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October 16, 2009

## Headnote

*Securities Act*, s. 169 – *Confidentiality* - An applicant wants to keep an application and order confidential for a limited amount of time after the order is granted - The record provides intimate financial, personal or other information; the disclosure of the information before a specific transaction would be detrimental to the person affected; the information will be made available after a specific date

## Applicable British Columbia Provisions

*Securities Act*, R.S.B.C. 1996, c. 418, s. 169

In the Matter of  
the Securities Legislation of  
Québec and Ontario and British Columbia, Alberta, Saskatchewan,  
Manitoba, Nova Scotia, New Brunswick, Prince Edward Island and  
Newfoundland and Labrador

and

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

and

In the Matter of  
Cominar Real Estate Investment Trust and National Bank Financial Inc.  
(the “Applicants”)

## Decision

## Background

The securities regulatory authority or regulator in Quebec and Ontario (the “Decision Maker”) has received an application from the Applicants (the “Application”) for a decision under the securities legislation of those jurisdictions (the “Legislation”) for the following relief:

- (a) that the requirement that a dealer who receives an order to subscribe for or purchase a security offered in a distribution to which the prospectus requirement of the Legislation applies deliver to the purchaser a copy of the prospectus (including the applicable prospectus supplement(s) in the case of a base shelf prospectus) and any amendment to the prospectus not later than the second working day after the subscription or purchase (the

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“Prospectus Delivery Requirement”) does not apply to National Bank Financial Inc. (the “Underwriter”) or any Selling Agent (as defined below) in connection with at-the-market distributions (the “ATM Distributions”) as defined in National Instrument 44-102 *Shelf Distributions* (the “NI 44-102”) made by Cominar Real Estate Investment Trust (the “Issuer”) pursuant to the Equity Distribution Agreement (as defined below) (the “Prospectus Delivery Relief”);

- (b) that the requirement to include in a prospectus supplement: (i) a certificate of the Issuer in the form specified in NI 44-102 and (ii) the statement respecting purchaser’s statutory rights of withdrawal and remedies of rescission or damages in the form prescribed by item 20 of Form 44-101F1 under *National Instrument 44-101 Respecting Short Form Prospectus Distributions* (collectively the “Prospectus Form Requirement”), do not apply to a prospectus supplement to be filed in connection with the ATM Distributions, provided the alternative certificate and disclosure contemplated herein is provided (such exemption being hereinafter referred to, collectively with the Prospectus Delivery Relief, as the “Prospectus Relief”); and

The securities regulatory authority or regulator in each of Quebec, Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador (collectively, the “Jurisdiction”) (Coordinated Exemptive Relief Decision Makers) has received an application from the Applicants for a decision under securities legislation of the Jurisdiction (the “Legislation”) for a decision that the Application and this decision (the “Confidential Material”) be kept confidential and not be made public until the earlier of (i) the date on which the Issuer enters into the Equity Distribution Agreement; (ii) the date the Applicants advise the Decision Makers that there is no longer any need for the Confidential Material to remain confidential; and (iii) the date that is 90 days after the date of this decision (the “Confidential Relief”).

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

- (a) the *Autorité des marchés financiers* is the principal regulator for this application;
- (b) the Applicants 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 British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia,

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New Brunswick, Prince Edward Island and Newfoundland and Labrador;  
and

- (c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.
- (d) the decision evidences the decision of each Coordinated Exemptive Relief Decision Maker.

### **Interpretation**

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**

This decision is based on the following facts represented by the Applicants (as applicable to each of them):

#### *The Issuer*

1. The Issuer is an unincorporated closed-end investment trust established under the laws of the Province of Québec. The principal office of the Issuer is located in Québec City, Québec.
2. The Issuer owns a diversified real estate portfolio of 215 retail, industrial and mixed-use properties.
3. The Issuer is a reporting issuer under the Legislation of each of the Jurisdictions and is not, to its knowledge, in default of its obligations as a reporting issuer under such Legislation.
4. The units of the Issuer (the “Units”) are listed on the Toronto Stock Exchange (the “TSX”).

