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March 31, 2005

## Headnote

Mutual Reliance Review System for Exemptive Relief Applications - National Instrument 51-102, s. 13.1 *Continuous Disclosure Obligations* - an issuer wants relief from the requirement to file an annual information form - the issuer is a trust; the issuer's security holders receive fixed distributions guaranteed by a bank, trust company or insurance company; the continuous disclosure materials of the guarantor will be filed and provided to security holders of the trust

## Applicable British Columbia Provisions

National Instrument 51-102, s. 13.1 *Continuous Disclosure Obligations*

In the Matter of  
the Securities Legislation  
of British Columbia, Alberta, Manitoba, Nova Scotia, Newfoundland and  
Labrador, Yukon and Nunavut (the Jurisdictions)

and

In the Matter of  
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of the Bank of Nova Scotia (the Bank) and BNS Capital Trust (the  
Trust and collectively with the Bank, the Filer)

## MRRS Decision Document

## Background

The local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the Legislation) for an exemption from the requirement for the Trust to prepare and file an annual information form (an AIF) for financial years beginning on or after January 1, 2004 (the Requested Relief), subject to certain terms and conditions.

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Under the Mutual Reliance Review System (MRRS) for Exemptive Relief Applications

- (a) the British Columbia 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**

The decision is based on the following facts represented by the Filer:

#### **The Bank of Nova Scotia**

- 1. the Bank is a Canadian chartered bank governed by the *Bank Act* (Canada) (the Bank Act); the Bank is a reporting issuer in each of the Jurisdictions and is not, to its knowledge, in default of any of the requirements of the Legislation;
- 2. the authorized capital of the Bank consists of: (i) an unlimited number of common shares without par value (Bank Common Shares) and (ii) an unlimited number of preferred shares, issuable in series without par value (Preferred Shares);
- 3. the Bank Common Shares are listed and posted for trading on the Toronto Stock Exchange (the TSX) and The New York Stock Exchange;

#### **BNS Capital Trust**

- 4. the Trust is a closed-ended trust established under the laws of the Province of Ontario by Montreal Trust Company of Canada (now Computershare Trust Company of Canada) as trustee (the Trustee), pursuant to an amended and restated declaration of trust dated March 1, 2000, as amended and restated from time to time (the Declaration of Trust);
- 5. the beneficial interests of the Trust are divided into two classes of units, issuable in series, designated as Scotiabank Trust Series — Series 2000 — 1 (Scotia BaTS) and Special Trust Securities (Special Trust Securities, together with the Scotia BaTS, the Trust Securities);

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6. the Trust was established solely for the purpose of effecting the Offering (as defined below) in order to provide the Bank with a cost-effective means of raising capital for Canadian bank regulatory purposes;
7. the Trust is a reporting issuer in each of the Jurisdictions and, to its knowledge, is not in default of any reporting requirement of the Legislation;

### **Scotia BaTS**

8. the Trust distributed 500,000 Scotia BaTS under a prospectus (the Prospectus) dated March 28, 2000 (the Offering); the Prospectus also qualified certain other related securities for distribution, including the Holder Exchange Right and the Automatic Exchange Right (both as defined below);
9. the Scotia BaTS are listed and posted for trading on the TSX;
10. the Trust also issued and sold an aggregate of 500,000 Special Trust Securities to the Bank in connection with the Offering;
11. the business objective of the Trust is to acquire and hold assets (Trust Assets) primarily from the Bank or its affiliates which may consist of: (a) undivided co-ownership interests in one or more pools of Canada Mortgage and Housing Corporation (CMHC) insured first mortgages on residential property situated in Canada; (b) certain mortgage-backed securities; (c) CMHC-insured first mortgages on residential property; and (d) to the extent that the proceeds of the assets of the Trust are not invested in the assets referred to above in (a), (b) or (c), money and certain debt obligations that are qualified investments under the *Income Tax Act* (Canada) for trusts governed by certain deferred income plans;
12. subject to paragraph 13 below, each Scotia BaTS entitles the holder (a Scotia BaTS Holder) to receive a fixed cash distribution (a Distribution) payable by the Trust on the last day of June and December of each year (each such day, a Distribution Date and each period from and including the Distribution Date to but excluding the next Distribution Date (a Distribution Period);
13. Scotia BaTS Holders are not entitled to receive Distributions in respect of a particular Distribution Date if the Bank has not declared regular cash dividends on its preferred shares or, if no such shares are then outstanding, on the Bank Common Shares (in accordance with the Bank's ordinary dividend practice in effect from time to time) in the most recent month in which the Bank ordinarily declares dividends from time to time in respect of such shares occurring prior to the commencement of the Distribution Period ended on such Distribution Date;

