&Co;

17. The Issuer proposes to offer Notes from time to time through an alternative syndicate structure pursuant to which ML Canada would act as an underwriter (either on a firm commitment or an agency basis) in respect of up to 49% of the distribution (based on either the dollar value of the distribution or the total management fees for the distribution, as applicable) for certain issuances of Notes by the Issuer pursuant to the Offering (the "Minority Offerings");
18. Pursuant to NI 33-105, ML Canada is permitted to act as an underwriter in connection with the distribution of up to 80% of the distribution (based on either the dollar value of the distribution or the total management fees for the distribution, as applicable) for each Offering by the Issuer provided that an independent underwriter that is not a related issuer or a connected issuer (an "Independent Underwriter") distributes a percentage that is equal to the lesser of (i) the largest percentage of the distribution underwritten by a non-Independent Underwriter or (ii) 20% of the distribution (based on either the dollar value of the distribution or the total management fees for the distribution, as applicable);
19. The Issuer expects that, based on ML&Co's U.S. experience, not less than 90% of each Minority Offering made under the alternative syndicate structure, in which the minimum subscription will be \$500,000, will be purchased by Canadian institutions, pension funds, endowment funds or mutual funds, who can be expected to be knowledgeable about the appropriate pricing parameters for securities of the type offered under the Minority Offerings and to independently determine the appropriateness of the price in making a purchase decision with respect to any such Minority Offering;
20. Other than the proceeds of the Offering, which are intended for general corporate purposes (including ML&Co's Canadian operations), the only financial benefits which ML Canada will receive as a result of each Offering are the normal arm's length underwriting commissions and reimbursement of expenses associated with a public offering in Canada and, because the net proceeds from the sale of Notes may be loaned to or otherwise invested in various affiliates of the Issuer or of ML&Co, ML Canada may also receive inter-company financing;
21. In connection with the proposed distribution by ML Canada of the Notes for each Minority Offering under the alternative syndicate structure:

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- (a) the Prospectus and each Prospectus Supplement of the Issuer will be prepared and filed in accordance with the Shelf Requirements, and will contain the information required to be disclosed pursuant to Appendix C of NI 33-105, including:
  - (i) on the front page of each such document:
    - (A) a statement in bold type that the Issuer is a connected issuer and a related issuer of ML Canada in connection with the distribution,
    - (B) a statement that the Issuer is a connected issuer and a related issuer of ML Canada based on the common ownership by ML&Co of ML Canada and the Issuer,
    - (C) a cross-reference to the applicable section in the body of the document where further information concerning the relationship between the Issuer and ML Canada is provided, and
    - (D) a statement that the minimum subscription for each subscriber of Notes under the Offering is \$500,000;
  - (ii) in the body of each such document:
    - (A) a statement that the Issuer is a connected issuer and a related issuer of ML Canada in connection with the distribution,
    - (B) disclosure regarding the basis on which the Issuer is a connected issuer and a related issuer of ML Canada, including details of the common ownership by ML&Co of ML Canada and the Issuer, and other aspects of the relationship between ML Canada and the Issuer,
    - (C) disclosure regarding the involvement of ML Canada and of each related issuer of ML Canada in the decision to distribute the Notes being offered and the determination of the terms of the distribution, including disclosure concerning whether the issue was required, suggested or consented to by ML Canada or a related issuer of ML Canada and, if so, on what basis,
    - (D) details of the financial benefits described in paragraph 20 hereof which ML Canada or a related issuer of ML Canada will receive, directly or indirectly, from the applicable Offering; and

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- (E) details of the method of distribution under the applicable Offering, including the name of any underwriter involved in such Offering and the amount of any underwriting fee, discount or commission;
- (b) one or more Independent Underwriters will underwrite, in the aggregate, at least 51% of such Offering (based on either the dollar value of the distribution or the total management fees for the distribution, as applicable) will participate in the structuring and pricing of the distribution of such Offering and in the due diligence activities performed by the underwriters for the distribution, and will sign a Prospectus certificate required by the Legislation; and
- (c) each Prospectus Supplement will, to the extent not disclosed in the Prospectus, identify the Independent Underwriters and disclose the role of the Independent Underwriters in the structuring and pricing of the distribution of the applicable Offering and in the due diligence activities performed by the underwriters for the distribution.

**AND WHEREAS** pursuant to the System this MRRS 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 in connection with the Offering (and, for greater clarity, provided that the requirements under the Legislation shall continue to apply to the Issuer in respect of any securities offered by the Issuer other than pursuant to the Offering or pursuant to separate relief granted by the Decision Makers) is that:

1. the Annual Financial Statement Requirements shall not apply to the Issuer, provided that (i) ML&Co files with the Decision Makers two copies of the annual reports on Form 10-K filed by it with the SEC promptly after they are filed with the SEC; and (ii) such documents are provided to security holders whose last address as shown on the books of the Issuer is in Canada ("Canadian security holders") in the manner and at the time as would be required by applicable U.S. law if the Canadian security holders were holders of debt securities of ML&Co resident in the U.S.;
2. the Interim Financial Statement Requirements shall not apply to the Issuer, provided that (i) ML&Co files with the Decision Makers two copies of the



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quarterly reports on Form 10-Q filed by it with the SEC promptly after they are filed with the SEC; and (ii) such documents are provided to Canadian security holders in the manner and at the time as would be required by applicable U.S. law if the Canadian security holders were holders of debt securities of ML&Co resident in the U.S.;

