



Ontario  
Securities  
Commission

Commission des  
valeurs mobilières  
de l'Ontario

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**IN THE MATTER OF THE *SECURITIES ACT*  
R.S.O. 1990, c. S.5, AS AMENDED**

**- and -**

**IN THE MATTER OF  
CERTAIN FINANCIAL SECTOR ISSUERS  
set forth on Schedule A attached (the Respondents)**

**REASONS FOR DECISION TO EXTEND THE  
TEMPORARY CEASE TRADE ORDER  
(subsections 127(1), (2) and (7) and subsection 144(1) of the Act)**

HEARING: October 3, 2008

REASONS: October 8, 2008

PANEL: Lawrence E. Ritchie - Vice-Chair and Chair of the Panel  
Paul K. Bates - Commissioner

APPEARANCES: Kathryn Daniels - for Staff of the Ontario Securities  
Jane Waetcher Commission  
Dunniel Medina - for Kingsway Financial Services Inc.

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## **REASONS FOR DECISION TO EXTEND THE TEMPORARY CEASE TRADE ORDER**

### **Background**

[1] This matter relates to the continuation of a cease trade order issued by the Ontario Securities Commission (the “Commission”) on September 19, 2008 with respect to certain financial sector issuers set forth in Schedule A attached (the “Respondents”).

[2] On October 3, 2008 we convened a hearing in this matter. We were advised that all the Respondents listed in Schedule A were served with the Notice of Hearing in this matter. We heard submissions from Staff of the Commission (“Staff”) and one of the Respondents, Kingsway Financial Services Inc. In particular, we found Staff’s detailed and thorough submissions to be a great help to the Panel.

[3] At the end of the hearing, we extended the order until 11:59 p.m. on October 8, 2008 and gave oral reasons. The following text has been prepared based on our oral reasons for the purpose of providing a public record of the decision.

### **The Action of the S.E.C.**

[4] It is perhaps trite to say that we are living in interesting times. The global events over the past number of months have been extraordinary. We have witnessed liquidity challenges, wild fluctuations in the value of securities traded on exchanges across the world and insolvencies of major financial institutions in the United States and other countries in the world. Our financial markets and economies around the world are interconnected and interdependent.

[5] As stated in its press release issued October 1, 2008, the United States Securities and Exchange Commission (the “S.E.C.”) has:

... taken steps during recent weeks to address concerns regarding short sales in light of the ongoing credit crisis. These efforts relating to short sales have focused particularly on the securities of financial institutions whose health may have an impact on financial stability. The steps the [S.E.C.] has taken are designed to ensure the continued smooth operation of orderly markets. [The S.E.C.’s] actions have been taken in consultation with regulators of the major developed securities markets around the world, with whom [the S.E.C. has] coordinated in monitoring market reactions.

[6] One of the steps taken by the S.E.C. was to issue an order temporarily prohibiting short selling in certain securities of financial institutions trading in the U.S. markets. The shares of some of those firms, 12 in number, are interlisted on the TSX.

## **The Public Interest Jurisdiction of the Commission**

[7] The Commission has a public interest jurisdiction under the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “Act”) and we have the statutory obligation to perform our duties assigned to us under the Act to: (a) provide protection to investors from unfair, improper or fraudulent practices; and (b) to foster fair and efficient capital markets and confidence in capital markets (see section 1.1 of the Act). As Ms. Daniels pointed out, the Act also states that in pursuing the purposes of our mandate, we are to have regard to the principle that the “integration of capital markets be supported and promoted by sound and responsible harmonization and co-ordination of securities regulation” (see section 2.1 of the Act).

## **The Chronology of Events**

[8] On September 19, 2008, in the exercise of its public interest jurisdiction, the Commission issued a temporary order with respect to shares of those financial sector issuers which were interlisted in the United States (and in one case had outstanding securities that were exchangeable into securities of a certain financial issuer in the United States) (the “Ontario Short Selling Order”). That order was amended pursuant to section 144 of the Act on September 22, 2008.

[9] In an order issued on October 1, 2008, the S.E.C. clarified that each of the emergency orders it issued on September 17 and September 18, 2008, prohibiting short selling of shares of financial companies trading on exchanges in the United States (the “S.E.C. Short Selling Orders”), would be extended to allow time for the completion of a political and legislative initiative in the United States. By this order on October 1, 2008, the S.E.C. Short Selling Orders were extended to expire at 11:59 p.m. Eastern time on the third business day after the enactment of the resulting legislation, but in any case no later than 11:59 p.m. Eastern time on October 17, 2008.

## **The Importance of Avoiding Regulatory Arbitrage**

[10] The Ontario Short Selling Order was issued in response to the S.E.C. Short Selling Orders, as a precautionary matter to prevent regulatory arbitrage with respect to short selling in Ontario of the common equity securities of certain financial sector issuers, and to promote fair and orderly markets in Ontario for those issuers.

[11] Staff has asked us to extend the Ontario Short Selling Order to parallel the extensions of the S.E.C. Short Selling Orders granted by the S.E.C.

[12] In light of the temporary nature of the S.E.C. Short Selling Orders, and to continue to avoid regulatory arbitrage with respect to the short selling in Ontario of the common equity securities of those financial institutions affected by the S.E.C. Short Selling Orders, we find that

it is in the public interest to grant the extension as requested with the amendments proposed by Staff.

### **Terms of Order Issued on October 3, 2008**

[13] For the record, our order issued October 3, 2008 under subsections 127(1), (2) and (7) and subsection 144(1) of the Act states the following:

**IT IS ORDERED** pursuant to subsections 127 (1), (2) and (7) and subsection 144(1) of the Act that the prohibition on trading in common equity securities that constitutes a short sale (as defined in section 1.1 of the Investment Industry Regulatory Organization of Canada's Universal Market Integrity Rules (UMIR) which is attached as Schedule B) is extended until 11:59 p.m. on October 8, 2008 only with respect to those financial sector issuers listed in the attached Schedule A (the Financial Sector Issuers) and only with the exception of a short sale:

- (i) 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 the Temporary Order;
- (ii) 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 order (the "Extension Order");
- (iii) conducted in order to comply with UMIR Rule 5.2 *Best Price Obligation*;
- (iv) conducted by a person or company as a result of the automatic exercise or assignment of an equity option, or in connection with settlement of a futures contract, held prior to the effectiveness of the Temporary Order due to expiration of the option or futures contract;

- (v) that is 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;
- (vi) conducted to adjust a hedged derivative position in order to maintain the risk exposure either hedged under paragraph (ii) above or that existed at the time the Temporary Order became effective; or
- (vii) 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.

**IT IS FURTHER ORDERED** that pursuant to section 127(7) of the Act this order shall expire at 11:59 p.m. on October 8, 2008, unless further extended by order of the Commission, varied or revoked.

[14] Finally, as a postscript, we note that the events leading up to this proceeding have required significant effort on the part of Staff to move promptly and coordinate its activities with other regulators, including our Canadian Securities Administrators partners, staff of the Investment Industry Regulatory Organization of Canada and staff of the S.E.C. Their impressive efforts are acknowledged and appreciated.

Dated at Toronto, this 8<sup>th</sup> day of October, 2008.

*“Lawrence E. Ritchie”*

*“Paul K. Bates”*

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Lawrence E. Ritchie

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Paul K. Bates

## 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. <sup>1</sup>	MLC

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<sup>1</sup> This company is not interlisted in the US. However, it is included on this list because its securities are exchangeable into securities of Merrill Lynch & Co. Inc. (listed in the US), which is subject to the S.E.C. Order.