

Headnote

Mutual Reliance Review System for Exemptive Relief Application - all unitholders of exchange traded index fund exempted from formal take-over bid requirements in connection with normal course purchases of units on the TSE, provided that such unitholders provide trustee/manager of fund with an undertaking not to exercise any votes attached to units which represent more than 20% of the votes attached to all outstanding units of the fund.

Applicable Ontario Statute

Securities Act, R.S.O. 1990, c.s.5, as amended, ss. 95, 96, 97, 98, 100 and 104(2)(c).

Applicable Ontario Regulation

Regulation under the Securities Act, R.R.O. 1990, Regulation 1015, as amended, s.203.1(1).

**IN THE MATTER OF THE
SECURITIES LEGISLATION OF
BRITISH COLUMBIA, ALBERTA, SASKATCHEWAN,
MANITOBA, ONTARIO, QUÉBEC,
NEW BRUNSWICK, NOVA SCOTIA, NEWFOUNDLAND AND LABRADOR,
YUKON AND NUNAVUT**

AND

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

AND

**IN THE MATTER OF
TD SECURITIES INC. (ATDSI[®])
BMO NESBITT BURNS INC. (ABMO NB[®])
RBC DOMINION SECURITIES INC. (ARBCDS[®])
BARCLAYS GLOBAL INVESTORS CANADA LIMITED (ABARCLAYS[®])**

AND

**IN THE MATTER OF
iUNITS S&P/TSX 60 INDEX FUND
iUNITS S&P/TSX 60 CAPPED INDEX FUND
iUNITS S&P/TSX CANADIAN MIDCAP INDEX FUND
iUNITS S&P/TSX CANADIAN ENERGY INDEX FUND
iUNITS S&P/TSX CANADIAN INFORMATION TECHNOLOGY INDEX FUND
iUNITS S&P/TSX CANADIAN GOLD INDEX FUND
iUNITS S&P/TSX CANADIAN FINANCIALS INDEX FUND
(COLLECTIVELY, THE iFUNDS[®])**

MRRS DECISION DOCUMENT

WHEREAS the local securities regulatory authority or regulator (the iDecision Maker[®]) in each of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia, Newfoundland and Labrador, Yukon and Nunavut (the iJurisdictions[®]) has received an application from TDSI, BMO NB, RBCDS and Barclays for a decision pursuant to the securities legislation of the Jurisdictions (the iLegislation[®]) exempting all unitholders of the Funds from the requirements of the Legislation related to take-over bids, including the requirement

to file a report of a take-over bid and the accompanying fee with each applicable Jurisdiction (the **ATake-over Bid Requirements@**) in respect of take-over bids for the Funds (as defined in paragraph 10 below);

AND WHEREAS pursuant to the Mutual Reliance Review System for Exemptive Relief Applications (the **ASystem@**), the Ontario Securities Commission is the principal regulator for this application;

AND WHEREAS TDSI, BMO NB, RBCDS and Barclays have represented to the Decision Makers as follows:

1. Each Fund is a trust that has been created under the laws of Ontario, the units of each Fund are listed on The Toronto Stock Exchange (the **ATSX@**), the head office of each Fund is located in Toronto, Ontario and each Fund is a reporting issuer or its equivalent in every province and territory of Canada.
2. The investment objective of each Fund is to track the performance of a relevant S&P/TSX Index (each, an **AIindex@** and collectively, the **AIindices@**). Each Fund holds shares of the companies (collectively, the **AConstituent Companies@**) that make up the relevant Index in substantially the same weight as they are reflected in the Index.
3. Barclays is the trustee of the Funds and as such is responsible for the day-to-day administration of each Fund.
4. The market price of the shares of Constituent Companies underlying each Fund unit equals, as closely as possible, a specified percentage of the level of the relevant Index. The net asset value of each Fund is calculated and published daily.
5. Units of a Fund may be purchased directly from the Fund by registered dealers who have entered into an underwriting agreement with the Fund. The consideration payable by underwriters for each Unit consists of a basket of shares of the Fund's Constituent Companies (a **ABasket of Shares@**) and a cash component.
6. Each Fund has appointed BMO NB and RBCDS as the designated brokers (the **ADesignated Brokers@**) to perform certain functions which include standing in the market with a bid and ask price for the Fund's units for the purpose of maintaining market liquidity for the units and facilitating adjustments to Baskets of Shares both as a result of adjustments that have been made to the Index and as a result of non-cash distributions received by the Fund.
7. Except as described in paragraphs 5 and 6 above, units of a Fund may not be

purchased directly from the Fund. As a result, investors must generally acquire units through the facilities of the TSX.

