

June 25, 2019

IN THE MATTER OF  
THE SECURITIES LEGISLATION OF  
NOVA SCOTIA AND ONTARIO  
(THE **JURISDICTIONS**)

AND

IN THE MATTER OF  
THE PROCESS FOR EXEMPTIVE RELIEF APPLICATIONS  
IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF EMERA INCORPORATED (THE **ISSUER**), SCOTIA  
CAPITAL INC., RBC DOMINION SECURITIES INC. AND J.P. MORGAN  
SECURITIES CANADA INC. (COLLECTIVELY, THE **AGENTS** AND TOGETHER  
WITH THE ISSUER, THE **FILERS**)

**DECISION**

**Background**

The securities regulatory authority or regulator in each of the Jurisdictions (the **Decision Makers**), has received an application (the **Application**) from the Filers for a decision under the securities legislation of the Jurisdictions (the **Legislation**) for the following relief (the **Exemptions Sought**):

- (a) that the requirement that a dealer, not acting as agent of the purchaser who receives an order or subscription for a security offered in a distribution to which the prospectus requirement applies, send or deliver to the purchaser the latest prospectus (including the applicable prospectus supplement(s) in the case of a base shelf prospectus) and any amendment to the prospectus (the **Prospectus Delivery Requirement**) does not apply to the Agents or any other TSX participating organization or other marketplace participant acting as selling agent for the Agents (each, a **Selling Agent**) in connection with any at-the-market distribution (each, an **ATM Distribution** and collectively, the **ATM Offering**), as defined in National Instrument 44-102 - *Shelf Distributions* (**NI 44-102**) of common shares (**Common Shares**) of the Issuer pursuant to an equity distribution agreement (the **Equity Distribution Agreement**) to be entered into between the Issuer and the Agents; and

- (b) that the requirements to include in a base shelf prospectus or prospectus supplement or an amendment thereto:
  - (i) a forward-looking issuer certificate of the Issuer in the form specified in section 2.1 or section 2.4, as applicable, of Appendix A to NI 44-102;
  - (ii) a forward-looking underwriter certificate in the form specified by section 2.2 or section 2.4, as applicable, of Appendix A to NI 44-102; and
  - (iii) a statement respecting purchasers' statutory rights of withdrawal and remedies of rescission or damages in substantially the form prescribed in Item 20 of Form 44-101F1 - *Short Form Prospectus*;

(collectively, the **Prospectus Form Requirements**) do not apply to the Shelf Prospectus (as defined below), the Prospectus Supplement (as defined below) or an amendment thereto provided that the Issuer include in the Prospectus Supplement or an amendment thereto the form of issuer certificate and form of underwriter certificate and include in the Prospectus Supplement or an amendment thereto the revised description of a purchaser's statutory rights of withdrawal and remedies for rescission or damages described below, in each case (other than with respect to the underwriter certificate) superseding and replacing the corresponding language in the Shelf Prospectus solely with regards to the ATM Offering.

The Decision Makers have also received a request from the Filers for a decision that the Application and this decision (together, the **Confidential Material**) be kept confidential and not be made public until the earliest of: (a) the date on which the Filers publicly announce the ATM Offering, (b) the date on which the Filers first enter into an Equity Distribution Agreement; (b) the date any of the Filers advise the Decision Makers that there is no longer any need for the Confidential Material to remain confidential; and (c) the date that is 90 days after the date of this decision (the **Confidentiality Relief**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

- (a) the Nova Scotia Securities Commission is the principal regulator for this Application;
- (b) the Filers have provided notice that section 4.7(1) of Multilateral Instrument 11-102 - *Passport System (MI 11-102)* is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, Prince Edward Island and Newfoundland and Labrador

(collectively the **Passport Jurisdictions** and together with the Jurisdictions, the **Reporting Jurisdictions**); and

- (c) the decision is the decision of the principal regulator and evidences the decision of the Ontario Securities Commission.

### **Interpretation**

Terms defined in National Instrument 14-101 - *Definitions*, in National Instrument 13-101 – *System for Electronic Document Analysis and Retrieval (SEDAR)*, in MI 11-102 or in NI 44-102 have the same meaning if used in this decision, unless otherwise defined herein. All dollar figures in this decision refer to Canadian dollars.

### **Representations**

This decision is based on the following facts represented by the Filers.

#### ***The Issuer***

1. The Issuer is a company incorporated under the *Companies Act* (Nova Scotia). The head office of the Issuer is located at 5151 Terminal Road, Halifax, Nova Scotia, B3J 1A1.
2. The Issuer is a reporting issuer in each province of Canada and is not in default of securities legislation in any of the jurisdictions of Canada.
3. The Common Shares are listed on the Toronto Stock Exchange (the **TSX**).
4. The Issuer currently intends to file a short form base shelf prospectus (a **Shelf Prospectus**) to provide for the distribution from time to time of Common Shares, and to the extent the Equity Distribution Agreement is entered into among the Issuer and the Agents, a prospectus supplement in each of the provinces of Canada to qualify the distribution of Common Shares in connection with the ATM Offering.

