

Headnote

MRRS - Underwriter and advisor registration relief for Schedule III Bank - prospectus and registration relief for trades where Schedule III Bank purchasing as principal and first trade relief for Schedule III Bank - prospectus and registration relief for trades of bonds, debentures and other evidences of indebtedness of or guaranteed by Schedule III Bank provided trades involve only specified purchasers - prospectus and registration relief for evidences of deposits by Schedule III Bank to specified purchasers - fee relief for trades made in reliance on Decision.

Applicable Ontario Statutory Provisions

Securities Act, R.S.O. 1990, c.S.5, as am. ss. 25(1)(a)&(c), 34(a), 35(1)(3)(i), 35(2)1(c), 53(i), 72(1)(a)(i), 73(1)(a), 74(1), 147.

Regulations Cited

Regulation made under the Securities Act, R.R.O. 1990, Reg. 1015, as am. ss. 151, 206, 218, Schedule 1 s. 28.

**IN THE MATTER OF
THE SECURITIES LEGISLATION OF
BRITISH COLUMBIA, ALBERTA, SASKATCHEWAN, MANITOBA,
ONTARIO, QUEBEC, NEW BRUNSWICK, NOVA SCOTIA,
PRINCE EDWARD ISLAND, NEWFOUNDLAND AND LABRADOR,
YUKON TERRITORY, NORTHWEST TERRITORIES,
AND NUNAVUT TERRITORY**

AND

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

AND

**IN THE MATTER OF
WESTLB AG**

MRRS DECISION DOCUMENT

WHEREAS the local securities regulatory authority or regulator (the "Decision Maker") in each of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Northwest Territories, Nunavut Territory and Yukon Territory (the "Jurisdictions") has received an application (the "Application") from WestLB AG ("WestLB") for a decision pursuant to the securities legislation of the Jurisdictions (the "Legislation") that WestLB is exempt from various registration, prospectus and filing requirements of the Legislation in connection with the banking activities to be carried on by WestLB in Canada;

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

AND WHEREAS it has been represented by WestLB to the Decision Makers that:

1. WestLB is a joint stock corporation duly organized and existing under the laws of the Federal Republic of Germany and is a validly existing banking organization under the banking laws of the Federal Republic of Germany;
2. WestLB has an extensive international branch network. WestLB currently maintains a representative office in Toronto, Ontario. WestLB intends to participate in the Canadian domestic loan and structured finance markets by establishing a foreign bank lending branch;

3. In March, 2002, WestLB made an application (the "Bank Act Application") to the Office of the Superintendent of Financial Institutions Canada ("OSFI") for an order under the *Bank Act* (Canada) (the "*Bank Act*") permitting it to establish a lending branch under the *Bank Act* and designating it on Schedule III to the *Bank Act*;
4. Upon approval of the Bank Act Application and receipt of an order from the Superintendent of Financial Institutions approving the commencement and carrying on of business in Canada, WestLB will establish itself and commence business as a foreign bank branch under the *Bank Act*;
5. For purposes of this Decision, "Authorized Purchasers" shall mean:
 - (a) Her Majesty in right of Canada or in right of a province or territory, an agent of Her Majesty in either of those rights and includes a municipal or public body empowered to perform a function of government in Canada, or an entity controlled by Her Majesty in either of those rights;
 - (b) the government of a foreign country or any political subdivision thereof, an agency of the government of a foreign country or any political subdivision thereof, or an entity that is controlled by the government of a foreign country or any political subdivision thereof;
 - (c) an international agency of which Canada is a member, including an international agency that is a member of the World Bank Group, the Inter-American Development Bank, the Asian Development Bank, the Caribbean Development Bank and the European Bank for Reconstruction and Development and any other international regional bank;
 - (d) a financial institution (*i.e.*: (a) a bank or an authorized foreign bank under the *Bank Act*; (b) a body corporate to which the *Trust and Loan Companies Act* (Canada) applies, (c) an association to which the *Cooperative Credit Association Act* (Canada) applies, (d) an insurance company or a fraternal benefit society to which the *Insurance Companies Act* (Canada) applies, (e) a trust, loan or insurance corporation incorporated by or under an Act of the legislature of a province or territory in Canada, (f) a cooperative credit society incorporated and regulated by or under an Act of the legislature of a province or territory in Canada; (g) an entity that is incorporated or formed by or under an Act of Parliament or of the legislature of a province or territory in Canada and that is primarily engaged in dealing in securities, including portfolio management and investment counseling, and is registered to act in such capacity under the applicable Legislation, and (h) a foreign institution that is (i) engaged in the banking, trust, loan or insurance business, the business of a cooperative credit society or the business of dealing in securities or is otherwise

