2004 BCSECCOM 400

Headnote
Mutual Reliance Review System for Exemptive Relief Applications – relief granted from prohibition against trading in portfolio securities by persons having information about the trading programs of mutual funds - the portfolio of the mutual fund is fixed and the portfolio is passively managed - independent directors of the mutual fund will approve any purchase of portfolio securities from the mutual fund by the fund administrator

Applicable British Columbia Provisions
Securities Act, R.S.B.C. 1996, c. 418, ss. 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 NEWGROWTH 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 NewGrowth Corp. (the "Company") and Scotia Capital Inc. ("Scotia Capital") for decisions under the securities legislation of the Jurisdictions (the "Legislation") that the prohibition in the Legislation prohibiting trading in portfolio shares by persons or companies having information concerning the trading programs of mutual funds (the "Principal Trading Prohibition") shall not apply to Scotia Capital in connection with Principal Purchases (defined below) by Scotia Capital from the Company;

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, unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 Definitions;

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

The Company

1. The Company is a passive investment company whose principal undertaking is the holding of a portfolio (the "Portfolio") of publicly listed common shares of Canadian banks and utility companies (the "Portfolio Shares"). The Portfolio Shares are the only material assets of the Company. The purpose of the Company is to provide a vehicle through which different investment objectives with respect to participation in the Portfolio Shares may be satisfied;

2. The Company was incorporated on June 27, 1991 under the laws of the Province of Ontario, amalgamated with Utility Preferred Corp. on June 19, 1992 and became a reporting issuer in the Jurisdictions by filing a final prospectus dated June 19, 1992 which qualified its initial public offering (the "IPO") of capital shares and equity dividend shares;

3. The Company filed articles of amendment on March 24, 1998 in connection with a share capital reorganization (the "1998 Reorganization") approved by its shareholders on March 16, 1998. Pursuant to the 1998 Reorganization, the outstanding capital shares of the Company were exchanged for Class A Capital Shares, the outstanding equity dividend shares were redeemed and, in order to maintain the leveraged "split share" structure of the Company, a new class of preferred shares (the "Preferred Shares") was issued pursuant to a final prospectus dated June 16, 1998;

4. The Company filed articles of amendment on May 11, 2004 in connection with a share capital reorganization (the "2004 Reorganization") approved by its shareholders on April 29, 2004. Pursuant to the 2004 Reorganization, 827,105 Class A Capital Shares will be redeemed under the Special Retraction Right and all of the outstanding Preferred Shares will be redeemed on June 25, 2004 in accordance with their terms;

5. In order to maintain the leveraged "split share" structure of the Company in respect of the 3,728,147 Class A Capital Shares that will remain outstanding, 3,728,147 Class B Preferred Shares, Series 1 (the "Series 1 Preferred Shares") will be issued;

6. The Company filed an initial annual information form dated May 11, 2004 (the "Initial AIF") for the purpose of qualifying for the Prompt Offering Qualification System provided for under National Instrument 44-101 of the Canadian Securities Administrations;

7. The Company filed a final short form prospectus dated June 17, 2004 (the "Prospectus") in respect of the offering (the "Offering") of the Series 1 Preferred Shares for which a final receipt was issued in each of the provinces of Canada on June 17, 2004. The Offering is expected to close on June 24, 2004;

8. The authorized capital of the Company consists of an unlimited number of Class A Capital Shares, an unlimited number of Preferred Shares, an unlimited number of Class B Preferred Shares, 1,000 Class B Shares and an unlimited number of Class C Shares. As of May 31, 2004, an aggregate of 4,555,252 Class A Capital Shares and the same number of Preferred Shares remained outstanding. After giving effect to the Offering and the redemption of Class A Capital Shares and Preferred Shares on June 25, 2004, there will be 3,728,147 Class A Capital Shares and 3,728,147 Series 1 Preferred Shares outstanding;

9. The Class B Shares are the only voting shares in the capital of the Company. As of the date of the Prospectus, there are 1,000 Class B Shares issued and outstanding. A former director and officer of Scotia Capital, owns all of the issued and outstanding Class B Shares of the Company. The Class B Shares are lodged in escrow with CIBC Mellon Trust Company pursuant to an escrow agreement dated June 19, 1992. Under the Escrow Agreement, the Class B Shares may not be disposed of or dealt with in any manner until all the Class A Capital Shares and all preferred shares of the Company have been retracted or redeemed, without the express consent, order or direction in writing of the Commission;

10. The Class A Capital Shares are listed on the Toronto Stock Exchange (the "TSX") and conditional listing approval has been received in respect of the listing of the Series 1 Preferred Shares on the TSX;

11. Scotia Capital, in its capacity as administrator of the operations of the Company, will own all of the issued and outstanding Class C Shares of the Company. Holders of Class C Shares are not entitled to vote. Class C Shares

rank subsequent to the Series 1 Preferred Shares, *pari passu* with the Class B Shares and prior to Class A Capital Shares with respect to dividends and with respect to distributions upon a retraction, redemption or reduction of capital and distributions on the dissolution, liquidation or winding-up of the Company;

