

2005 BCSECCOM 597

August 30, 2005

Headnote

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act s. 123 - Relief from self dealing restrictions in ss. 121 and 122 of the Act - A mutual fund(s) wants relief from s. 121(2)(a) of the Act so that it can make or hold an investment in a person who is a substantial security holder of the mutual fund, its mutual fund manager or its mutual fund distributor or an associate of any of them - 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. 121(2)(a), 123, 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 BNS Split Corp. II

and

In the Matter of Scotia Capital Inc. (collectively, the Filers)

MRRS Decision Document

2005 BCSECCOM 597

Background

The local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions has received an application from the Filers for decisions under the securities legislation (the Legislation) of the Jurisdictions that the following requirements contained in the applicable Legislation shall not apply to BNS Split Corp. II (the Issuer) and/or Scotia Capital Inc. (Scotia Capital), as applicable, in connection with the initial public offering (the Offering) of class A capital shares (the Capital Shares) and class A preferred shares (the Preferred Shares) of the Issuer:

- (a) The prohibitions contained in the Legislation 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 Scotia Capital in connection with the Principal Sales and Principal Purchases (both as hereinafter defined); and
- (b) The restrictions contained in the Legislation prohibiting the Issuer from making investments in the common shares (the BNS Shares) of The Bank of Nova Scotia (BNS), which bank is a substantial security holder of Scotia Capital, a distribution company of the Issuer, (the Investment Restrictions) shall not apply to the Issuer in connection with the Offering.

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) the Ontario Securities Commission is the principal regulator for this application; and
- (b) 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 Issuer

1. The Issuer was incorporated on February 28, 2005 under the *Business Corporations Act* (Ontario).

2005 BCSECCOM 597

2. The Issuer has filed the Preliminary Prospectus with each of the Decision Makers in respect of the Offering of Capital Shares and Preferred Shares to the public.
3. The Issuer is a passive investment company whose principal undertaking will be to invest the net proceeds of the Offering in a portfolio (the Portfolio) of BNS Shares 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 BNS Shares after payment of administrative and operating expenses of the Issuer. It will be the policy of the Board of Directors of the Issuer to pay dividends on the Capital Shares in an amount equal to the dividends received by the Issuer on the BNS Shares minus the distributions payable on the Preferred Shares and all administrative and operating expenses of the Issuer.
4. The Issuer is considered to be a mutual fund, as defined in the Legislation, except in Québec. Since the Issuer 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 may be surrendered for retraction at any time in the manner described in the Preliminary Prospectus.
6. It will be the policy of the Issuer to hold the BNS Shares and to not engage in any trading of the BNS Shares, except:
 - (i) to fund retractions or redemptions of Capital Shares and Preferred Shares;
 - (ii) following receipt of stock dividends on the BNS Shares;
 - (iii) in the event of a take-over bid for any of the BNS Shares;
 - (iv) if necessary, to fund any shortfall in distributions on the Preferred Shares;
 - (v) to meet obligations of the Issuer in respect of liabilities including extraordinary liabilities; or
 - (vi) certain other limited circumstances as described in the Preliminary Prospectus.

2005 BCSECCOM 597

7. 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 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 13 of the Preliminary Prospectus.
8. The Class J Shares are currently the only voting shares in the capital of the Issuer. At the time of filing the Final Prospectus, there will be 150 Class J Shares and 100 Class S non-voting shares issued and outstanding. Scotia Capital will not own any Class J Shares and will own all of the Class S shares. BNS Split II Holdings Corp. will own all of the Class J Shares of the Company.
9. The Issuer has a Board of Directors which currently consists of three directors. All of the directors are employees of Scotia Capital. Also, the offices of President/Chief Executive Officer and Chief Financial Officer/Secretary of the Issuer are held by employees of Scotia Capital. At least three additional, independent directors will be appointed to the Board of Directors of the Issuer prior to the filing of the Final Prospectus.
10. The BNS Shares are listed and traded on The Toronto Stock Exchange (the TSX).
11. The Issuer is not, and will not upon the completion of the Offering be, an insider of BNS within the meaning of the Legislation.

The Offering

12. 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 defined in Section 20), expenses of issue and carrying costs relating to the acquisition of the BNS Shares, will be used by the Issuer to: (i) pay the acquisition cost (including any related costs or expenses) of the BNS Shares; and (ii) pay the initial fee payable to Scotia Capital for its services under the Administration Agreement (as defined in Section 21).

2005 BCSECCOM 597

13. The Final Prospectus will disclose the acquisition cost to the Issuer of the BNS Shares and selected financial information and dividend and trading history of the BNS Shares.
14. Application will be made to list the Capital Shares and Preferred Shares on the TSX.
15. 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.

