

2004 BCSECCOM 167

Headnote

Mutual Reliance Review System for Exemptive Relief Applications – relief granted from prohibition against trading in portfolio securities by persons or companies having information concerning the trading programs of mutual funds - 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, and independent directors of the mutual fund will determine, prior to the purchase of the securities, that the terms and conditions (including the consideration to be paid) relating to the purchase of the securities are reasonable and in the best interests of the mutual fund

Applicable British Columbia Provisions

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

IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH COLUMBIA, ALBERTA, SASKATCHEWAN, ONTARIO, NOVA SCOTIA AND NEWFOUNDLAND AND LABRADOR

AND

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

AND

IN THE MATTER OF BNN SPLIT CORP., BNN INVESTMENTS LTD., EDPERPARTNERS LIMITED AND SCOTIA CAPITAL INC.

MRRS DECISION DOCUMENT

WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in each of British Columbia, Alberta, Saskatchewan, Ontario, Nova Scotia and Newfoundland and Labrador (the “Jurisdictions”) has received an application (the “Application”) from BNN Split Corp. (the “Company”) for a decision under the securities legislation (the “Legislation”) of the Jurisdictions that:

- (i) the prohibitions contained therein prohibiting trading in portfolio shares by persons or companies having information concerning the investment programs of mutual funds (the “Principal Trading Prohibitions”) shall not apply to BNN Investments Ltd. (“BNN Investments”), EdperPartners Limited (“EPL”) and Scotia Capital

2004 BCSECCOM 167

Inc. ("Scotia Capital") in connection with the purchase of Brascan Shares (as herein defined) in connection with the Proposed Offering (as herein described) of the Company; and

- (ii) the Application and this Decision Document be kept confidential until the earlier of the date of filing of the Preliminary Prospectus (as herein defined) or March 16, 2004.

AND WHEREAS under the Mutual Reliance Review System for Exemptive Relief Applications (the "System"), 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 Company has represented to the Decision Makers that:

1. The Company was incorporated under the laws of the Province of Ontario on July 12, 2001. The Company is a reporting issuer in each of the Jurisdictions and is not in default of any securities law requirements. The primary business undertaking of the Company is to invest in a portfolio of Class A Limited Voting Shares (the "Brascan Shares") of Brascan Corporation ("Brascan"). The Brascan Shares and any cash held by the Company from time to time are the only material assets of the Company.
2. The Company is considered to be a mutual fund as defined in the Legislation. However, since the Company does not operate as a conventional mutual fund, it received a waiver from certain requirements of National Instrument 81-102 in August of 2001.
3. The Company has a board of directors (the "Board") consisting of six directors. Two of the Company's directors are securityholders of EPL and one director is an employee of Brascan, while the remaining three directors are independent of EPL (the "Independent Directors").
4. The purpose of the Company is to provide a vehicle through which different investment objectives in respect of the Company's holding of Brascan Shares may be satisfied. This is accomplished through the issuance of capital shares ("Capital Shares") and preferred shares ("Preferred Shares") of the Company. Preferred Shares ("Class A Preferred Shares") were offered through an initial public offering in September of 2001. Concurrently with that offering, the Company issued, on an exempt basis, one Capital Share to BNN Investments (then named Canadian Express Ltd.) for each Preferred Share sold.

