

# 2003 BCSECCOM 280

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Application – relief from the registration and prospectus requirements to allow a closed-end investment trust to issue units to existing unitholders under a distribution reinvestment plan subject to conditions – first trade relief for additional units subject to conditions in Multilateral Instrument 45-102

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C.1996, c. 418, ss. 48 and 76  
Multilateral Instrument 45-102 *Resale of Securities*

**IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH  
COLUMBIA, ALBERTA, SASKATCHEWAN, MANITOBA, ONTARIO,  
QUEBEC, NOVA SCOTIA, NEW BRUNSWICK, PRICE EDWARD  
ISLAND AND NEWFOUNDLAND AND LABRADOR**

**AND**

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

**IN THE MATTER OF ALEXIS NIHON REAL ESTATE INVESTMENT  
TRUST**

## **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, Québec, Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland, and Labrador (the "Jurisdictions") has received an application from Alexis Nihon Real Estate Investment Trust (the "REIT") for a decision, pursuant to the securities legislation of the Jurisdictions (the "Legislation") that the requirement contained in the Legislation to be registered to trade in a security and to file and obtain a receipt for a preliminary prospectus and a final prospectus (the "Registration and Prospectus Requirements") shall not apply to the distribution of units of the REIT pursuant to a distribution reinvestment plan to be implemented by the REIT (the "DRIP");

AND WHEREAS under the Mutual Reliance Review System for Exemptive Relief Applications (the "System"), the Commission des valeurs mobilières is the principal regulator for this application;

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AND WHEREAS the REIT has represented to the Decision Makers that:

1. The REIT is an unincorporated closed-end investment trust established under the laws of the Province of Québec pursuant to a contract of trust dated October 18, 2002, as it may be amended, supplemented and/or restated from time to time;
2. The REIT is not a “mutual fund” as defined in the Legislation because the unitholders of the REIT (the “Unitholders”) are not entitled to receive on demand an amount computed by reference to the value of a proportionate interest in the whole or in part of the net assets of the REIT as contemplated in the definition of “mutual fund” in the Legislation;
3. The REIT is currently a reporting issuer under the Legislation. On December 13, 2002, the REIT filed a prospectus (final) (the “Prospectus”) in connection with an initial public offering (the “Offering”) of its units (the “Units”) in each of the Jurisdictions. On the same date, the Commission des valeurs mobilières du Québec, on behalf of each Decision Maker, issued a receipt for the Prospectus;
4. Each Unit represents a proportionate undivided ownership interest in the REIT and entitles Unitholders to one vote at any meeting of Unitholders and to participate pro rata in the distributions of the REIT. The REIT is authorized to issue an unlimited number of Units. As of the date hereof, one Unit is issued and outstanding;
5. The REIT has applied to have the Units listed and posted for trading on The Toronto Stock Exchange (the “TSX”);
6. The REIT was establish to acquire from the Alexis Nihon group of companies, on or prior to the closing of the Offering, directly and through certain associates of the REIT, up to twenty-five (25) income-producing office, retail, industrial and mixed-use properties, including a multi-family residential property, all located in the Greater Montreal Area, as well as certain other assets related to such properties;
7. The objectives of REIT are to: (i) provide Unitholders with stable and growing cash distributions, payable monthly and to the maximum extent practicable, income tax-deferred, from the REIT’s investments in diversified portfolio of income-producing properties located primarily in the Greater Montreal Area; and (ii) to improve and maximize Unit value through future acquisitions of

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additional income-producing properties and the ongoing management of the REIT's properties or interests therein;

8. The REIT intends to distribute to Unitholders monthly on or about the 15<sup>th</sup> of each calendar month (other than January) and on December 31<sup>st</sup> of each calendar year, in cash, not less than 85% of its distributable income, for the preceding calendar month, and in the case of distributions made on December 31, for the calendar month then ended;
9. The REIT intends to establish a DRIP pursuant to which Canadian resident Unitholders may, at their option, invest cash distributions paid on their Units in additional Units (the "Additional Units") as an alternative to receiving cash distributions. The DRIP will not be available to Unitholders who are not Canadian residents;
10. Distributions due to participants in the DRIP (the "DRIP Participants") will be paid to National Bank Trust Inc. in its capacity as agent under the DRIP (in such capacity, the "DRIP Agent") and applied to purchase Additional Units. All Additional Units purchased under the DRIP will be purchased by the DRIP Agent directly from the REIT. The price of Additional Units purchased with such cash distributions will be the volume weighted average of the trading price for the Units on the TSX for the five trading days immediately preceding the relevant distribution date. DRIP Participants will receive a further bonus distribution payable in Units (the "Bonus Units", the Additional Units and the Bonus Units being hereinafter referred to as "Plan Units") equal in value to 3% of each distribution that is reinvested under the DRIP;
11. No commissions, service charges or brokerage fees will be payable by the DRIP Participants in connection with the DRIP and all administrative costs will be borne by the REIT;
12. The Plan Units will be registered in the name of the DRIP Agent, as agent for the DRIP Participants in the DRIP. An account will be maintained by the DRIP Agent or its nominee for each DRIP Participant. Accounts under the DRIP will be maintained in the names on which Units were registered at the time DRIP Participants enrolled in the DRIP;
13. Participation in the DRIP may be terminated by a DRIP Participant at any time except during the time between a distribution record date and the corresponding distribution date, inclusively, by giving written notice to the DRIP Agent;