3. the Material Change Requirements shall not apply to the Issuer, provided that
  - (i) ML&Co files with the Decision Makers two copies of each of the current reports on Form 8-K relating to the financial condition of, or disclosing a material change in the affairs of, ML&Co which are filed by it with the SEC promptly after they are filed with the SEC;
  - (ii) ML&Co complies with the requirements of the New York Stock Exchange in respect of making public disclosure of material information on a timely basis and forthwith issues in each Jurisdiction any press release issued in this regard;
  - (iii) ML&Co forthwith issues in each Jurisdiction and files any press release which discloses a material change in ML&Co's affairs; and
  - (iv) if there is a material change in respect of the business, operations or capital of the Issuer that is not a material change in respect of ML&Co, the Issuer will comply with the requirements of the Legislation to issue a press release and file a material change report notwithstanding that the change may not be a material change in respect of ML&Co;
4. the Proxy Requirements shall not apply to the Issuer, provided that
  - (i) ML&Co complies with the requirements of the 1934 Act and the rules and regulations thereunder relating to proxy statements, proxies and proxy solicitations in connection with any meetings of its note holders;
  - (ii) ML&Co files with the Decision Makers two copies of the proxies and proxy solicitation materials prepared in connection with any meetings of ML&Co's note holders and filed by it with the SEC promptly after they are filed with it by the SEC;
  - (iii) such documents are provided to Canadian security holders in the manner and at the time as would be required by applicable U.S. law if

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the Canadian security holders were holders of debt securities of ML&Co resident in the U.S.; and

5. the Insider Reporting Requirements shall not apply to insiders of the Issuer, provided that each insider (as defined in the Legislation) files with the SEC, on a timely basis, the reports, if any, required to be filed with the SEC pursuant to subsection 16(a) of the 1934 Act and the rules and regulations thereunder;

for so long as

- (i) the Notes maintain an Approved Rating;
- (ii) ML&Co remains the direct or indirect sole beneficial owner of the voting shares, and any securities of the Issuer other than debt securities which are offered to the public, in each case as the same may be issued and outstanding from time to time;
- (iii) ML&Co maintains a class of securities registered pursuant to section 12 of the 1934 Act;
- (iv) ML&Co continues to satisfy the criteria set forth in paragraph 3.1 of NI 71-101 (or any successor provision) and remains eligible to use MJDS (or any successor instrument) for the purpose of distributing Approved Debt in Canada based on compliance with U.S. prospectus requirements with certain additional disclosure;
- (v) the Issuer carries on no other business than set out in paragraph 5 hereof;
- (vi) ML&Co. continues to fully and unconditionally guarantee payment of the principal and interest on the Notes, together with any other amounts that may be due under any provisions of the trust indenture relating to the Notes, such that the Note holders shall be entitled to receive payment from ML&Co within 15 days of any failure by the Issuer to make a payment as stipulated; and
- (vii) all filing fees that would otherwise be payable by the Issuer in connection with the requirements described in paragraphs A to E, inclusive, are paid.

Paul Moore

Theresa McLeod

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**THE FURTHER DECISION** of the Decision Makers pursuant to the Legislation is that, in connection with the Offering, the AIF Requirement shall not apply to the Issuer, provided that (i) ML&Co complies with the AIF requirements of NI 44-101 as if it is the issuer; and (ii) the Applicants comply with all of the conditions in the Decisions above and below.

Margo Paul

**THE FURTHER DECISION** of the Decision Makers pursuant to the Legislation is that, in connection with the Offering (and, for greater clarity, provided that the requirements under the Legislation shall continue to apply to the Issuer in respect of any securities offered by the Issuer other than pursuant to the Offering or pursuant to separate relief granted by the Decision Makers), the Applicants be exempted from the Canadian GAAP Requirement and the Canadian GAAS Reconciliation Requirement provided that:

- (i) each of the Issuer and ML&Co complies with paragraph 13 above;
- (ii) the Issuer complies with all of the filing requirements and procedures set out in NI 44-101 except as varied by the Decision;
- (iii) ML&Co remains the direct or indirect beneficial owner of all of the issued and outstanding voting securities of the Issuer; and
- (iv) ML&Co continues to satisfy the criteria set forth in paragraph 3.1 of NI 71-101 (or any successor provision) and remains eligible to use MJDS (or any successor instrument) for the purposes of distributing Approved Debt in Canada based on compliance with U.S. prospectus requirements with certain additional Canadian disclosure.

Margo Paul

**THE FURTHER DECISION** of the Decision Makers of British Columbia, Alberta, Ontario, Québec, Nova Scotia, Prince Edward Island and Newfoundland and Labrador pursuant to the Legislation is that ML Canada shall be exempted from the independent underwriter requirements contained in NI 33-105 (or, in the case of Québec, the independent underwriter requirements contained in sections 236.1 and 237.1 of the Regulation Concerning Securities and the requirements of Décision générale – 33-105 A dated December 11, 2001; and, in the case of Newfoundland, the requirements of section 188(1)(b) of the regulations promulgated under the Newfoundland Securities Act, in each such case until such

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time as NI 33-105 has been adopted in Québec and Newfoundland, respectively) in respect of the Minority Offerings, provided that:

- (i) the Issuer complies with subparagraphs 21( a) and (c); and
- (ii) the Independent Underwriters participate in each proposed Minority Offering as stated in subparagraph 21(b) hereof.

Margo Paul

**DATED** this 3rd day of May, 2002.