

# 2006 BCSECCOM 483

August 1, 2006

## Headnote

### Mutual Reliance Review System for Exemptive Relief Applications

National Instrument 51-102 *Continuous Disclosure Obligations*, s. 13.1 - preparation, filing and delivery of annual and interim financial statements and related MD&A; annual information form requirement - General - An issuer wants relief from the requirement to file and deliver all financial statements, MD&A, and 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

Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*, s. 4.5 - certification of annual and interim f/s - An issuer wants relief from the requirements in Parts 2 and 3 of MI 52-109 to file annual and interim certificates - The issuer has applied for and received an exemption from filing interim and annual financial statements

## Applicable British Columbia Provisions

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 91(1) and 119(2)

*Securities Rules*, B.C. Reg. 194/97, ss. 144, 145, 149 and 184

National Instrument 51-102, s. 4.3, 4.4, 4.6, 5.1, 5.6, 6.1, s. 13.1

Multilateral Instrument 52-109, Parts 2 and 3, s. 4.5

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

and

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

and

In the Matter of  
National Bank of Canada and  
NBC Capital Trust

MRRS Decision Document

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### **Background**

The local securities regulatory authority or regulator (the “Decision Maker”, and collectively the “Decision Makers”) in each of the Provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, New-Brunswick, Nova Scotia and Newfoundland and Labrador (collectively the “Jurisdictions”) has received an application from National Bank of Canada (the “Bank”) and NBC Capital Trust (the “Trust”) for a decision, pursuant to the securities legislation of the Jurisdictions (the “Legislation”), that the requirements contained in the Legislation to:

- (a) (i) file interim financial statements and audited annual financial statements and deliver same to the security holders of the Trust, pursuant to Sections 4.1, 4.3 and 4.6 of National Instrument 51-102 – Continuous Disclosure Obligations (“NI 51-102”);
  - (ii) file interim and annual management’s discussion and analysis (“MD&A”) of the financial conditions and results of operations and deliver same to the security holders of the Trust pursuant to Section 5.1 and 5.6 of NI 51-102;
  - (iii) file an annual information form pursuant to Section 6.1 of NI 51-102;
- (the obligations set out in paragraph (a) are collectively defined as the “Continuous Disclosure Obligations”).
- (b) file interim and annual certificates contained in Sections 2.1 and 3.1 of Multilateral Instruments 52-109 – *Certification of Disclosure in Issuer’s Annual and Interim Filings* (“MI 52-109”) (the “Certification Obligations”);

shall not apply to the Trust, subject to certain conditions;

Under the Mutual Reliance Review System for Exemptive Relief Applications (the “System”):

- (a) the Autorité des marchés financiers (“AMF”) 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.

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### **Representations**

This decision is based on the following facts represented by the Trust:

#### *The Trust*

1. The Trust is an open-end trust established under the laws of Ontario by Natcan Trust Company, as trustee (the “Trustee”), pursuant to a declaration of trust dated May 17, 2006 (as amended and restated from time to time) (the “Declaration of Trust”). The Trust’s principal office is located in Montréal, Québec. The Bank, whose head office is located in Québec, will be the administrative agent of the Trust pursuant to an administration agreement entered into between the Trustee and the Bank (the “Administration Agreement”).
2. Upon completion of the Offering (as defined below), the authorized capital of the Trust will consist of: (i) an unlimited number of Trust Capital Securities, including the Trust Capital Securities – Series 1 (“NBC CapS – Series 1”); and (ii) an unlimited number of trust units called Special Trust Securities.
3. Following the issuance of a final MRRS Decision Document evidencing receipts granted by the Decision Makers for the final prospectus (the “Prospectus”) in respect of the public offering of NBC CapS – Series 1 (the “Offering”), the Trust is a reporting issuer or its equivalent in each of the provinces of Canada that provides for a reporting issuer regime as at June 8, 2006. The Special Trust Securities and the NBC CapS – Series 1 are collectively referred to herein as the “Trust Securities”.
4. The Trust was established solely for the purpose of effecting the Offering and possible future offerings of Trust Securities in order to provide the Bank with a cost effective means of raising capital for regulatory purposes by means of: (i) creating and selling the Trust Securities; and (ii) acquiring and holding assets, which will initially consist primarily of a deposit note issued by the Bank (the “Bank Deposit Note”). The Bank Deposit Note will generate income for distribution to holders of the Trust Securities. The Trust does not and will not carry on any operating activity, other than in connection with the Offering and any future offerings.

#### *The Bank*

5. The Bank, a chartered bank subject to the provisions of the Bank Act, was formed through a series of amalgamations and its roots date back to 1859 with the founding of Banque Nationale in Québec City. The Bank’s head office is

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located at the National Bank's Tower, 600 de La Gauchetière Street West, 4th Floor, Montréal, Québec H3B 4L2.