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14. The REIT may amend, suspend or terminate the DRIP at any time, provided that such action shall not have a retroactive effect which would prejudice the interests of the DRIP Participants;
15. Legislation in some of the Jurisdictions provides exemptions from the Registration and Prospectus Requirements for reinvestment plans. Such examinations are not available to the REIT because such exemptions are with respect to the distribution of one or more of the following: (i) dividends; (ii) interest; (iii) distributions of capital gains; or (iv) distributions out of earnings or surplus. Technically, the distributions payable to Unitholders will be distributions of income and may not fall within any of these categories;
16. In addition, Legislation in some of the Jurisdictions provides exemptions from the Registration and Prospectus Requirements for reinvestment plans of mutual funds. However, such exemptions are technically not available to the REIT because the REIT is not a "mutual fund" as defined under the Legislation of such Jurisdictions;
17. Legislation in the Jurisdictions provides that the first trade in securities acquired by a DRIP Participant will be a distribution unless such first trade complies with the applicable resale conditions contained in the Legislation including that the REIT has been, a reporting issuer for at least 12 months prior to the first trade. Because the REIT only became a reporting issuer on December 13, 2002, Unitholders who receive Plan Units under the DRIP up to December 13, 2003 will be unable to trade the Plan Units they receive under the DRIP;

AND WHEREAS under the System, this MRRS Decision Document evidences the decision of each of the Decision Makers (collectively, the "Decision");

AND WHEREAS each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Makers with the jurisdiction to make the Decision has been met.

THE DECISION of the Decision Makers pursuant to the Legislation is that the trades of Plan Units by the REIT to the DRIP Participants pursuant to the DRIP shall not be subject to the Registration and Prospectus Requirements of the Legislation provided that:

- (a) at the time of the trade the REIT is a reporting issuer or the equivalent under the Legislation and is not in default of any requirements of the Legislation;

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- (b) no sales charge is payable in respect of the distributions of Plan Units from treasury;
- (c) the REIT has caused to be sent to the person or company to whom the Plan Units are traded, not more than 12 months before the trade, a statement describing:
  - (i) their right to withdraw from the DRIP and to make an election to receive cash instead of Additional Units on the making of a distribution by the REIT; and
  - (ii) instructions on how to exercise the right referred to in (i);
- (d) except in Québec, the first trade of Plan Units acquired pursuant to the DRIP in a Jurisdiction shall be deemed a distribution or primary distribution to the public under the Legislation unless the conditions in paragraphs 2 through 5 of subsection 2.6(4) of Multilateral Instrument 45-102 are satisfied; and
- (e) in Québec, the first trade (alienation) of Plan Units acquired pursuant to the DRIP shall be deemed a distribution or primary distribution to the public unless;
  - (i) at the time of the first trade the REIT is a reporting issuer in Québec and is not in default of any of the requirements of securities legislation in Québec;
  - (ii) no unusual effort is made to prepare the market or to create a demand for the Plan Units;
  - (iii) no extraordinary commission or consideration is paid to a person or company other than the vendor of the Plan Units in respect of the trade; and
  - (iv) the vendor of the Plan Units, if in a special relationship with the REIT, has no reasonable grounds to believe that the REIT is in default of any requirements of the securities legislation in Québec;
- (f) disclosure of the distribution of the Plan Units is made to the relevant Jurisdictions by providing the particulars of the date of the distribution of such Plan Units, the number of such Plan Units and the purchase price paid or to be paid for such Plan Units in:

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- (i) an information circular or take-over bid circular filed in accordance with the Legislation; or
- (ii) a letter filed with the Decision Maker in the relevant Jurisdiction by a person or company certifying that the person or company has knowledge of the facts contained in the letter,

when the REIT distributes such Plan Units for the first time and thereafter, not less frequently than annually, unless the aggregate number of Plan Units so traded in any months exceeds 1% of the Units outstanding at the beginning of a month in which the Plan Units were traded, in which case a separate report shall be filed in each relevant Jurisdiction in respect of that month within ten days of the end of such month.

DATED this 10<sup>th</sup> of January 2003.

Josée Deslauriers, Directrice-adjointe, Marchés des capitaux