- 8. Individuals who wish to dispose of units must generally do so by selling them through the TSX. Unitholders of the Funds (Unitholders) may, however, redeem prescribed numbers of units, or integral multiples thereof, for Baskets of Shares plus cash. Each Unitholder also has the right to have its units redeemed for cash only at a discount to the then market price of the units on the TSX. The cash redemption price of the units of each Fund is equal to 95% of the closing trading price of such units on the effective day of the redemption.**
- 9. Unitholders holding at least a prescribed number of the units of a Fund are also entitled to vote the proportion of the shares of a Constituent Company that are held by the Fund that is equal to the Unitholder's proportionate holding of outstanding units. Unitholders holding less than the prescribed number of units have no right to vote the shares of Constituent Companies.**
- 10. Barclays may, from time to time, establish additional exchange traded index funds (the Future Funds) for the purpose of tracking indices other than those tracked by the Funds and it is anticipated that Future Funds will be structured and operated in a manner that is substantially similar to the way in which the Funds are structured and operated. For purposes of this MRRS Decision Document, Funds and Future Funds are referred to collectively as Funds and Unitholders and unitholders of Future Funds are referred to collectively as Fund Unitholders.**
- 11. As the units of each Fund are, or will be, both voting and equity securities for purposes of the Take-over Bid Requirements, anyone acquiring beneficial ownership of, or the power to exercise control or direction over, 10% or more of the outstanding units of a Fund would be required to comply with the early warning press release and reporting requirements, as well as the further acquisition restrictions, imposed by the Legislation (the Early Warning Requirements) but for section 3.3 of National Instrument 62-103 which provides that the Early Warning Requirements do not apply in respect of the ownership or control of securities issued by a mutual fund that is governed by National Instrument 81-102.**
- 12. There is no exemption from the Take-over Bid Requirements for conventional mutual funds that is comparable to the exemption from Early Warning Requirements in section 3.3 of National Instrument 62-103 because the securities of conventional mutual funds are not typically subject to the Take-over Bid Requirements because acquisitions of conventional mutual funds are**

made from treasury.

13. **Although units of the Funds trade, or will trade, on the TSX and the acquisition of such units can therefore become subject to the Take-over Bid Requirements,**
 - (a) **it is not, and will not be, possible for one or more Fund Unitholders to exercise control or direction over a Fund as the constating document of each Fund generally ensures, or will ensure, that there can be no changes made to the Fund which do not have the support of the trustee of the Fund;**
 - (b) **it is difficult for purchasers of units of the Funds to monitor compliance with Take-over Bid Requirements because the number of outstanding units is always in flux as a result of the ongoing issuance and redemption of units by the Funds; and**
 - (c) **the way in which Fund units are, or will be, priced deters anyone from either seeking to acquire control, or offering to pay a control premium, for outstanding units because unit pricing is dependent upon, and generally represents a prescribed percentage of, the level of the relevant Index.**
14. **The application of the Take-over Bid Requirements to the Funds can have an adverse impact upon Fund unit liquidity because they can cause both the Designated Broker and hedgers to cease trading Fund units once prescribed take-over bid thresholds are reached and this, in turn, can serve to provide conventional mutual funds with a competitive advantage over the Funds.**

AND WHEREAS pursuant to the System this Decision Document evidences the decision of each Decision Maker (collectively, the ADecision@);

AND WHEREAS each Decision Maker 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 purchase of the units of a Fund by a person or company (a AUnit Purchaser@) in the normal course through the facilities of the TSX is exempt from the Take-over Bid Requirements for so long as the Fund remains an exchange traded index fund provided that, prior to making any take-over bid for the units of the Fund that is not otherwise exempt from the Take-over Bid Requirements, the Unit Purchaser, and any person or company acting jointly or in concert with the Unit Purchaser (a AConcert

Party@), provide Barclays, as trustee and manager of the Funds, with an undertaking not to exercise any votes attached to units of the Fund held by the Unit Purchaser and any Concert Party which represent more than 20% of the votes attached to all outstanding units of the Fund.

DATED this 26th day of July, 2002.

APaul M. Moore@

ARobert L. Shirriff@

July 18, 2002

MEMORANDUM TO: The Commission

FROM: Naizam Kanji
Legal Counsel, Take-over/Issuer Bids, Mergers & Acquisitions

RE: TD Securities Inc., BMO Nesbitt Burns Inc., RBC Dominion Securities Inc. and Barclays Global Investors Canada Limited
MRRS for Exemptive Relief Applications
- application pursuant to ss. 104(2)(c) of the *Securities Act* (Ontario)

Application

This is an application made under the Mutual Reliance Review System ("MRRS") for Exemptive Relief Applications in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia, Newfoundland, Yukon and Nunavut (the "Jurisdictions"). Ontario has been selected as the principal regulator.

TD Securities Inc. (TD SI), BMO Nesbitt Burns Inc. (BMO NB), RBC Dominion Securities Inc. (RBC DS) and Barclays Global Investors Canada Limited (Barclays) (collectively, the Applicants) have applied for relief from the requirements applicable to take-over bids under the Legislation, in connection with their acquisition of units of certain exchange traded index funds through the facilities of The Toronto Stock Exchange (the TSX).

Recommendation

I recommend that the relief requested be granted in the form of the attached MRRS Decision Document.

Facts

The facts are as set out, and defined terms have the meaning ascribed to them, in the MRRS Decision Document.