engaged primarily in the business of providing financial services, and (ii) is incorporated or formed otherwise than by or under an Act of Parliament or of the legislature of a province or territory in Canada);

- (e) a pension fund that is maintained in respect of a pension plan registered for income tax purposes and that has total assets under administration of more than \$100 million;
 - (f) a mutual fund that is regulated under an Act of the legislature of a province or territory in Canada or under the laws of any other jurisdiction and the assets of which are managed by a person that has total assets under their management of more than \$10 million;
 - (g) an entity that has gross revenues on its own books and records of greater than \$5 million as of the date of its most recent annual financial statements;
 - (h) any other entity, where the deposit facilitates the provision of the following services by WestLB to the entity, namely,
 - (i) lending money,
 - (ii) dealing in foreign exchange, or
 - (iii) dealing in securities, other than debt obligations of WestLB;
 - (i) any other person if the trade is in a security which has an aggregate acquisition cost to the purchaser of \$150,000 or more;
6. The only advising activities which WestLB intends to undertake will be incidental to its primary business and it will not advertise itself as an adviser or allow itself to be advertised as an adviser in the Jurisdictions;
7. Under the current Legislation, banks chartered under Schedules I and II to the *Bank Act* have numerous exemptions from various aspects of the Legislation. Since WestLB's foreign bank branch will not be chartered under Schedule I or II of the *Bank Act*, the existing exemptions will not be available to it;
8. In order to ensure that WestLB, as an entity listed on Schedule III to the *Bank Act*, is able to provide banking services to businesses in the Jurisdictions it requires similar exemptions enjoyed by banking institutions incorporated under the *Bank Act* to the extent that the current exemptions applicable to such banking institutions are relevant to the banking business being undertaken by WestLB in the Jurisdictions;

AND WHEREAS pursuant to 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 upon the establishment by WestLB of a branch designated on Schedule III to the *Bank Act* and in connection with the banking business to be carried on by WestLB in the Jurisdictions by such branch:

1. WestLB is exempt from the requirement under the Legislation, where applicable, to be registered as an underwriter with respect to trading in the same types of securities that an entity listed on Schedule I or II to the *Bank Act* may act as an underwriter in respect of without being required to be registered under the Legislation as an underwriter;
2. WestLB is exempt from the requirement under the Legislation to be registered as an adviser where the performance of the service as an adviser is solely incidental to its primary banking business;
3. A trade of a security to WestLB where WestLB purchases the security as principal shall be exempt from the registration and prospectus requirements of the Legislation of the Jurisdiction in which the trade takes place (the "Applicable Legislation") provided that:
 - (i) the forms that would have been filed and the fees that would have been paid under the Applicable Legislation if the trade had been made, on an exempt basis, to an entity listed on Schedule I or II to the *Bank Act* purchasing as principal are filed and paid in respect of the trade to WestLB;
 - (ii) except in Quebec, the first trade in a security acquired by WestLB pursuant to this Decision is deemed a distribution or primary distribution to the public under the Applicable Legislation unless the conditions in subsections 2 or 3, as applicable, of section 2.5 of Multilateral Instrument 45-102 - *Resale of Securities* are satisfied; and
 - (iii) in Quebec, the first trade in a security acquired by WestLB pursuant to this Decision will be a distribution unless,
 - (a) at the time WestLB acquired the security: (i) the issuer of the security is a reporting issuer in Quebec; (ii) the issuer is not a Capital Pool Company as defined in Policy 2.4 of The Canadian Venture Exchange Inc.; (iii) the issuer has a class of securities listed on an acceptable exchange, has not been advised that it does not meet the requirements to maintain that listing and is not designated inactive, or the issuer has a class of securities that has