#### **The Agents**

5. Scotia Capital Inc. is a corporation incorporated under the laws of the Province of Ontario with its head office in Toronto, Ontario.
6. RBC Dominion Securities Inc. is a corporation incorporated under the laws of Canada with its head office in Toronto, Ontario.

7. J.P. Morgan Securities Canada Inc is a corporation incorporated under the laws of Canada with its head office in Toronto, Ontario.
8. Each of the Agents is registered as an investment dealer under the securities legislation in each province of Canada, is a member of the Investment Industry Regulatory Organization of Canada and is a participating organization of the TSX.
9. None of the Agents are in default of any requirements under applicable securities legislation in any of the jurisdictions of Canada.

***Proposed ATM Distribution***

10. Subject to mutual agreement on terms and conditions, the Filers propose to enter into the Equity Distribution Agreement for the purpose of the ATM Offering involving the periodic sale of Common Shares by the Issuer through the Agents, as agents, under the shelf prospectus procedures prescribed by Part 9 of NI 44-102.
11. If the Equity Distribution Agreement is entered into, the Issuer will immediately do both of the following:
  - (a) issue and file a news release pursuant to section 3.2 of NI 44-102 announcing the Equity Distribution Agreement and indicating that the Shelf Prospectus and the Prospectus Supplement have been filed on SEDAR and specifying where and how purchasers of Common Shares under the ATM Offering may obtain copies; and
  - (b) file the Equity Distribution Agreement on SEDAR.
12. Prior to making an ATM Distribution, the Issuer will have filed, in each province of Canada, the Shelf Prospectus and will have received a receipt for the Shelf Prospectus from the Decision Makers. Shortly thereafter, the Issuer will file, in each province of Canada, a prospectus supplement describing the terms of the ATM Offering, including the terms of the Equity Distribution Agreement and otherwise supplementing the disclosure in the Shelf Prospectus (the **Prospectus Supplement**).
13. Under the proposed Equity Distribution Agreement, the Issuer may conduct one or more ATM Distributions subject to the 10% limitation set out in subsection 9.1(1) of NI 44-102.
14. The Issuer will not, during the period that the Shelf Prospectus is effective, distribute by way of one or more ATM Distributions a total market value of

Common Shares that exceeds 10% of the aggregate market value of Common Shares, such aggregate market value calculated in accordance with section 9.2 of NI 44-102 and as at the last trading day of the month before the month in which the first ATM Distribution is made.

15. The Issuer will conduct ATM Distributions only through one or more of the Agents (as agent) directly or via a Selling Agent, and only through (a) the TSX or (b) another marketplace (as defined in National Instrument 21-101 – *Marketplace Operation*) upon which the Common Shares are listed, quoted or otherwise traded (each, a **Marketplace**).
16. The Agents will act as the sole agents of the Issuer in connection with an ATM Distribution directly or through one or more Selling Agents on the TSX or any other Marketplace, and will be paid an agency fee or commission by the Issuer in connection with such sales. If sales are effected through a Selling Agent, the Selling Agent will be paid a seller's commission for effecting the trades on behalf of the Agents. The Agents will each sign an agent's certificate, in the form set out in paragraph 33 below, in the Prospectus Supplement.
17. A purchaser's rights and remedies under applicable securities legislation against the Agents, as agents of an ATM Distribution through a Marketplace, will not be affected by a decision to effect the sale directly or through a Selling Agent.
18. The aggregate number of Common Shares sold on one or more Marketplaces pursuant to an ATM Distribution on any trading day will not exceed 25% of the trading volume of the Common Shares on all Marketplaces on that day.
19. The Equity Distribution Agreement will provide that, at the time of each sale of Common Shares pursuant to an ATM Distribution, the Issuer will represent to the Agents that the Shelf Prospectus, as supplemented by the Prospectus Supplement, including the documents incorporated by reference in the Shelf Prospectus (which shall include any news release that has been designated and filed as a Designated News Release (as defined below)) and any subsequent amendment or supplement to the Shelf Prospectus or the Prospectus Supplement (together, the **Prospectus**), contains full, true and plain disclosure of all material facts relating to the Issuer and the Common Shares being distributed. The Issuer will, therefore, be unable to proceed with sales pursuant to an ATM Distribution when it is in possession of undisclosed information that would constitute a material fact or a material change in respect of the Issuer or the Common Shares.
20. During the period after the date of the Prospectus Supplement and before the termination of any ATM Distribution, if the Issuer disseminates a news release disclosing information that, in the Issuer's determination, constitutes a "material fact" (as such term is defined in the Legislation), the Issuer will identify such

news release as a "designated news release" for the purposes of the Prospectus. This designation will be made on the face page of the version of such news release filed on SEDAR (any such news release, a **Designated News Release**). The Prospectus Supplement will provide that any such Designated News Release will be deemed to be incorporated by reference into the Prospectus. A Designated News Release will not be used to update disclosure in the Prospectus by the Issuer in the event of a "material change" (as such term is defined in the Legislation).