The Funds are a new form of mutual fund that is actively traded on the TSX. They are technically mutual funds for the purposes of securities legislation, but they are different in a number of respects:

- ! Investors must acquire units through the facilities of the TSX, as opposed to directly from the Funds themselves. Only registered dealers who have entered into underwriting agreements with a Fund or Designated Brokers may purchase units directly from the Fund.**
- ! Unitholders can redeem Units in two ways: (i) if they hold a prescribed number of units, they can redeem units for a basket of shares of the Constituent Companies, plus cash adjustment, if applicable, or (ii) they can redeem for a cash price equal to 95% of the closing trading price of the Units on the effective day of the redemption. It is therefore expected that Unitholders will generally dispose of their Units by selling them through the TSX.**
- ! The trustee of the Funds cannot be removed by the Unitholders, nor can Unitholders amend the terms of the trust indenture for each Fund of their own accord. Only the trustee can amend the trust indenture, and only the trustee can call a meeting of Unitholders.**
- ! Unitholders who hold at least a prescribed number of units can vote the shares of the Constituent Companies that underlie their units. Therefore, Unitholders must take into account the number of shares of Constituent Companies that they own indirectly through their units for the purposes of Take-Over Bid Requirements, Early Warning Requirements or insider reporting requirements of the Legislation. These requirements are unaffected by this relief.**

Each Fund is designed to track the performance of the S&P/TSE 300 Index, and they each hold a basket of shares of the same companies that make up the Index. In the event that the market price of Units deviates from the Index level, it will be corrected independently by arbitrage activity. The net asset value of each Fund is calculated and published daily.

BMO NB and RBC DS are the Designated Brokers for the Funds. The Designated Brokers are also responsible for making a market for Units, *i.e.* they have agreed to have a bid and ask price outstanding at all times in order to provide liquidity for Unitholders. Barclays is the trustee of the Funds and as such is responsible for the

day-to-day administration of each Fund.

Discussion

The units of the Funds are *Avoting* and *Aequity* securities for the purposes of the Legislation, therefore any person or company that offers to acquire more than 20% of the outstanding units of a Fund would trigger the Take-Over Bid Requirements. The Applicants have applied on behalf of all Unitholders for relief from the Take-Over Bid Requirements in connection with any offer to acquire units of the Funds, on the basis that no Unitholder can control a Fund, so there is no reason to apply the Take-Over Bid Requirements.

Counsel for the Applicants submits that it is not possible for one or more Unitholders of a Fund to exercise control or direction over the Fund. The constating document of each Fund generally ensures that there can be no changes to the Fund which do not have the support of the trustee of the Fund, since no Unitholder is entitled to requisition a meeting of Unitholders, nor can Unitholders amend the Fund's trust indenture, remove the trustee of the Fund or terminate the Fund, of their own accord. Since the Take-Over Bid Requirements are intended to regulate changes in control and the sharing of control premiums, counsel submits that there is no policy objective served by applying them to purchasers of units.

In addition, relief from the Take-Over Bid Requirements is only available to a purchaser of units if that purchaser agrees not to exercise the votes attached to more than 20% of the outstanding units of a Fund, regardless of the number of units that the purchaser owns or controls.

Staff is comfortable that this condition addresses concerns about Unitholders being able to influence or control a Fund. A unitholder is already able to accumulate 20% of the outstanding units without triggering a take-over bid, so staff sees no prejudice with permitting a Unitholder to exercise votes attached to 20% of the outstanding units.

The Early Warning Requirements do not apply to accumulations of units of the Funds, since section 3.3 of NI 62-103 provides an exemption from Early Warning Requirements in connection with the ownership or control of securities issued by mutual funds. While this exemption was likely intended to apply to *Atraditional* mutual funds, whose securities were typically acquired directly from the mutual fund (and thereby would never trigger Take-Over Bid Requirements), staff sees no reason to make this exemption unavailable to Unitholders of the Funds (particularly if this relief is granted).

This type of application is made primarily to permit the Designated Brokers to make

a market in units of the Funds. This relief would allow the Designated Brokers to accumulate large blocks of units of the Funds to ensure liquidity for institutional investors without limiting them to the 20% threshold at which the Take-Over Bid Requirements apply. Staff does not think this is a problem because the Designated Brokers are not seeking to acquire control of the Funds.

Future Relief

The relief granted in this Decision Document will apply to the existing Funds, and also to additional exchange traded index funds (the **Future Funds**) that Barclays may establish to track other indices (see paragraph 10 of the Decision Document). Such Future Funds will be structured and operated in a manner that is substantially similar to the way in which the Funds are structured and operated.

This should not cause any problems because the Decision Document specifies that the Future Funds will be similarly structured, the relief is limited to normal course purchases through the TSX, the Future Funds must continue to be exchange traded index funds (*i.e.* they cannot re-organize themselves as an actively managed fund), and any purchaser or party that acts jointly or in concert with the purchaser must agree not to vote more than 20% of the outstanding Units. Therefore, the relief granted by this Decision Document will only be available to an identifiable, small group of Funds established by Barclays in limited circumstances.

Precedents

The Commission has granted identical relief to TDSI in *In the Matter of TD Securities Inc., TD TSE 300 Index Fund and TD TSE 300 Capped index Fund* (November 16, 2001), copy of which is attached to this memo.

Comments from Other Jurisdictions

There were no comments from staff in the other jurisdictions.