an approved rating from an approved rating organization; for purposes of this Decision, the acceptable exchanges include the Toronto Stock Exchange, tier 1 and 2 of The Canadian Venture Exchange Inc., the American Stock Exchange, Nasdaq National Market, Nasdaq SmallCap Market, the New York Stock Exchange and the London Stock Exchange Limited; and (iv) the issuer has filed an annual information form required under section 159 of the Regulation made under the *Securities Act* (Quebec), as amended from time to time, (the "Quebec Act") within the time period contemplated by that section, or, if not required to file an annual information form, has filed a prospectus that contains the most recent annual financial statements;

- (b) the issuer has been a reporting issuer in Quebec for 4 months immediately preceding the trade;
 - (c) WestLB has held the securities for at least 4 months;
 - (d) no extraordinary commission or other consideration is paid;
 - (e) no effort is made to prepare the market or to create a demand for the securities;
 - (f) if WestLB is an insider of the issuer, WestLB has no reasonable grounds to believe that the issuer is in default under the Quebec Act; and
 - (g) WestLB files a report within 10 days of the trade prepared and executed in accordance with the requirements of the Quebec Act that would apply to a trade made in reliance on section 43 or 51 of the Quebec Act.
4. Provided WestLB only trades the types of securities referred to in this paragraph with Authorized Purchasers, trades of bonds, debentures or other evidences of indebtedness of or guaranteed by WestLB shall be exempt from the registration and prospectus requirements of the Legislation.
5. Evidences of deposit issued by WestLB to Authorized Purchasers, as permitted under the Bank Act, shall be exempt from the registration and prospectus requirements of the Legislation.

THE FURTHER DECISION of the Decision Maker in Ontario is that:

- A. Subsection 25(1)(a) of the *Securities Act* (Ontario) R.S.O. 1990 c. S.5 (as amended) (the "Act") does not apply to a trade by WestLB:

- (i) of a type described in subsection 35(1) of the Act or section 151 of the Regulations made under the Act; or
 - (ii) subject to paragraph 4 above, in securities described in subsection 35(2) of the Act;
- B. Subsection 25(1)(a) and section 53 of the Act do not apply to a trade by WestLB in:
- (i) a security of a mutual fund, if the security is sold to a pension plan, deferred profit sharing plan, retirement savings plan or other similar capital accumulation plan maintained by the sponsor of the plan for its employees, and
 - (a) the employees deal only with the sponsor in respect of their participation in the plan and the purchase of the security by the plan, or
 - (b) the decision to purchase the security is not made by or at the direction of the employee; or
 - (ii) in a security of a mutual fund that:
 - (a) is administered by a body corporate to which the *Trust and Loan Companies Act* (Canada) applies or a trust, loan or insurance corporation incorporated by or under an Act of the legislature of a province or territory in Canada;
 - (b) consists of a pool of funds that:
 - (A) results from, and is limited to, the combination or commingling of funds of pension or other superannuation plans registered under the *Income Tax Act* (Canada), and
 - (B) is established by or related to persons or companies that are associates or affiliates of or that otherwise do not deal at arms length with the promoters of the mutual fund, except the trust, loan or insurance corporation that administers the fund; and
 - (c) is managed, in whole or in part, by a person who is registered or who is exempt from registration under the Act; and

- C. Except as provided for in paragraph 3 of this Decision, section 28 of Schedule I to the Regulations made under the Act shall not apply to trades made by WestLB in reliance on this Decision.

DATED November 22, 2002.

“Robert L. Shirriff”

“Harold P. Hands”