21. If, after the Issuer delivers a sell notice to the Agents directing the Agents to sell Common Shares on the Issuer's behalf pursuant to the Equity Distribution Agreement (a **Sell Notice**), the sale of the Common Shares specified in the Sell Notice, taking into consideration prior sales under the ATM Offering, would constitute a material fact or material change, the Issuer will suspend sales under the Equity Distribution Agreement until either: (a) it has filed a Designated News Release or material change report, as applicable, or amended the Prospectus; or (b) circumstances have changed such that a sale would no longer constitute a material fact or material change.
22. In determining whether the sale of the number of Common Shares specified in a Sell Notice would constitute a material fact or material change, the Issuer will take into account a number of factors, including, without limitation:
  - (a) the parameters of the Sell Notice, including the number of Common Shares proposed to be sold and any price or timing restrictions that the Issuer may impose with respect to the particular ATM Distribution;
  - (b) the percentage of the outstanding Common Shares that the number of Common Shares proposed to be sold pursuant to the Sell Notice represents;
  - (c) sales under earlier Sell Notices;
  - (d) trading volume and volatility of the Common Shares;
  - (e) recent developments in the business, operations or capital of the Issuer; and
  - (f) prevailing market conditions generally.
23. It is in the interest of the Issuer and the Agents to minimize the market impact of sales under an ATM Distribution. Therefore, the Agents will closely monitor the market's reaction to trades made on any Marketplace pursuant to an ATM Distribution in order to evaluate the likely market impact of future trades. The Agents have experience and expertise in managing sell orders to limit downward

pressure on trading prices. If the Agents have concerns as to whether a particular sell order placed by the Issuer may have a significant effect on the market price of the Common Shares, the Agents will recommend against effecting the trades pursuant to the sell order at that time.

***Disclosure of Common Shares Sold in ATM Offering***

24. The Issuer will disclose the number and average price of Common Shares sold pursuant to ATM Distributions, as well as gross proceeds, commissions and net proceeds, in its annual and interim financial statements and management discussion and analysis filed on SEDAR.

***Prospectus Delivery Requirement***

25. Pursuant to the Prospectus Delivery Requirement, a dealer effecting a trade of securities offered under a prospectus is required to deliver a copy of the prospectus (including the applicable prospectus supplement(s) in the case of a base shelf prospectus) to the purchaser within prescribed time limits.
26. Delivery of a prospectus is not practicable in the circumstances of an ATM Distribution, because neither the Agents nor a Selling Agent effecting the trade will know the identity of the purchasers.
27. The Prospectus will be filed and readily available electronically via SEDAR to all purchasers under ATM Distributions. As stated in paragraph 11 above, the Issuer will issue a news release that specifies where and how copies of the Prospectus may be obtained.
28. The liability of an issuer or an underwriter (or others) for a misrepresentation in a prospectus pursuant to the civil liability provisions of the Legislation will not be affected by the grant of an exemption from the Prospectus Delivery Requirement because purchasers of securities offered by a prospectus during the period of distribution have a right of action for damages or rescission, without regard to whether or not the purchaser relied on the misrepresentation or in fact received a copy of the prospectus.

***Withdrawal Right and Right of Action for Non-Delivery***

29. Pursuant to the Legislation, an agreement to purchase a security in respect of a distribution to which the prospectus requirement applies is not binding upon the purchaser if the dealer from whom the purchaser purchases the security receives, not later than midnight on the second day (exclusive of Saturdays, Sundays and holidays) after receipt by the purchaser of the latest prospectus or any amendment

to the prospectus, a notice in writing evidencing the intention of the purchaser not to be bound by the agreement of purchase and sale (the **Withdrawal Right**).

30. Pursuant to the Legislation, a purchaser of securities to whom a prospectus was required to be sent or delivered in compliance with the Prospectus Delivery Requirement, but was not so sent or delivered, has a right of action for rescission or damages against the dealer who did not comply with the Prospectus Delivery Requirement (the **Right of Action for Non-Delivery**).
31. Neither the Withdrawal Right nor the Right of Action for Non-Delivery is workable in the context of the ATM Offering because of the impracticability of delivering the Prospectus to a purchaser of Common Shares thereunder.