Scotia Capital

16. Scotia Capital was incorporated under the laws of the Province of Ontario and is a direct, wholly-owned subsidiary of BNS.
17. BNS is a substantial security holder of Scotia Capital, which is a distribution company of the Issuer.
18. 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 a participant in the TSX.
19. Scotia Capital 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 BNS Shares (defined below) by the Issuer.
20. Pursuant to an agreement (the Agency Agreement) to be made between the Issuer and Scotia Capital, BMO Nesbitt Burns Inc., CIBC World Markets Inc., RBC Dominion Securities Inc., TD Securities Inc., National Bank Financial Inc., HSBC Securities (Canada) Inc., Canaccord Capital Corporation, Desjardins Securities Inc., Raymond James Ltd. and Wellington West Capital Inc. (collectively, the Agents and individually, an Agent), the Issuer will appoint the Agents, as its agents, to offer the Capital Shares and Preferred Shares of the Issuer 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.
21. Pursuant to an administration agreement (the Administration Agreement) to be entered into between Scotia Capital and the Issuer, the Issuer will retain Scotia Capital to administer the ongoing operations of the Issuer and will pay Scotia Capital a quarterly fee of 1/4 of 0.20 % of the market value of the BNS Shares held by the Issuer.

2005 BCSECCOM 597

22. Scotia Capital's 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;
 - (c) commissions in respect of the acquisition of BNS Shares, the disposition of BNS Shares 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 BNS Shares; and
 - (e) amounts in connection with Principal Sales and Principal Purchases (as described in paragraphs 23 and 28 below).

The Principal Trades

23. Pursuant to a securities purchase agreement (the Securities Purchase Agreement) to be entered into between the Issuer and Scotia Capital, Scotia Capital will purchase, as agent for the benefit of the Issuer, BNS Shares in the market on commercial terms or from non-related parties with whom Scotia Capital and the Issuer deal at arm's length. Subject to receipt of all necessary regulatory approvals, Scotia Capital may, as principal, sell BNS Shares to the Issuer (the Principal Sales). The aggregate purchase price to be paid by the Issuer for the BNS Shares (together with carrying costs and other expenses incurred in connection with the purchase of BNS Shares) will not exceed the net proceeds from the Offering.
24. Under the Securities Purchase Agreement, Scotia Capital may receive commissions at normal market rates in respect of its purchase of BNS Shares, as agent on behalf of the Issuer, and the Issuer will pay any carrying costs or other expenses incurred by Scotia Capital, on behalf of the Issuer, in connection with its purchase of BNS Shares as agent on behalf of the Issuer. In respect of any Principal Sales made to the Issuer by Scotia Capital as principal, Scotia Capital may realize a financial benefit to the extent that the proceeds received from the Issuer exceed the aggregate cost to Scotia Capital of such BNS Shares. Similarly, the proceeds received from the

2005 BCSECCOM 597

Issuer may be less than the aggregate cost to Scotia Capital of the BNS Shares and Scotia Capital may realize a financial loss, all of which is disclosed in the Preliminary Prospectus and will be disclosed in the Final Prospectus.

25. The Preliminary Prospectus discloses and the Final Prospectus will disclose that any Principal Sales will be made in accordance with the rules of the applicable stock exchange and the price paid by Scotia Capital (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 BNS Shares are listed and posted for trading at the time of the purchase from Scotia Capital.
26. Scotia Capital will not receive any commissions from the Issuer in connection with the Principal Sales and all Principal Sales will be approved by a majority of the independent directors of the Issuer. In carrying out the Principal Sales, Scotia Capital will deal fairly, honestly and in good faith with the Issuer.
27. For the reasons set forth in Section 23 and 24 above, and the fact that no commissions are payable to Scotia Capital in connection with the Principal Sales, in the case of the Principal Sales, the interests of the Issuer and the shareholders of the Issuer may be enhanced by insulating the Issuer from price increases in respect of the BNS Shares.
28. In connection with the services to be provided by Scotia Capital to the Issuer pursuant to the Administration Agreement, Scotia Capital may sell BNS Shares to fund retractions of Capital Shares and Preferred Shares prior to the Redemption Date and upon liquidation of the BNS Shares in connection with the final redemption of Capital Shares and Preferred Shares on the Redemption Date. These sales will be made by Scotia Capital as agent on behalf of the Issuer, but in certain circumstances, such as where a small number of Capital Shares and Preferred Shares have been surrendered for retraction, Scotia Capital may purchase BNS Shares as principal (the Principal Purchases) subject to receipt of all regulatory approvals.
29. In connection with any Principal Purchases, Scotia Capital 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 Scotia Capital may realize a gain or loss on the resale of such securities.

2005 BCSECCOM 597

30. The Administration Agreement will provide that Scotia Capital must take reasonable steps, such as soliciting bids from other market participants or such other steps as Scotia Capital, 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 BNS Shares so long as the price obtained (net of all transaction costs, if any) by the Issuer from Scotia Capital is 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.
31. All Principal Purchases will be approved by a majority of the independent directors of the Company. Scotia Capital will not receive any commissions from the Issuer in connection with Principal Purchases and, in carrying out the Principal Purchases, Scotia Capital shall deal fairly, honestly and in good faith with the Issuer.
32. At the time of making Principal Sales and/or Principal Purchases, Scotia Capital will not have any knowledge of a material fact or material change with respect to BNS 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 authority to make the decision has been met.

The decision of the Decision Makers is that:

- A. The Principal Trading Prohibitions shall not apply to Scotia Capital in connection with the Principal Sales and Principal Purchases; and
- B. The Investment Restrictions shall not apply to the Issuer in connection with the Investments in BNS Shares for the purposes of the Offering.

Robert L. Shirriff
Commissioner
Ontario Securities Commission

Wendell S. Wigle
Commissioner