

# 2005 BCSECCOM 209

April 4, 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 Scotiabank 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;

#### **Scotiabank Capital Trust**

4. the Trust is an open-end trust established under the laws of the Province of Ontario by Computershare Trust Company of Canada (Trustee), as trustee, pursuant to a declaration of trust made as of March 28, 2002, as supplemented by a first supplemental declaration of trust dated February 6, 2003, as amended and restated from time to time (the Declaration of Trust);
5. the outstanding securities of the Trust consist of (i) Special Trust Securities (the Special Trust Securities); and (ii) Scotiabank Trust Securities – Series 2002 – 1 (the Scotia BaTS II – Series 2002) and Scotiabank Trust Securities – Series 2003 - 1 (the Scotia BaTS II — Series 2003, together with the Scotia BaTS II — Series 2002, the Scotia BaTS II); the Special Trust Securities and the Scotia BaTS II are collectively referred to herein as the Trust Securities; the Scotia BaTS II and the Special Trust Securities are not quoted or listed on any exchange or organized market;

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6. 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;
7. the Trust was established solely for the purpose of effecting the Offerings (as defined below) in order to provide the Bank with a cost-effective means of raising capital for Canadian financial institutions regulatory purposes by means of: (i) creating and selling the Trust Securities; and (ii) acquiring and holding assets, which consist primarily of senior deposit notes issued by the Bank (the Bank Deposit Notes); the Bank Deposit Notes 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 Offerings (as defined below);

### **Scotia BaTS II**

8. the Trust distributed 1,500,000 Scotia BaTS II (the Offerings) under prospectuses dated April 23, 2002 and February 6, 2003 (the Prospectuses); the Trust also issued and sold 2,000 Special Trust Securities, which are voting securities of the Trust, to the Bank in connection with the Offerings;
9. holders of Scotia BaTS II are entitled to receive fixed, semi-annual non-cumulative distributions (each, an Indicated Yield) on the basis described below (Distributions); each semi-annual payment date for the Indicated Yield in respect of the Scotia BaTS II (a Distribution Date) will be either a Regular Distribution Date or a Distribution Diversion Date; a Distribution Date will be a Distribution Diversion Date, with the result that the Indicated Yield will not be paid in respect of the Scotia BaTS II but, instead, the Trust will pay the net distributable funds of the Trust to the holder of Special Trust Securities, if (i) the Bank has failed in the period described in the applicable Prospectus to declare regular dividends on its Bank Non-Cumulative Preferred Shares of any series and its Bank Parity Preferred Shares (if any) in accordance with their terms; or (ii) if no Bank Non-Cumulative Preferred Shares or Bank Parity Preferred Shares are then outstanding and the Bank has failed in the period described in the applicable Prospectus to declare regular dividends on its Bank Junior Preferred Shares; or (iii) if no Bank Junior Preferred Shares are then outstanding and the Bank has failed in the period described in the applicable Prospectus to declare regular dividends on its Bank Common Shares; in all other cases, a Distribution Date will be a Regular Distribution Date, in which case holders of Scotia BaTS II will be entitled to receive the Indicated Yield; Bank Non-Cumulative Preferred Shares means the non-cumulative Preferred Shares of the Bank (including the Bank Preferred Shares Series W, the Bank Preferred Shares Series X, the Bank Preferred Shares Series U and the Bank Preferred Shares Series V); Bank Parity Preferred Shares means preferred or

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preference shares issued by the Bank ranking *pari passu* with the Bank Non-Cumulative Preferred Shares; Bank Junior Preferred Shares means preferred or preference shares issued by the Bank ranking junior to the Bank Non-Cumulative Preferred Shares; (the Bank Non-Cumulative Preferred Shares, the Bank Common Shares, the Bank Parity Preferred Shares and the Bank Junior Preferred Shares are hereinafter referred to as the Bank Dividend Restricted Shares);