2004 BCSECCOM 167

5. The Company is authorized to issue an unlimited number of Capital Shares, Class A Preferred Shares, Class AA Preferred Shares (as herein defined) and Class A Voting Shares.
6. It is the policy of the Company to hold the Brascan Shares and to not engage in any trading of the Brascan Shares, except:
 - (a) to fund retractions or redemptions of Preferred Shares or Capital Shares; and
 - (b) in certain other limited circumstances as described in the final prospectus dated August 21, 2001 filed with all of the provinces of Canada.
7. The Company holds the Brascan Shares in order to generate fixed cumulative preferential dividends for the holders of the Preferred Shares, and to enable the holders of the Capital Shares to participate in any capital appreciation in the Brascan Shares held by the Company.
8. The Class A Preferred Shares of the Company are listed on the Toronto Stock Exchange ("TSX").
9. BNN Investments was incorporated under the laws of the Province of Ontario. BNN Investments is a reporting issuer in each of the Jurisdictions and is not in default of any securities law requirements. Its principal business mandate is to provide holders of its common shares with a leveraged investment in Brascan Shares. BNN Investments is the promoter of the Company and owns all of the outstanding Capital Shares and Class A Voting Shares of the Company.
10. EPL was incorporated under the laws of the Province of Ontario. EPL is a private company with less than 100 securityholders. EPL and its shareholders collectively own, directly or indirectly, approximately 30 million Brascan Shares, representing approximately 16% of the outstanding Brascan Shares, and own 100% of the Class B Limited Voting Shares of Brascan. EPL currently holds approximately 7% of the issued and outstanding common shares of BNN Investments.
11. Scotia Capital was incorporated under the laws of the Province of Ontario and is a direct, wholly-owned subsidiary of the Bank of Nova Scotia. Scotia Capital 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. Scotia Capital will be lending Brascan

2004 BCSECCOM 167

Shares to BNN Investments (see paragraph 18). Scotia Capital has no relationship with the Company.

12. No ongoing fees for services are paid by the Company to EPL, BNN Investments or Scotia Capital.

Issuance of New Preferred Shares

13. In August of 2003, shareholders of the Company approved a special resolution which amended the Company's articles of incorporation to give the Company the ability to issue additional Preferred Shares, subject to certain conditions intended to protect the holders of the Class A Preferred Shares, and Preferred Shares generally. The amendment created a new class of Preferred Shares issuable in series (the "Class AA Preferred Shares").
14. The new issue tests in the Company's articles of incorporation provide that additional Preferred Shares may be issued in order to purchase additional Brascan Shares, provided that in the determination of the Board such issuance would not, at the time of issuance:
- (a) cause an existing class or series of Preferred Shares to be downgraded by Dominion Bond Rating Service Limited (or a successor credit rating agency) to below Pfd-2;
 - (b) cause the Net Asset Value (as defined in the Company's articles), after giving effect to the purchase of additional Brascan Shares, to be less than 1.8 times the aggregate value of all the outstanding Preferred Shares after giving effect to the issuance of additional Preferred Shares where the value of such Preferred Shares shall be deemed to be \$25.00 per share; and
 - (c) cause the aggregate amount of annual dividends payable on all Preferred Shares, after giving effect to the issuance of additional Preferred Shares, to exceed (i) the aggregate amount of the ordinary dividends expected to be received in a year on the portfolio of shares held by the Company and any additional Brascan Shares to be purchased minus (ii) all expected administrative and operating expenses of the Company for such year.

Principal Trades

15. The Company now proposes to complete a transaction (the "Proposed Offering") in order to acquire additional Brascan Shares. Two concurrent transactions will occur:

2004 BCSECCOM 167

- (a) In the first transaction, Brascan Shares will be acquired by the Company from EPL.
 - (b) In the second transaction, Brascan Shares will be acquired by the Company from BNN Investments.
- 16. To fund the transaction with EPL, two new series of Preferred Shares will be issued: one series to the public ("Series 1 Shares") and one series on an exempt basis to EPL ("Series 2 Shares"). For this purpose, the Company will file a preliminary prospectus (the "Preliminary Prospectus") with all of the provinces of Canada. An application will be made to have the Series 1 Shares listed and traded on the TSX.
- 17. The price and the terms of the Series 1 Shares and Series 2 Shares will be determined through negotiation with the underwriters for the Proposed Offering, led by Scotia Capital. Series 1 Shares and Series 2 Shares will be issued at a price of \$25.00 per share and will have the terms described in the Preliminary Prospectus and the Company's (final) prospectus for the offering of the Series 1 Shares.
- 18. The consideration for the Brascan Shares purchased from EPL will be a combination of cash and Series 2 Shares. The consideration for the Brascan Shares purchased from BNN Investments will be cash. To effect this sale, BNN Investments will have previously borrowed the Brascan Shares under securities lending arrangements, expected to be entered into with Scotia Capital and EPL.
- 19. None of the Brascan Shares to be sold by EPL as principal to the Company have been acquired while EPL had access to information concerning the investment program of the Company.
- 20. The Company does not have the financial capacity to acquire Brascan Shares in the market prior to closing. The Proposed Offering provides the Company with certainty that a significant block of shares can be acquired at an appropriate price, and enables the Company to properly size the new issue of Series 1 Shares in accordance with the new issue tests in the Company's articles of incorporation. By purchasing from BNN Investments and EPL, the Company also ensures that no fees (whether to brokers, those providing financing or otherwise) will be payable by the Company in respect of the purchase of the Brascan Shares.

