

2010 BCSECCOM 560

September 14, 2010

Headnote

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – National Instrument 41-101 - *General Prospectus Requirements* (NI 41-101), sections 14.2(1)(c)(i), 19.1 - An investment fund, fund manager or custodian wants relief from the requirement that a custodian must have shareholders' equity of not less than \$10 Million as reported in financial statements that have been made public - The custodian's shareholders' equity is greater than \$10 Million but is not reported separately to the public because its financial results are consolidated with those of its parent bank; the custodian will provide any investment fund for which it acts as custodian with an annual audited summary statement of consolidated financial position; the relief will terminate 10 days after the custodian is no longer owned or controlled by a Schedule 1 bank or its shareholders' equity declines below \$10 Million

Applicable British Columbia Provisions

National Instrument 41-101 - *General Prospectus Requirements* (NI 41-101), sections 14.2(1)(c)(i), 19.1

In the Matter of
the Securities Legislation of
British Columbia and Ontario
(the Jurisdictions)

and

In the Matter of
the Process for Exemptive Relief Applications In Multiple Jurisdictions

and

In the Matter of
Sunstone Investment Management Inc.
(Sunstone)
and
NBCN Inc.
(NBCN)
(together, the Filers)

and

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In the Matter of
Morguard Sunstone Real Estate Income Fund
(the Fund)

Decision

Background

- ¶ 1 The securities regulatory authority or regulator in each of the Jurisdictions (Decision Maker) has received an application from the Filers for a decision under the securities legislation of the Jurisdictions (the Legislation) for an exemption from section 14.2(1)(c)(i) of National Instrument 41-101 *General Prospectus Requirements* (NI 41-101) that would enable the Fund and other funds subject to NI 41-101 that may in the future wish to engage NBCN to serve as custodian or sub-custodian (the Additional Funds) to enter into arrangements with NBCN to act as custodian or sub-custodian, as applicable pursuant to Part 14 of NI 41-101 (the Exemption Sought).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

- (a) the British Columbia Securities Commission is the principal regulator for this application;
- (b) the Filers have provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in all other provinces of Canada except Ontario; and
- (c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

- ¶ 2 Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

- ¶ 3 This decision is based on the following facts represented by the Filers:
- 1. NBCN is incorporated under the laws of Canada and is an indirect subsidiary of the National Bank of Canada, a bank listed in Schedule I of the *Bank Act* (Canada) (a Schedule I Bank); NBCN is a member of Investment Industry Regulatory Organization of Canada (IIROC) and is registered as an investment dealer (or equivalent) with the securities regulatory authorities in each province and territory of Canada; NBCN's head office is in Toronto, Ontario;

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the financial results of NBCN are consolidated with those of the National Bank of Canada and, as such, are not reported separately to the public;

2. NBCN is subject to regulatory oversight and regulatory capital requirements and accordingly files with the applicable regulators audited financial statements on a regular basis; NBCN's most recent audited financial statements for the financial year ended October 31, 2009, indicate shareholders' equity in excess of \$10 million;
3. the Fund is an investment trust established under the laws of the Province of British Columbia pursuant to a declaration of trust; Sunstone is incorporated under the laws of British Columbia; Sunstone is the manager of the Fund; Sunstone and the Fund have their head offices located in Vancouver, British Columbia; the Fund filed its preliminary prospectus on April 20, 2010, in each of the provinces of Canada; the Fund is not on the defaulting issuers list maintained by the BCSC as at August 23, 2010;
4. the Filers are not in default of securities legislation in any jurisdiction;
5. NBCN is currently the custodian of the Fund; with respect to the Fund, the National Bank of Canada has assumed responsibility for all of the custodial obligations of NBCN through a guarantee of these obligations; NBCN relies on meeting the requirements in 14.2(1)(c)(ii) to be a custodian for the Fund;
6. NBCN has the systems and resources required to act as a custodian or sub-custodian for funds under NI 41-101;
7. NBCN does not meet the requirements of section 14.2(1)(c)(i) of NI 41-101, as it does not have audited financial statements that have been made public; NBCN otherwise meets all other requirements of NI 41-101 in order to act as a custodian or sub-custodian of funds under NI 41-101; subject to the relief, Sunstone will appoint NBCN as a custodian or sub-custodian of the Fund to hold portfolio assets of the Fund under the requirements of 14.2(1)(c)(i);
8. NBCN wishes to have the flexibility to act as a custodian or a sub-custodian for any Additional Funds, without having to make separate applications for relief; and
9. NBCN will give the Fund a copy of its audited summary statement of consolidated financial position in respect of the financial year ended October 31, 2009 and will continue to give to the Fund and the Additional Funds (including their custodians, as applicable) an audited financial summary upon request to allow those entities to continue to conclude that, if NBCN had

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audited financial statements that were made public, NBCN would be qualified under NI 41-101 to act as a custodian or sub-custodian, as the case may be.

Decision

- ¶ 4 Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted provided that:

- (a) the relief terminates 10 days following the date that:
 - (i) a Schedule I Bank ceases to own or control NBCN directly or indirectly; or
 - (ii) the shareholders' equity of NBCN declines below \$10 million;
- (b) the custodian or sub-custodian agreement, as applicable, between the Fund or any Additional Funds and NBCN includes a provision requiring NBCN to provide a copy of its audited summary statement of consolidated financial position in respect of its most recently completed financial year to the Fund or any Additional Funds (including their custodians, as applicable) upon request; and
- (c) the compliance report required by section 14.6(2) of NI 41-101 to be delivered on behalf of the Fund or any Additional Funds, as applicable, includes a statement that:
 - (i) NBCN is acting as custodian or sub-custodian of the Fund or any Additional Funds, as applicable, under a passport decision of the British Columbia Securities Commission and a decision of the Ontario Securities Commission; and
 - (ii) circumstances described in clause (a) above do not exist as at the date of the compliance report.

Martin Eady, CA
Director, Corporate Finance
British Columbia Securities Commission