6. The authorized capital of the Bank consists of: (i) an unlimited number of common shares (the "Bank Common Shares"), without par value; (ii) an unlimited number of first preferred shares (the "First Preferred Shares"), without par value, issuable for a maximum aggregate consideration of \$1 billion or the equivalent thereof in foreign currencies; and (iii) 15 million second preferred shares, without par value, issuable for a maximum aggregate consideration of \$300 million or the equivalent thereof in foreign currencies. As at May 18, 2006, there were 162,376,529 Bank Common Shares and 16 million First Preferred Shares issued and outstanding.
7. The Bank is a reporting issuer or the equivalent in each of the provinces of Canada providing for such a regime and is not, to its knowledge, in default of any requirement under the Legislation.
8. The Bank Common Shares are listed and posted for trading on the Toronto Stock Exchange.

### *NBC CapS – Series 1*

9. Each NBC CapS — Series 1 will entitle the holder thereof to receive non-cumulative fixed cash distributions (an "Indicated Yield") on the last day of June and December of each year (a "Distribution Date"). A Distribution Date will be a "Regular Distribution Date" unless the Bank fails to declare regular dividends on (i) any series of preferred shares of the Bank (collectively, the "Bank Preferred Shares"), or (ii) if no Bank Preferred Shares are then outstanding, the Bank Common Shares (in each case, "Dividends") in the "Dividend Reference Period" (each such failure being a "Distribution Diversion Event"). The Dividend Reference Period in respect of any Distribution Date is the 90 day period preceding the Distribution Period ending on the day immediately preceding such Distribution Date. The periods commencing on and including the Closing Date to but excluding December 31, 2006 and thereafter from and including each Distribution Date to but excluding the next Distribution Date are referred to as "Distribution Periods".
10. Whether or not the Indicated Yield on the NBC CapS — Series 1 will be payable by the Trust on any Distribution Date will be determined prior to the commencement of the Distribution Period ending on the day immediately preceding that Distribution Date. On each Regular Distribution Date, the Trust will pay the Indicated Yield to the holders of NBC CapS — Series 1 and the holder of the Special Trust Securities will be entitled to receive the Net

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Distributable Funds, if any, of the Trust remaining after payment of the Indicated Yield.

11. If a Distribution Diversion Event occurs, the Distribution Date occurring on the day immediately following the end of the first Distribution Period following the Distribution Diversion Event will be a Distribution Diversion Date. In that case, although the Bank will pay interest to the Trust on the Bank Deposit Note Interest Payment Date, the Trust will not pay the Indicated Yield on the NBC CapS — Series 1 on the Distribution Diversion Date; instead, it will distribute the Net Distributable Funds of the Trust, if any, as at such Distribution Diversion Date to the holder of the Special Trust Securities.
12. Pursuant to a share exchange agreement to be entered into among the Bank, the Trust and a party acting as Exchange Trustee (the “Share Exchange Agreement”), the Bank will agree for the benefit of holders of NBC CapS — Series 1 that, if the Trust fails on any Regular Distribution Date to pay the Indicated Yield on the NBC CapS — Series 1 in full, the Bank will not pay dividends on the “Dividend Restricted Shares”, being the Bank Preferred Shares and the Bank Common Shares, until the month commencing immediately after the 12th month following the Trust’s failure to pay the Indicated Yield in full on the NBC CapS — Series 1, unless the Trust first pays such Indicated Yield (or the unpaid portion thereof) to the holders of the NBC CapS — Series 1 (the “Dividend Stopper Undertakings”). Accordingly, it is in the interest of the Bank to ensure, to the extent within its control, that the Trust pays the Indicated Yield on the NBC CapS — Series 1 on each Regular Distribution Date so as to avoid triggering the Dividend Stopper Undertakings.
13. Pursuant to the terms of the NBC CapS - Series 1 and the Share Exchange Agreement, the NBC CapS - Series 1 may be exchanged, at the option of the holders of NBC CapS - Series 1 (the “Holder Exchange Right”), at a price for each NBC CapS – Series 1 equal to 40 Bank Preferred Shares Series 17. The NBC CapS - Series 1 will be automatically exchanged, without the consent of the holder, for 40 Bank Preferred Shares, Series 18 (the “Bank Preferred Shares Series 18” and together with the Bank Preferred Shares Series 17, the “Bank Exchange Preferred Shares”) upon the occurrence of certain stated events relating to the solvency of the Bank or actions taken by the Superintendent of Financial Institutions (Canada) (the “Superintendent”) in respect of the Bank (the “Automatic Exchange”).
14. On June 30, 2011 and on any Distribution Date thereafter, the Trust, at its option, and with the approval of the Superintendent, and on not less than 30 nor more than 60 days’ prior written notice, may redeem the outstanding NBC

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CapS — Series 1 in whole or in part, without the consent of the holders, for an amount in cash per NBC CapS — Series 1 equal to (i) the greater of (A) \$1,000 per NBC CapS — Series 1, together with any Unpaid Indicated Yield to the date of redemption (the “Redemption Date”) stated in the notice (the “Redemption Price”), and (B) the NBC CapS — Series 1 Canada Yield Price (the greater of (A) and (B) being the “Early Redemption Price”), if the NBC CapS — Series 1 are redeemed prior to June 30, 2016, and (ii) the Redemption Price, if the NBC CapS — Series 1 are redeemed on or after June 30, 2016.