#### *The Underwriter*

5. The Underwriter is based in Montreal, Québec, and is registered as an investment dealer under the Legislation of each of the Jurisdictions, is a member of the Investment Industry Regulatory Organization of Canada, and is a participating organization of the TSX.

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### *Base Shelf Prospectus*

6. The Issuer will file under National Policy 11-202 – *Process for Prospectus Reviews in Multiple Jurisdictions* (“NP 11-202”) a short form base shelf prospectus (the “Shelf Prospectus”) in the Jurisdictions for the distribution of Units. The Shelf Prospectus will contain the non-forward looking issuer certificate contemplated by section 1.1 of Appendix B to NI 44-102.

### *Proposed ATM Distributions*

7. The Issuer is proposing to enter into an equity distribution agreement (the “Equity Distribution Agreement”) with the Underwriter, pursuant to which the Issuer may issue and sell Units through the Underwriter, as agent, as described below.
8. Prior to making ATM Distributions, the Issuer will have filed in the Jurisdictions in connection with the ATM Distributions a prospectus supplement describing the ATM Distributions, including terms of the Equity Distribution Agreement (the “Prospectus Supplement”).
9. The Issuer will issue a news release regarding the entering into of the Equity Distribution Agreement and will file the Equity Distribution Agreement on SEDAR. The news release will indicate that the Shelf Prospectus and Prospectus Supplement have been filed on SEDAR and specify where and how purchasers may obtain a copy. A copy of the news release will also be posted on the Issuer’s website.
10. Under the Prospectus Supplement, the Issuer may issue and sell Units in an amount not to exceed 10% of the market value of the outstanding Units calculated in accordance with section 9.2 of NI 44-102.
11. The Underwriter will, in turn, sell Units in Canada through methods constituting an ATM Distribution, including sales made on the TSX through the Underwriter, as agent, directly or through another TSX participating organization retained by the Underwriter to act as selling agent for the Underwriter (such other TSX participating organization, a “Selling Agent”).
12. The Underwriter will act as an agent on behalf of the Issuer in connection with the sale of the Units on pre-existing trading markets in which Units are traded (“Trading Markets”) and will be the sole entity paid an underwriting fee (in this instance an agency fee) or commission by the Issuer in connection with such sales. The Underwriter will sign an underwriter’s certificate in the

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Prospectus Supplement filed on SEDAR. The Underwriter will effect the ATM Distributions on Trading Markets either itself or through a Selling Agent. If the sales are effected through a Selling Agent, the Underwriter will pay the Selling Agent a customary seller's commission for effecting the trades on its behalf. A purchaser's rights and remedies under the Legislation against the Underwriter as underwriter of an ATM Distribution through a Trading Market will not be affected by a decision to effect the sale directly or through a Selling Agent.

13. The number of Units sold on Trading Markets pursuant to an ATM Distribution on any trading day will not exceed 25% of the trading volume of the Units on the TSX on that day.
14. The Equity Distribution Agreement will provide that, at the time of each sale of Units pursuant to an ATM Distribution, the Issuer will make a representation to the Underwriter that the Shelf Prospectus, as supplemented by the Prospectus Supplement, contains full, true and plain disclosure of all material facts relating to the Issuer and Units being distributed. The Issuer would therefore be unable to proceed with sales pursuant to an ATM Distribution when it is in possession of undisclosed information that would constitute a material fact or a material change in respect of the Units.
15. If, after the Issuer delivers a sell notice to the Underwriter, the sale of Units specified in the notice, taking into consideration prior sales, would constitute a material fact or material change, the Issuer would have to suspend sales under the Equity Distribution Agreement until either (i) it has filed a material change report or amended the Shelf Prospectus or Prospectus Supplement, or (ii) circumstances have changed so that the sales would no longer constitute a material fact or material change.
16. In determining whether the sale of the number of Units specified in the sell notice would constitute a material fact or material change, the Issuer will take into account a number of factors, including, without limitation: (i) the parameters of the sell notice including the number of Units proposed to be sold and any price or timing restrictions that the Issuer may impose; (ii) the percentage of the outstanding Units that the number of Units proposed to be sold represents; (iii) the trading volume and volatility of Units; (iv) any recent development in the business, affairs and capital structure of the Issuer; and (v) the prevailing market conditions generally.
17. The Underwriter will monitor closely the market's reaction to trades made under the ATM Distributions in order to evaluate the likely market impact of future trades. The Underwriter has experience and expertise in managing sell