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14. the Bank has covenanted, pursuant to the Bank Share Exchange Agreement (as defined below) that, if on the Distribution Date the Trust fails to pay in full Distributions on the Scotia BaTS to which the Scotia BaTS Holders are entitled, the Bank will not declare dividends of any kind on its preferred shares until a specific period of time has elapsed from the Distribution Date;
15. upon the occurrence of certain adverse tax events or events relating to the treatment of Scotia BaTS for capital purposes prior to June 30, 2005, Scotia BaTS will be redeemable, at the option of the Trust and with the approval of the Superintendent of Financial Institutions (Canada) (the Superintendent), in whole (but not in part) for a cash amount;
16. on June 30, 2005 and on any subsequent Distribution Date, the Scotia BaTS will be redeemable in whole (but not in part) for a cash amount, at the option of the Trust and subject to the approval of the Superintendent;
17. on June 30, 2011, and on any subsequent Distribution Date, each Scotia BaTS will be exchangeable (the Holder Exchange Right), at the option of the Scotia BaTS Holder, for one non-cumulative Preferred Share, Series Y of the Bank (Bank Preferred Share Series Y), in accordance with the terms set forth in a bank share exchange trust agreement made as of April 14, 2000, (the Bank Share Exchange Agreement) between the Bank, the Trust and the Trustee, as trustee for the Scotia BaTS Holders;
18. each Scotia BaTS will be automatically exchanged (the Automatic Exchange Right) without the consent of the holder, for one Bank Preferred Share Series Y if: (i) an application for a winding-up order in respect of the Bank pursuant to the *Winding-up and Restructuring Act* (Canada) is filed by the Attorney General of Canada or a winding-up order in respect of the Bank pursuant to that Act is granted by a court; (ii) the Superintendent has taken control of the Bank or its assets pursuant to the Bank Act; (iii) the Superintendent advises the Bank in writing that the Superintendent is of the opinion that the Bank has a risk-based Tier 1 Capital ratio of less than 5.0% or a risk-based Total Capital ratio of less than 8.0%; or (iv) the Superintendent directs the Bank pursuant to the Bank Act to increase its capital or to provide additional liquidity and the Bank elects to cause the exchange as a consequence of the issuance of such direction or the Bank does not comply with such direction to the satisfaction of the Superintendent within the time specified in such direction;
19. the Bank Preferred Shares Series Y will be convertible after specified dates, at the option of the Bank and subject to regulatory approvals, into Bank Common Shares;

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20. beginning on June 30, 2011, and on each subsequent Distribution Date, the Bank Preferred Shares Series Y will be convertible, at the option of the holder, into Bank Common Shares, except under certain circumstances;
21. as set forth in the Declaration of Trust, Scotia BaTS are non-voting except in certain limited circumstances and Special Trust Securities entitle the holders to vote;
22. except to the extent that Distributions are payable to Scotia BaTS Holders and other than in the event of termination of the Trust (as set forth in the Declaration of Trust), Scotia BaTS Holders have no claim or entitlement to the income of the Trust or the Trust Assets;
23. in certain circumstances (as described in paragraph 18 above), including at a time when the Bank's financial condition is deteriorating or proceedings for the winding-up of the Bank have been commenced, the Scotia BaTS will be automatically exchange for preferred shares of the Bank without the consent of Scotia BaTS Holders; as a result, Scotia BaTS Holders will have no claim or entitlement to the Trust Assets, other than indirectly in their capacity as preferred shareholders of the Bank;
24. Scotia BaTS Holders may not take any action to terminate the Trust;
25. the Trust is not requesting relief for the purposes of filing a short form prospectus pursuant to National Instrument 44-101 – Short Form Prospectus Distributions (NI 44-101) (including, without limitation, any relief which would allow the Trust to use the Bank's AIF as a current AIF of the Trust) and no such relief is provided by this Order from any of the requirements of NI 44-101;
26. because of the terms of the Scotia BaTS, the Share Exchange Agreements and the various covenants of the Bank, information about the affairs and financial performance of the Bank, as opposed to that of the Trust, is meaningful to holders of Scotia BaTS; the Bank's filings and the delivery of the same material delivered to shareholders of the Bank will provide holders of Scotia BaTS and the general investing public with all information required in order to make an informed decision relating to an investment in Scotia BaTS; information regarding the Bank is relevant both to an investor's expectation of being paid the Indicated Yield on the Scotia BaTS as well as the return of the investor's principal;

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27. under an MRRS Decision Document dated May 11, 2001 (the Previous Decision), the Trust is exempt from certain continuous disclosure requirements of the Legislation, subject to certain conditions;
28. since the date of the Previous Decision, the Trust has become subject to the requirement contained in National Instrument 51-102 *Continuous Disclosure Obligations* to prepare and file an AIF, which requirement did not exist in the Jurisdictions at the time the Previous Decision was issued.

### **Decision**

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 under the Legislation is that, effective March 31, 2005, the Requested Relief is granted, for so long as:

- (a) the Bank remains a reporting issuer under the Legislation;
- (b) the Bank prepares and files an AIF with each of the Decision Makers under the Legislation on an annual basis;
- (c) all outstanding securities of the Trust are either Scotiabank Trust Securities or Special Trust Securities;
- (d) the rights and obligations of holders of additional series of Scotiabank Trust Securities are the same in all material respects as the rights and obligations of the holders of Scotia BaTS at the date hereof; and
- (e) the Bank is the beneficial owner of all Special Trust Securities;

and provided that if a material change occurs in the affairs of the Trust, this decision will expire 30 days after the date of that change.

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