15. Upon the occurrence of certain regulatory or tax events affecting the Bank or the Trust (a “Special Event”), the Trust may, subject to regulatory approval, and on not less than 30 and not more than 90 days’ prior written notice, redeem at any time all, but not less than all, of the NBC CapS - Series 1 at the Early Redemption Price (if the NBC CapS - Series 1 are redeemed prior to June 30, 2016) or at the Redemption Price (if the NBC CapS - Series 1 are redeemed on or after June 30, 2016).
16. The Bank has agreed, pursuant to the Share Exchange Agreement, that it will maintain ownership of 100% of the outstanding Special Trust Securities.
17. As long as any NBC CapS - Series 1 are outstanding, the Trust may only be terminated with the approval of the holder of Special Trust Securities and with the approval of the Superintendent: (i) upon the occurrence of a Special Event at any time; or (ii) for any reason on June 30, 2011 or on December 31, 2011 or on the last day of June and December of each year thereafter. Holders of Trust Securities rank *pari passu* in the distribution of the property of the Trust in the event of a termination of the Trust, after the discharge of any creditor claims. As long as any NBC CapS - Series 1 are outstanding and held by any person other than the Bank, the Bank will not approve the termination of the Trust, unless the Trust has sufficient funds to pay the Early Redemption Price or the Redemption Price, as applicable.
18. The NBC CapS – Series 1 are non-voting, except in limited circumstances, and Special Trust Securities entitle their holders to vote.
19. Except to the extent that the Distributions are payable to NBC CapS – Series 1 holders and, other than in the event of the termination of the Trust (as set forth in the Declaration of Trust), NBC CapS – Series 1 holders have no claim or entitlement to the income of the Trust or the assets held by the Trust.
20. Under an Administration Agreement entered into between the Trustee and the Bank, the Trustee has delegated to the Bank certain of its obligations in relation to the administration of the Trust. The Bank, as administrative agent,

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will provide advice and counsel with respect to the administration of the day-to-day operations of the Trust and other matters as may be requested by the Trustee from time to time.

21. The Trust has not requested 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 that 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 Decision Document from any of the requirements of NI 44-101.
22. The Trust may, from time to time, issue further series of Trust Securities, the proceeds of which would be used to acquire, amongst other eligible investments, additional deposit notes from the Bank.
23. Because of the nature of the Trust, the terms of the NBC CapS – Series 1, the Share Exchange Agreement and the various covenants of the Bank given in connection with the Offering, information about the affairs and financial performance of the Bank, as opposed to that of the Trust, is meaningful to holders of NBC CapS – Series 1. The Bank's filings and the delivery of the same material to holders of NBC CapS – Series 1 as that delivered to shareholders of the Bank will provide holders of NBC CapS – Series 1 and the general investing public with all information required in order to make an informed decision relating to an investment in NBC CapS – Series 1. Information regarding the Bank is relevant both to an investor's expectation of being paid the Indicated Yield on the NBC CapS – Series 1 as well as the return of the investor's initial investment.

### **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 the Trust be exempted from the Continuous Disclosure Obligations provided that:

- (i) the Bank remains a reporting issuer under the Legislation and has filed all documents it is required to file;
- (ii) the Bank files with the Decision Makers, in electronic format under the Trust's SEDAR profile, the documents listed in paragraph (a) above of this Decision, at the same time as they are required under the Legislation to be filed by the Bank;

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- (iii) the Trust pays all filing fees that would otherwise be payable by the Trust in connection with the filing of the documents referred to in paragraph (a) above of this Decision;
- (iv) the Trust sends or causes the Bank to send its interim and annual financial statements and interim and annual MD&A, as applicable, to holders of Trust Securities at the same time and in the same manner as if the holders of Trust Securities were holders of Bank Common Shares;
- (v) all outstanding securities of the Trust are either NBC CapS – Series 1, additional series of the Trust Capital Securities or Special Trust Securities;
- (vi) the rights and obligations of holders of additional series of the Trust Capital Securities are the same in all material respects as the rights and obligations of the holders of the NBC CapS – Series 1, with the exceptions of economic terms such as the rate of Indicated Yield, redemption dates, exchange dates and rates of exchange;
- (vii) the Bank is the beneficial owner of all issued and outstanding voting securities of the Trust, including the Special Trust Securities.

The further decision of the Decision Makers under the Legislation is that the Trust be exempted from the Certification Obligations provided that:

- (i) the Trust is exempt from the Continuous Disclosure Obligations;
- (ii) the Bank files with the Decision Makers, in electronic format under the Trust's SEDAR profile, the Bank Interim and Annual Certificates at the same time as such documents are required under the Legislation to be filed by the Bank;
- (iii) the Trust continues to be exempted from the Continuous Disclosure Obligations.

This Decision shall expire 30 days after the date a material adverse change occurs in the affairs of the Trust.

Louis Morisset  
Surintendant aux marchés des valeurs