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orders to limit downward pressure on the Unit price. If the Underwriter has concerns as to whether a particular sell order placed by the Issuer may have a significant effect on the market price of the Units, the Underwriter will recommend against effecting the trade at that time as it is in the interest of both the Issuer and the Underwriter to minimize the market impact of sales under an ATM Distribution.

18. The underwriter's certificate to be signed by the Underwriter and included in the Prospectus Supplement will be in the form prescribed by section 2.2 of Appendix B to NI 44-102.

### *Prospectus Delivery Requirement*

19. Pursuant to the Prospectus Delivery Requirement, a dealer effecting a trade of the Units on behalf of the Issuer as part of an ATM Distribution is required to deliver a prospectus to all investors who purchase Units on Trading Markets.
20. The delivery of a prospectus is not practicable in the circumstances of an ATM Distribution as neither the Underwriter nor a Selling Agent effecting the trade will know the identity of the purchasers.
21. Although purchasers under an ATM Distribution would not physically receive a printed prospectus, the Shelf Prospectus and the Prospectus Supplement (together with all documents incorporated by reference) will be filed and readily available to all purchasers electronically via SEDAR. Moreover, the Issuer will issue a news release that specifies where and how copies of the Shelf Prospectus and the Prospectus Supplement can be obtained.
22. The liability of an issuer or an underwriter (and others) for misrepresentation in a prospectus pursuant to the civil liability provisions of the Legislation will not be affected by the grant of an exemption from the Prospectus Delivery Requirement, as purchasers of securities offered by a prospectus during the period of distribution have a right of action for damages or rescission without regard as to whether the purchaser relied on the misrepresentations and whether or not the purchaser in fact received a copy of the prospectus.

### *Withdrawal Right*

23. Pursuant to the Legislation, an agreement to purchase securities is not binding on the purchaser if a dealer receives, not later than midnight on the second day, exclusive of Saturdays, Sundays and holidays, after receipt by the purchaser of the latest prospectus or any amendment to the prospectus, a

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notice in writing that the purchaser does not intend to be bound by the agreement of purchase (the “Withdrawal Right”).

24. The Withdrawal Right is not workable in the context of an ATM Distribution because the Shelf Prospectus and Prospectus Supplement will not be delivered to purchasers.

### *Right of Rescission or Damages for Non-Delivery*

25. Pursuant to the Legislation, a purchaser of securities has a right of rescission or damages against a dealer for non-delivery of the prospectus (the “Right of Action for Non-Delivery”).
26. The Right of Action for Non-Delivery is not workable in the context of an ATM Distribution because the Shelf Prospectus and Prospectus Supplement will not be delivered to purchasers.

### *Disclosure of Securities Sold in ATM Distributions*

27. The Issuer will file on SEDAR a report disclosing the number and average price of Units distributed by the Issuer pursuant to the Shelf Prospectus and Prospectus Supplement filed in connection with the ATM Distributions, as well as gross proceeds, commissions and net proceeds, within seven calendar days after the end of the month with respect to sales made during the prior month.
28. The Issuer will also disclose in the ordinary course the number and average price of Units sold under ATM Distributions, as well as gross proceeds, commissions and net proceeds in its annual and interim financial statements and related MD&A filed on SEDAR.