#### **Modified Certificates and Statements**

32. To reflect the fact that the ATM Offering is a continuous distribution, the Prospectus Supplement and any amendment thereto will include the following issuer certificate (with appropriate modifications in respect of the filing of an amendment prescribed by section 2.4 of Appendix A to NI 44-102), such issuer certificate to supersede and replace the issuer certificate to be included in the Shelf Prospectus solely with regard to the ATM Offering:

*The short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing, as of the date of a particular distribution of securities under the prospectus, will, as of that date, constitute full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and this supplement as required by the securities legislation of each of the provinces of Canada.*

33. The Prospectus Supplement and any amendment thereto will include the following underwriter certificate (with appropriate modifications in respect of the filing of an amendment prescribed by section 2.4 of Appendix A to NI 44-102):

*To the best of our knowledge, information and belief, the short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing, as of the date of a particular distribution of securities under the prospectus, will, as of that date, constitute full, true and plain disclosure of all material facts relating to the*



*securities offered by the prospectus and this supplement as required by the securities legislation of each of the provinces of Canada.*

34. A different statement of purchasers' rights than that required by the Legislation is necessary so that the Prospectus Supplement will accurately reflect the relief granted from the Prospectus Delivery Requirement. Accordingly, the Prospectus Supplement will state the following, with the date reference completed:

*Securities legislation in certain of the provinces of Canada provides purchasers with the right to withdraw from an agreement to purchase securities and with remedies for rescission or, in some jurisdictions, revisions of the price, or damages if the prospectus, prospectus supplements relating to securities purchased by a purchaser and any amendment are not delivered to the purchaser, provided that the remedies are exercised by the purchaser within the time limit prescribed by securities legislation. However, purchasers of Common Shares under an at-the-market distribution by the Issuer will not have the right to withdraw from an agreement to purchase the Common Shares and will not have remedies of rescission or, in some jurisdictions, revisions of the price, or damages for non-delivery of the prospectus supplement, the accompanying prospectus and any amendment thereto relating to Common Shares purchased by such purchaser because the prospectus supplement, the accompanying prospectus and any amendment thereto relating to the Common Shares purchased by such purchaser will not be delivered as permitted under a decision dated ● 2019 and granted pursuant to National Policy 11-203 - Process for Exemptive Relief Applications in Multiple Jurisdictions.*

*Securities legislation in certain of the provinces of Canada further provides purchasers with remedies for rescission or, in some jurisdictions, revisions of the price or damages if the prospectus, prospectus supplements relating to securities purchased by a purchaser and any amendment contains a misrepresentation, provided that the remedies are exercised by the purchaser within the time limit*

*prescribed by securities legislation. Any remedies under securities legislation that a purchaser of Common Shares under an at-the-market distribution by the Issuer may have against the Issuer or the Agents for rescission or, in some jurisdictions, revisions of the price, or damages if the prospectus supplement, the accompanying prospectus and any amendment thereto relating to securities purchased by a purchaser and any amendment contain a misrepresentation will remain unaffected by the non-delivery and the decision referred to above.*

*A purchaser should refer to any applicable provisions of thesecurities legislation of the purchaser's province and the decisionreferred to above for the particulars of these rights or consult witha legal adviser.*

35. The Prospectus Supplement will disclose that, solely with regards to the ATM Offering, the statement prescribed in paragraph 34 above supersedes and replaces the statement of purchasers' rights to be included in the Shelf Prospectus.

### **Decision**

The Decision Makers are satisfied that this decision satisfies the test set out in the Legislation for the Decision Makers to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemptions Sought are granted, provided:

- (a) during the 60-day period ending not earlier than 10 days prior to the commencement of an ATM Distribution, the Common Shares have traded, in total, on one or more Marketplaces, as reported on a consolidated market display:
  - (i) an average of at least 100 times per trading day, and
  - (ii) with an average trading value of at least \$1,000,000 per trading day;
- (b) the Issuer does not, during the period that the Shelf Prospectus is effective, distribute by way of one or more ATM Distributions a total market value

of Common Shares that exceeds 10% of the aggregate market value of Common Shares, such aggregate market value calculated in accordance with section 9.2 of NI 44-102 and as at the last trading day of the month before the month in which the first ATM Distribution is made;

- (c) the Issuer complies with the disclosure requirements set out in paragraphs 24, 32 through 35 above; and
- (d) the Issuer and Agents respectively comply with the representations made in paragraphs 11, 15, 16 and 18 through 23 above.

This decision will terminate on the date that is 25 months from the date on which the receipt for the Shelf Prospectus is issued.

(signed) "Paul E. Radford"  
Paul E. Radford, Q.C., Chair  
Nova Scotia Securities Commission

(signed) "Shirley P. Lee"  
Shirley P. Lee, Q.C., Vice-chair  
Nova Scotia Securities Commission