

## **2002 BCSECCOM 698**

### **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications - subdivided offering - relief granted from the prohibitions contained in the Legislation against trading in portfolio shares by persons or companies having information concerning the trading programs of mutual funds with respect to certain principal trades - issuer's portfolio consisting of common shares of the Bank of Nova Scotia - issuer, a mutual fund, exempted from restriction against making an investment in any person or company who is a substantial security holder of the mutual fund, its management company or distribution company

### **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 121(2)(a), 123, 128 and 130

**IN THE MATTER OF THE SECURITIES LEGISLATION OF ONTARIO,  
BRITISH COLUMBIA, ALBERTA, SASKATCHEWAN,  
NEWFOUNDLAND AND LABRADOR AND NOVA SCOTIA**

**AND**

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

**AND**

**IN THE MATTER OF BNS SPLIT CORP.**

**AND**

**IN THE MATTER OF SCOTIA CAPITAL INC.**

### **MRRS DECISION DOCUMENT**

WHEREAS the local securities regulatory authority or regulator (the "Decision Maker") in each of Ontario, British Columbia, Alberta, Saskatchewan, Newfoundland and Labrador and Nova Scotia (the "Jurisdictions") has received an application from BNS Split Corp. (the "Issuer") and Scotia Capital Inc. ("Scotia Capital") for decisions under the securities legislation (the "Legislation") of the Jurisdictions that the following requirements contained in the applicable Legislation shall not apply to the Issuer and/or 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:

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- (a) in the case of the Legislation of each of the Jurisdictions, the prohibitions contained therein 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) in the case of the Legislation of each of the Jurisdictions, the restrictions contained therein prohibiting the Issuer from making investments in the common shares of The Bank of Nova Scotia, which bank is a substantial security holder of a distribution company of the Issuer (the “Investment Restrictions”) shall not apply to the Issuer in connection with the Offering;

subject to certain restrictions;

AND WHEREAS under the Mutual Reliance Review System for Exemptive Relief Applications (the “System”), the Ontario Securities Commission is the principal regulator for this application;

AND WHEREAS the Issuer and Scotia Capital have represented to the Decision Makers that:

1. Scotia Capital was incorporated under the laws of the Province of Ontario and is a direct, wholly-owned subsidiary of The Bank of Nova Scotia (“Scotiabank”) and 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 The Toronto Stock Exchange (the “TSX”).
2. 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 Scotiabank Shares (as defined below) by the Issuer.
3. The Issuer was incorporated on June 14, 2002 under the laws of the Province of Ontario and is authorized to issue an unlimited number of Class J Shares and an unlimited number of Class K Shares.
4. The Issuer has filed with the securities regulatory authorities of each Province of Canada a preliminary prospectus dated June 14, 2002 (the “Preliminary Prospectus”) in respect of the proposed offering (the “Offering”) of Capital Shares and Preferred Shares to the public.

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5. 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, and an unlimited number of Class J Shares, having the attributes set forth under the headings “Description of Share Capital” and “Details of the Offerings” commencing on page 16 of the Preliminary Prospectus.
6. The Capital Shares and Preferred Shares may be surrendered for retraction at any time in the manner described in the Preliminary Prospectus.
7. Application will be made to list the Capital Shares and Preferred Shares on the TSX.
8. The Capital Shares and the Class J Shares will be the only voting shares in the capital of the Issuer. At the time of filing the Final Prospectus, there will be 100 Class J Shares issued and outstanding. Scotia Capital will own all of the issued and outstanding Class J Shares of the Issuer.
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. Prior to filing the Final Prospectus, it is contemplated that three additional directors, independent of Scotia Capital, will be appointed to the board of directors of the Issuer.
10. Pursuant to an agreement (the “Agency Agreement”) to be made between the Issuer and Scotia Capital and such other agents as may be appointed after the date of this application (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.
11. The Issuer is considered to be a mutual fund as defined in the Legislation. 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.