### *Prospectus Form Requirements*

29. Exemptive relief from the Prospectus Form Requirements is required, including with respect to the Issuer’s certificate contained in the Prospectus Supplement, to reflect that no pricing supplement will be filed subsequent to the Prospectus Supplement. Accordingly, the Issuer will file the Prospectus Supplement with the following forward looking issuer certificate which will supersede and replace, solely as regards to ATM Distributions contemplated by the Prospectus Supplement, the non-forward looking issuer certificate contained in the Shelf Prospectus:

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The short form prospectus, as supplemented by the foregoing, together with the documents incorporated in the prospectus by reference as of the date of a particular distribution of securities offered under the prospectus as supplemented, will, as of that date, constitute full, true and plain disclosure of all material facts relating to the securities offered by the prospectus as supplemented, as required by the securities legislation of each of the provinces of Canada.

30. Exemptive relief from the Prospectus Form Requirements is required to reflect the Issuer's relief from the Prospectus Delivery Requirement. Accordingly, the Issuer will include the following language in the Prospectus Supplement in replacement of the language prescribed by the Prospectus Form Requirements:

Securities legislation in certain of the provinces of Canada (the "Jurisdictions") provides purchasers with the right to withdraw from an agreement to purchase securities and with remedies for rescission or, in some Jurisdictions, revision of the price or damages if the prospectus, prospectus supplements relating to securities purchased by a purchaser and any amendment are not delivered to the purchaser, provided that the remedies are exercised by the purchaser within the time limit prescribed by securities legislation. However, purchasers of Units under the issuer's at-the-market distributions will not have any right to withdraw from an agreement to purchase the Units and will not have remedies for rescission or, in some Jurisdictions, revision of the price or damages for non delivery of the Shelf Prospectus or this Prospectus Supplement because the Shelf Prospectus and this Prospectus Supplement relating to Units purchased by such purchaser will not be delivered, as permitted under the Decision dated ■, 2009 and granted pursuant to *National Policy 11-203 Respecting Process for Exemptive Relief Applications in Multiple Jurisdictions*.

Securities legislation in the Jurisdictions also provides purchasers with remedies for rescission or, in some Jurisdictions, revision of the price or damages if the prospectus, prospectus supplements relating to securities purchased by a purchaser and any amendment contain a misrepresentation, provided that the remedies are exercised by the purchaser within the time limit prescribed by the securities legislation of the purchaser's jurisdiction. Any remedies under the securities legislation of the Jurisdictions that a purchaser of Units under the issuer's at-the-market distributions may have against the issuer or the Underwriter for rescission or, in some jurisdictions, revision of the price or damages if the prospectus, prospectus supplements relating to securities purchased by a purchaser and any amendment contain a misrepresentation remain



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unaffected by the non-delivery of the Shelf Prospectus and this Prospectus Supplement and the Decision referred to above.

Purchasers should refer to the applicable provisions of the securities legislation of their respective jurisdictions and the Decision referred to above for the particulars of their rights or consult with a legal adviser.

31. The modified disclosure of purchasers' rights set forth in paragraph 30 above will supersede the statement of purchasers' rights contained in the Shelf Prospectus.

### **Decision**

Each of the principal regulator, the securities regulatory authority or regulator in Ontario and the Coordinated Exemptive Relief Decision Makers is satisfied that the decision meets the test set out in the Legislation for the relevant regulator or securities regulatory authority to make the decision.

The decision of the Dual Exemption Decision Makers under the Legislation is that the Dual Exemption for Prospectus Relief is granted provided that:

- (a) as it relates to the Prospectus Delivery Requirement, the representations in paragraphs 9, 11, 12, 14, 15 and 17 are complied with;
- (b) as it relates to the Prospectus Form Requirements, the disclosure described in paragraphs 27, 29 and 30 is made; and
- (c) this decision will terminate 25 months after the issuance of a receipt for the Shelf Prospectus under the Legislation.

Jean Daigle  
Director, Corporate Finance

The decision of the Coordinated Review Decision Makers under the Legislation is that the Coordinated Exemptive Relief for Confidential Relief is granted provided that the Confidential Material will be kept confidential and not be made public until the earlier of: (i) the date on which the Applicants enter into an Equity Distribution Agreement; (ii) the date the Applicants advise the Decision Makers that there is no longer any need for the Confidential Material to remain confidential; and (iii) the date that is 90 days after the date of this decision.

Benoit Longtin  
Interim Secretary