2004 BCSECCOM 167

21. BNN Investments, EPL and Scotia Capital will have access to information concerning the investment program of the Company.

Pricing of Brascan Shares

22. The Company will purchase Brascan Shares held by EPL and BNN Investments (and loaned by Scotia Capital and EPL) at no more than the ask price of a Brascan Share on the TSX on the day prior to signing the bid letter for the public offering of Series 1 Shares.
23. The price to be paid by the Company to EPL and BNN Investments for the Brascan Shares will be negotiated and agreed to among the parties prior to signing the bid letter for the public offering of Series 1 Shares. The exact number of Brascan Shares to be acquired by the Company will be determined at the time of the pricing of the Brascan Shares.
24. If the market price of the Brascan Shares declines between the date on which the price is set and the closing date of the Proposed Offering, when the proceeds thereof will be used to pay for the Brascan Shares to be acquired by BNN Investments, the resulting decline in the value of the Company's assets will be borne by BNN Investments as the sole holder of the Company's Capital Shares, which entitle the holder to residual rights to the assets of the Company upon liquidation.
25. No fees will be paid to EPL or BNN Investments for administration or otherwise with respect to the purchases of Brascan Shares and, in carrying out such trades, EPL and BNN Investments shall deal fairly, honestly and in good faith with the Company. Scotia Capital and EPL will receive traditional lending fees from BNN Investments under securities lending arrangements noted in paragraph 18 above. The Company will pay no fees in respect of these arrangements.

Transparency

26. The Company's (final) prospectus for the offering of the Series 1 Shares will disclose the market price of Brascan Shares as at the date immediately preceding the date of such prospectus. It will also disclose the acquisition cost of Brascan Shares that will be sold by EPL and BNN Investments to the Company in connection with the Proposed Offering, the fact that no fees are payable by the Company to BNN Investments, Scotia Capital or EPL in respect of the purchase of Brascan Shares, selected information with respect to the dividend and trading history of Brascan Shares, the fact that the Independent Directors of the Company have determined that the price to be

2004 BCSECCOM 167

paid for the Brascan Shares from EPL and BNN Investments is reasonable and in the best interests of the Company, as well as details of EPL's and BNN Investments' relationship to and economic interest in the Company.

27. The Proposed Offering will only be completed on terms that comply with the new issue tests in the Company's articles of incorporation that protect asset coverage, dividend coverage and the credit rating of the Company's Class A Preferred Shares, as described in paragraph 14 above.

Review by Independent Directors

28. The Independent Directors of the Company will determine, prior to the purchase of Brascan Shares from EPL and BNN Investments, that the terms and conditions (including the consideration to be paid) of the purchase of Brascan Shares from BNN Investments and EPL are reasonable and in the best interests of the Company.
29. The Company is not, and will not after its acquisition of Brascan Shares be, an insider of Brascan.
30. The acquisition of Brascan Shares represents the business judgment of the Board, uninfluenced by considerations other than the best interests of the Company.
31. In the absence of this decision (the "Decision"), BNN Investments, EPL and Scotia Capital are prohibited from selling Brascan Shares to the Company.

AND WHEREAS under 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 is that:

- (i) the Principal Trading Prohibitions shall not apply to BNN Investments, EPL, or Scotia Capital in connection with the purchase of Brascan Shares in connection with the Proposed Offering of the Company; and

2004 BCSECCOM 167

- (ii) the Application and this Decision Document shall be kept confidential until the earlier of the date of filing of the Preliminary Prospectus or March 16, 2004.

DATED March 12, 2004.

David A. Brown

Paul M. Moore