

IN THE MATTER OF THE *SECURITIES ACT*,
S.N.B. 2004, c. S-5.5 (*the Act*)

AND IN THE MATTER OF

FINANCIAL SECTOR ISSUERS
(as detailed on Schedule A attached)

VARIATION ORDER

WHEREAS on 22 September 2008, the New Brunswick Securities Commission (Commission) issued a decision with respect to the Financial Sector Issuers set forth on Schedule A pursuant to subsection 195.5(1) and subparagraph 184(1)(c)(i) of the *Act* (Original Decision) on similar terms as the order made by the Ontario Securities Commission on 19 September 2008 (OSC Original Order);

AND WHEREAS on 22 September 2008 the Ontario Securities Commission (OSC) issued an order amending and restating the OSC Original Order (OSC Amending Order) to address current and anticipated technical and operational concerns resulting from the requirements of the OSC Original Order;

AND WHEREAS on 23 September 2008, the Commission issued a decision with respect to the Financial Sector Issuers set forth in Schedule A pursuant to subsection 195.5(1) and subparagraph 184(1)(c)(i) of the *Act* (Amended Decision) on similar terms as the OSC Amending Order;

AND WHEREAS the OSC Amending Order expires on 3 October 2008 unless extended by order of the OSC;

AND WHEREAS on 3 October 2008, the OSC issued an order (OSC Extending Order) extending the OSC Amending Order to 20 October 2008

AND WHEREAS, pursuant to subsection 206(1) of the *Act*, the Commission may make an order varying or revoking a decision of the Commission on the application of the Executive Director if in the Commission's opinion the order would not be prejudicial to the public interest;

AND WHEREAS the Executive Director has applied to the Commission for an order varying the Amended Decision to reflect the terms of the OSC Extending Order;

AND WHEREAS the Commission has determined that it is not prejudicial to the public interest to issue an order varying the Amended Decision;

IT IS ORDERED, pursuant to subsection 206(1) of the *Act*, that the Amended Decision be varied and restated as follows:

IN THE MATTER OF THE *SECURITIES ACT*,
S.N.B. 2004, c. S-5.5 (*the Act*)

AND IN THE MATTER OF

FINANCIAL SECTOR ISSUERS
(as detailed on Schedule A attached)

DECISION

WHEREAS on 22 September 2008, the New Brunswick Securities Commission (the Commission) issued a decision with respect to certain Financial Sector Issuers pursuant to subsection 195.5(1) and subparagraph 184(1)(c)(i) of the *Act* (Original Decision) on similar terms as the order made by the Ontario Securities Commission (OSC) on 19 September 2008 (OSC Original Order);

AND WHEREAS on 22 September 2008 the OSC issued an order amending and restating the OSC Original Order (OSC Amending Order) to address current and anticipated technical and operational concerns resulting from the requirements of the Original OSC Order;

AND WHEREAS on 23 September 2008, the Commission issued a decision with respect to certain Financial Sector Issuers pursuant to subsection 195.5(1) and subparagraph 184(1)(c)(i) of the *Act* (Amended Decision) on similar terms as the OSC Amending Order;

AND WHEREAS on 3 October 2008, the OSC issued an order (OSC Extending Order) amending the OSC Amending Order which, among other amendments, discontinued the order against the Aberdeen Asia Pacific Income Investment Company Ltd. because that issuer is not a financial sector issuer interlisted in the United States;

AND WHEREAS the OSC Extending Order expires on 8 October 2008, unless further extended, varied or revoked;

AND WHEREAS under subsection 195.5(1) and subparagraph 184(1)(c)(i) the Commission is empowered to make a decision regarding a person, trade or security on the basis that an extra-provincial securities commission has made a substantially similar

decision regarding the person, trade or security;

AND WHEREAS the Commission is of the opinion that it is in the public interest to make a decision on the same terms as the OSC Extending Order;

NOW THEREFORE IT IS THE DECISION OF THE COMMISSION pursuant to subsection 195.5(1) and subparagraph 184(1)(c)(i) of the *Act* that, for as long as the OSC Extending Order (as from time to time extended or made permanent) remains in effect, trading that constitutes a short sale (as defined in Schedule B) in the common equity securities of the Financial Sector Issuers set forth in Schedule A is prohibited, unless the short sale is:

1. conducted in accordance with UMIR Rule 3.1 *Restrictions on Short Selling*, sections 2(a), (b), (d) and (g) provided that, however, a dealer fulfilling market maker obligations (market maker) may not effect a short sale in the common equity securities of the Financial Sector Issuers if the market maker ought reasonably to know that the client's or counterparty's transaction will result in the client or counterparty establishing or increasing an economic net short position (i.e. through actual positions, derivatives, or otherwise) in the issued share capital of a Financial Sector Issuer covered by this Decision;
2. conducted by a registered dealer acting as principal to facilitate with a client or counterparty (a) a securities transaction that has a current market value of \$200,000 or more in a single transaction, or in several transactions at approximately the same time, provided that the position is liquidated or hedged as soon as possible; or (b) a derivatives transaction that has a notional value of \$200,000 or more in a single transaction, or in several transactions at approximately the same time, provided that the position is liquidated or hedged as soon as possible; provided, however, that with respect to (a) and (b) a dealer facilitating the transactions in paragraphs (a) and (b) may not effect a short sale in the common equity securities of the Financial Sector Issuers if the dealer ought reasonably to know that the transaction will result in the client or counterparty establishing or increasing an economic net short position (i.e. through actual positions, derivatives, or otherwise) in the issued share capital of a Financial Sector Issuer covered by this Decision;
3. conducted in order to comply with the UMIR Rule 5.2 *Best Price Obligation*;
4. conducted by a person or company as a result of the automatic exercise or assignment of an equity option, or in connection with a settlement of a futures contract, held prior to the effectiveness of the Original Decision due to expiration of the option or futures contract;
5. a sale of a security identified in paragraph (g) of Schedule B, where the security is beneficially owned by the seller and the sale is made under an exemption from the prospectus requirements in accordance with applicable securities

legislation;

6. conducted to adjust a hedged derivative position in order to maintain the risk exposure either hedged under section 3 above or that existed at the time the Original Decision became effective; or
7. conducted by a writer of a call option that effects a short sale in a common equity security of a Financial Sector Issuer as a result of assignment following exercise by the holder of the call.

DATED at the City of Saint John, New Brunswick, this 6th day of October 2008.

"original signed by"
Donne W. Smith
Chair

"original signed by"
Ken Savage
Member

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Schedule A

List of Financial Sector Issuers

<u>Name</u>	<u>Root Ticker</u>
Bank of Montreal	BMO
Bank of Nova Scotia (The)	BNS
Canadian Imperial Bank of Commerce	CM
Fairfax Financial Holdings Limited	FFH
Kingsway Financial Services Inc.	KFS
Manulife Financial Corporation	MFC
Quest Capital Corp.	QC
Royal Bank of Canada	RY
Sun Life Financial Inc.	SLF
Thomas Weisel Partners Group Inc.	TWP
Toronto-Dominion Bank (The)	TD
Merrill Lynch & Co., Canada Ltd.	MLC

Schedule B

“short sale” means a sale of a security, other than a derivative instrument, which the seller does not own either directly or through an agent or trustee and, for this purpose, a seller shall be considered to own a security if the seller:

- (a) has purchased or has entered into an unconditional contract to purchase the security, but has not yet received delivery of the security;
- (b) has tendered such other security for conversion or exchange or has issued irrevocable instructions to convert or exchange such other security;
- (c) has an option to purchase the security and has exercised the option;
- (d) has a right or warrant to subscribe for the security and has exercised the right or warrant; or
- (e) is making a sale of a security that trades on a when issued basis and the seller has entered into a contract to purchase such security which is binding on both parties and subject only to the condition of issuance of distribution of the security,

but a seller shall be considered not to own a security if:

- (f) the seller has borrowed the security to be delivered on the settlement of the trade and the seller is not otherwise considered to own the security in accordance with this definition;
- (g) the security held by the seller is subject to any restriction on sale imposed by applicable securities legislation or by an Exchange or QTRS as a condition of the listing or quoting of the security; or
- (h) the settlement date or issuance date pursuant to:
 - (i) an unconditional contract to purchase,
 - (ii) a tender of a security for conversion or exchange,
 - (iii) an exercise of an option, or
 - (iv) an exercise of a right or warrant

would, in the ordinary course, be after the date for settlement of the sale.

Terms used in this schedule that are defined in the Universal Market Integrity Rules (UMIR) have the meaning ascribed to them in UMIR.