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12. 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 common shares (the “Scotiabank Shares”) of Scotiabank 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 Scotiabank Shares after payment of administrative and operating expenses.
13. The Final Prospectus will disclose the acquisition cost to the Issuer of the Scotiabank Shares and selected financial information and dividend and trading history of the Scotiabank Shares.
14. The Scotiabank Shares are listed and traded on the TSX.
15. The Issuer is not, and will not upon the completion of the Offering, be an insider of Scotiabank within the meaning of the Legislation.
16. Scotia Capital does not have knowledge of a material fact or material change with respect to Scotiabank that has not been generally disclosed.
17. 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 Scotiabank Shares, the disposition of Scotiabank Shares to fund a redemption or retraction, or the purchase for cancellation, of the Capital Shares and Preferred Shares or if necessary, to fund a portion of the fixed distribution on the Preferred Shares;
  - (d) interest and reimbursement of expenses, in connection with the acquisition of Scotiabank Shares; and
  - (e) amounts in connection with Principal Sales and Principal Purchases (as described in paragraphs 21 and 28 below).
18. The net proceeds from the sale of the Capital Shares and Preferred Shares under the Final Prospectus, after payment of commissions to the Agents,

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expenses of issue and carrying costs relating to the acquisition of the Scotiabank Shares, will be used by the Issuer to:

- (a) pay the acquisition cost (including any related costs or expenses) of the Scotiabank Shares; and
- (b) pay the initial fee payable to Scotia Capital for its services under the Administration Agreement (as defined below).

19. 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. Capital Shares and Preferred Shares will be retractable at the option of the holder and redeemable at the option of the Issuer as described in the Preliminary Prospectus.
20. Pursuant to an 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, Scotiabank 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 Scotiabank Shares to the Issuer (the “Principal Sales”). The aggregate purchase price to be paid by the Issuer for the Scotiabank Shares (together with carrying costs and other expenses incurred in connection with the purchase of Scotiabank Shares) will not exceed the net proceeds from the Offering.
21. Under the Securities Purchase Agreement, Scotia Capital may receive commissions at normal market rates in respect of its purchase of Scotiabank 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 Scotiabank 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 Scotiabank Shares. Similarly, the proceeds received from the Issuer may be less than the aggregate cost to Scotia Capital of the Scotiabank Shares and Scotia Capital may realize a financial loss, all of which is described in the Preliminary Prospectus and will be described in the Final Prospectus.
22. 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

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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 Scotiabank Shares are listed and posted for trading at the time of the purchase from Scotia Capital.

23. Scotia Capital will not receive any commissions from the Issuer in connection with the Principal Sales and all Principal Sales will be approved by the independent directors of the Issuer.
24. For the reasons set forth in paragraphs 20 and 21 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 Scotiabank Shares.
25. None of the Scotiabank Shares to be sold by Scotia Capital as principal to the Issuer have been acquired, nor has Scotia Capital agreed to acquire, any Scotiabank Shares while Scotia Capital had access to information concerning the investment program of the Issuer, although certain of the Scotiabank Shares to be held by the Issuer may be acquired or Scotia Capital may agree to acquire such Scotiabank Shares on or after the date of this Decision Document.
26. It will be the policy of the Issuer to hold the Scotiabank Shares and to not engage in any trading of the Scotiabank Shares, except:
  - (a) to fund retractions or redemptions of Capital Shares and Preferred Shares; or
  - (b) in certain other limited circumstances as described in the Preliminary Prospectus.
27. Pursuant to an administration agreement (the "Administration Agreement") to be entered into, the Issuer will retain Scotia Capital to administer the ongoing operations of the Issuer and will pay Scotia Capital (i) a monthly fee of 1/12 of 0.15% of the market value of the Scotiabank Shares held in the Portfolio, and (ii) any interest income earned by the Issuer from time to time excluding interest earned on any investment of surplus dividends received on the Scotiabank 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 Scotiabank Shares to fund retractions of Capital Shares and Preferred Shares prior to the

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Redemption Date and upon liquidation of the Scotiabank 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 Scotiabank 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.
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 Scotiabank 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. 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. Scotiabank is a substantial security holder of Scotia Capital, which is a distribution company of the Issuer.

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

AND WHEREAS 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 pursuant to the Legislation is that:

- A. The Principal Trading Prohibitions shall not apply to Scotia Capital in connection with the Principal Sales and Principal Purchases.

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- B. The Investment Restrictions shall not apply to the Issuer in connection with investments in Scotiabank Shares for the purposes of the Offering as described in the Preliminary Prospectus.

DATED at Toronto this 25<sup>th</sup> day of July, 2002.

Paul Moore

Robert L. Shirriff