10. under share exchange agreements dated April 30, 2002 and February 13, 2003 between the Bank and the Trust and a party acting as exchange trustee (the Share Exchange Agreements), the Bank has agreed, for the benefit of the holders of Scotia BaTS II, that in the event that the Trust fails on any Regular Distribution Date to pay the Indicated Yield on the Scotia BaTS II in full: (i) the Bank will not declare or pay Dividends on the Bank Dividend Restricted Shares, until a specified period of time has elapsed, unless the Trust first pays such Indicated Yield (or the unpaid portion thereof) to holders of Scotia BaTS II; accordingly, it is in the interest of the Bank to ensure, to the extent within their control, that the Trust complies with its obligation to pay the Indicated Yield on each Regular Distribution Date;
11. under the terms of the Scotia BaTS II and the Share Exchange Agreements, the Scotia BaTS II may be exchanged (the Holder Exchange Right), at the option of the holders of Scotia BaTS II, for newly issued Bank Preferred Shares Series W, in case of the Scotia BaTS II – Series 2002, or Bank Preferred Shares Series U, in the case of the Scotia BaTS II – Series 2003; the Scotia BaTS II will be automatically exchanged (the Automatic Exchange), without the consent of the holder, for Bank Preferred Shares Series X, in the case of the Scotia BaTS II – Series 2002, or Bank Preferred Shares Series V, in the case of the Scotia BaTS II – Series 2003, 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;
12. the terms of the Bank Preferred Shares Series W and the Bank Preferred Shares Series U provide, among other things, that such shares are convertible at the option of the holder for Bank Common Shares at certain times and in certain circumstances, but in any event the Bank Preferred Shares Series W and the Bank Preferred Shares Series U are not convertible into Bank Common Shares until December 31, 2012, in the case of the Bank Preferred Shares Series W, and December 31, 2013, in the case of the Bank Preferred Shares Series U; the Holder Exchange Right is not operative at any time that an event giving rise to the Automatic Exchange in respect of the Scotia BaTS II has occurred and is continuing;

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13. the Trust may, subject to regulatory approval, on June 30, 2007, in the case of the Scotia BaTS – Series 2002, and June 30, 2008, in the case of the Scotia BaTS – Series 2003, and on any Distribution Date thereafter, redeem such securities; the price payable in respect of any such redemption will include an early redemption compensation component (such price being the Early Redemption Price) in the event of a redemption prior to June 30, 2012, in the case of the Scotia BaTS II – Series 2002, and June 30, 2013, in the case of the Scotia BaTS II – Series 2003 (in each case, the Early Redemption Date); the price payable in all other cases will be \$1,000 per Scotia BaTS II together with any unpaid Indicated Yield thereon (the Redemption Price);
14. upon the occurrence of certain regulatory or tax events affecting the Bank or the Trust, the Trust may, subject to regulatory approval, redeem at any time all but not less than all of the Scotia BaTS II at the applicable Early Redemption Price (if the Scotia BaTS II are redeemed prior to the applicable Early Redemption Date) and at the applicable Redemption Price (if the Scotia BaTS II are redeemed on or after the applicable Early Redemption Date);
15. the Bank has covenanted, under the Share Exchange Agreements, that the Bank or its affiliates will maintain ownership, directly or indirectly, of 100% of the outstanding Special Trust Securities; as a result, the financial results of the Trust are consolidated with those of the Bank; the Scotia BaTS II constitute Tier 1 Capital of the Bank;
16. as long as any Scotia BaTS II 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 prior to June 30, 2007, in the case of the Scotia BaTS II – Series 2002, and June 30, 2008, in the case of the Scotia BaTS II – Series 2003; or (ii) for any reason on June 30, 2007, in the case of the Scotia BaTS II – Series 2002, and June 30, 2008, in the case of the Scotia BaTS II – Series 2003, or any Distribution Date 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 Scotia BaTS II are outstanding, the Bank will not approve the termination of the Trust unless the Trust has sufficient funds to pay the applicable Early Redemption Price in the case of a termination prior to the applicable Early Redemption Date, or the applicable Redemption Price in the case of any other termination;
17. as set forth in the Declaration of Trust, the Scotia BaTS II are non-voting except in limited circumstances and Special Trust Securities entitle the holders to vote;

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18. except to the extent that the Distributions are payable to Scotia BaTS II holders and, other than in the event of termination of the Trust (as set forth in the Declaration of Trust), Scotia BaTS II holders have no claim or entitlement to the income of the Trust or the assets held by the Trust;
19. under an amended and restated administration agreement dated February 6, 2003 between the Trustee and the Bank, the Trustee delegated to the Bank certain of its obligations in relation to the administration of the Trust; the Bank, as administrative agent, provides 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;
20. 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 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 Order from any of the requirements of NI 44-101;
21. the Trust may, from time to time, issue further series of Scotiabank Trust Securities, the proceeds of which would be used to acquire additional deposit notes from the Bank;
22. because of the terms of the Scotia BaTS II, 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 II; the Bank's filings and the delivery of the same material delivered to shareholders of the Bank will provide holders of Scotia BaTS II and the general investing public with all information required in order to make an informed decision relating to an investment in Scotia BaTS II; information regarding the Bank is relevant both to an investor's expectation of being paid the Indicated Yield on the Scotia BaTS II as well as the return of the investor's principal;
23. under an MRRS Decision Document dated July 26, 2002 (the Previous Decision), the Trust is exempt from certain continuous disclosure requirements of the Legislation, subject to certain conditions;
24. 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.

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### **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 (other than the economic terms thereof) 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 II at the date hereof; and
- (e) the Bank or its affiliates are the beneficial owners 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