12. The Company has a Board of Directors which currently consists of seven directors, four of whom are considered "unrelated directors" under the TSX Guidelines for Effective Corporate Governance and will be considered "independent directors" under pending Multilateral Policy 58-201 of the Canadian Securities Administrators. The remaining three directors are employees of Scotia Capital. Also, the offices of President/Chief Executive Officer and Chief Financial Officer/Secretary of the Company are held by employees of Scotia Capital;

13. The Company is not, and will not upon the completion of the Offering, be an insider of any of the issuers of Portfolio Shares;

14. The Company is considered to be a mutual fund as defined in the Legislation, except in Quebec. Since the Company does not operate as a conventional mutual fund, it sought and obtained relief from certain requirements of National Instrument 81-102 Mutual Funds on June 21, 2004;

Scotia Capital Inc.

15. Scotia Capital is registered under the Legislation as a dealer in the categories of "broker" and "investment dealer" (or equivalent category) and is a member of the Investment Dealers Association of Canada and the TSX;

16. Pursuant to an administration agreement (the "Administration Agreement") to be renewed as of June 25, 2004, the Company will retain Scotia Capital to administer its operations for a monthly fee equal to 1/12 of 0.15% of the market value of the Portfolio;

17. Pursuant to an underwriting agreement (the "Underwriting Agreement") dated June 17, 2004 made between the Company and Scotia Capital and BMO Nesbitt Burns Inc. (the "Underwriters"), the Company has agreed to issue and sell, and the Underwriters have agreed to purchase, on June 24, 2004 or on such other date as may be agreed, the 3,728,147 Series 1 Preferred Shares being issued pursuant to the Offering. The Company has agreed to pay fees to the Underwriters in an amount per Series 1 Preferred Share that is disclosed in the Prospectus;

18. Scotia Capital's economic interest in the Company is disclosed in the Prospectus under the heading "Interest of Management and Others in Material Transactions." In particular, Scotia Capital may receive the following amounts:

    (a) underwriting fees with respect to the Offering;

    (b) administration fees pursuant to the Administration Agreement;

    (c) commissions in respect of dispositions of Portfolio Shares by Scotia Capital, as agent for the Company, necessary to rebalance the Portfolio and to fund retractions or redemptions of Class A Capital Shares and Series 1 Preferred Shares, at a rate to be agreed upon by the Company and Scotia Capital; and

    (d) amounts in connection with Principal Purchases;

The Offering

19. The net proceeds from the sale of the Series 1 Preferred Shares under the Final Prospectus, after payment of commissions to the Underwriters and expenses of the issue, will be used by the Company to fund the redemption of Preferred Shares and Class A Capital Shares on June 25, 2004 and to purchase additional Portfolio Shares;

20. The Class A Capital Shares and Series 1 Preferred Shares may be surrendered for retraction at any time in the manner described in the Prospectus. All Class A Capital Shares and Series 1 Preferred Shares outstanding on June 26, 2009 (the "Redemption Date") will be redeemed by the Company on such date;

21. The policy of the Company is to refrain from trading the Portfolio Shares except:

    (a) to complete the one-time rebalancing of the Portfolio described in the Prospectus under the heading "The Portfolio";

    (b) to fund retractions of Class A Capital Shares and Series 1 Preferred Shares;

    (c) to fund the redemption of all Class A Capital Shares and Series 1 Preferred shares on the Redemption Date; and

    (d) in other limited circumstances as described in the Prospectus;

22. In connection with the services to be provided by Scotia Capital to the Company under the Administration Agreement, Scotia Capital may sell Portfolio Shares in the circumstances described in the preceding paragraph. These sales will be made by Scotia Capital as agent for the Company, but in certain circumstances, subject to receipt of all regulatory approvals, such as where a small number of Class A Capital Shares and/or Series 1 Preferred Shares have been surrendered for retraction, Scotia Capital may purchase Portfolio Shares as principal (the "Principal Purchases");

23. In connection with any Principal Purchases, Scotia Capital will comply with the rules, procedures and policies of the TSX (or any applicable stock exchange of which it is or may become a member) and in accordance with orders obtained from all applicable securities regulatory authorities. The Prospectus discloses that Scotia Capital may realize a gain or loss on the resale of such securities;

24. All Principal Purchases will be approved by at least two independent directors of the Company;

25. At the time of making a Principal Purchase, Scotia Capital will not have any knowledge of an undisclosed material fact or material change relating to the issuer whose shares are the subject of the Principal Purchase.

26. The Administration Agreement provides 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 Company to obtain the best price reasonably available for the Portfolio Shares so long as the price obtained (net of all transaction costs, if any) by the Company from Scotia Capital is at least as advantageous to the Company 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;

27. Scotia Capital will not receive any commissions from the Company in connection with Principal Purchases and, in carrying out the Principal Purchases, Scotia Capital shall deal fairly, honestly and in good faith with the Company;

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 the Principal Trading Prohibition shall not apply to Scotia Capital in connection with the Principal Purchases.

DATED July 5, 2004.

Wendell S. Wigle Robert W. Davis