

## 2005 BCSECCOM 232

March 2, 2005

### **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act s. 123 - Relief from self dealing restrictions in ss. 121 and 122 of the Act - a mutual fund wants relief from s. 121(2)(a) of the Act so that it can make or hold an investment in a person or company which is a substantial security holder of the mutual fund - Securities Act s. 130 - Relief from certain self-dealing restrictions in Part 15 of the Act - A portfolio manager, mutual fund or “responsible person” wants relief from s. 127(1)(a) of the Act so that it can invest in an issuer which has a “responsible person” as an officer or director of the issuer - An independent review committee will review the mutual fund’s purchases, sales, and continued holdings of securities of the issuers, and will determine whether the investments are in the best interests of the investors of the mutual funds

### **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 121(2)(c), 123, 127(1)(a), 130

In the Matter of  
the Securities Legislation  
of Ontario, British Columbia, Alberta, Saskatchewan, Quebec, Nova Scotia, New  
Brunswick and Newfoundland and Labrador (the “Jurisdictions”)

and

In the Matter of  
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of  
Scotia Securities Inc. (“SSI”), Scotia Capital Inc.  
(“Scotia Capital”), Scotia Cassels Investment Counsel Limited (“Scotia Cassels”)

and

In the Matter of  
Scotia Canadian Balanced Fund  
Scotia Total Return Fund  
Scotia Canadian Dividend Fund  
Scotia Canadian Blue Chip Fund  
Scotia Canadian Growth Fund  
Scotia American Growth Fund

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Scotia Young Investors Fund  
Scotia Global Growth Fund  
(the “Scotia Mutual Funds”)

### MRRS Decision Document

#### **Background**

The securities regulatory authority or regulator (the “Decision Maker”) in each of the Jurisdictions has received an application from SSI, Scotia Capital and Scotia Cassels (the “Filers”) in respect of the Scotia Mutual Funds together with such other mutual funds for which one of the Filers is, or may become, the manager (individually a “Fund” and collectively with the Scotia Mutual Funds, the “Funds”) for a decision (the “Decision”) under the securities legislation of the Jurisdictions (the “Legislation”) that:

- a) the provision prohibiting a mutual fund from knowingly making or holding an investment in any person or company which is a substantial security holder of the mutual fund, its management company or distribution company; and
- b) the provision prohibiting the portfolio manager of an investment portfolio from causing the investment portfolio, or in British Columbia the provision prohibiting a mutual fund or a responsible person from causing a mutual fund, to invest in an issuer in which a responsible person is a director or an officer unless the specific fact is disclosed to the client and, if applicable, the written consent of the client to the investment is obtained before the purchase;

(the “Investment Restrictions”) shall not apply to investments made by the Funds in common shares (the “Common Shares”) of The Bank of Nova Scotia (“Scotiabank”);

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) the Ontario Securities Commission is the principal regulator for this application, and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

#### **Interpretation**

Defined terms contained in National Instrument 14-101 Definitions or in Québec Commission Notice 14-101 have the same meaning in this Decision unless they are otherwise defined in this Decision.

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### **Representations**

This Decision is based on the following facts represented by SSI, Scotia Capital and Scotia Cassels:

1. SSI is a corporation established under the laws of the Province of Ontario and is registered as a dealer in the category of mutual fund dealer (or the equivalent) in all the Jurisdictions. SSI is a member of the Mutual Fund Dealers Association of Canada. SSI is or will be the principal distributor, trustee and manager of each of the Funds. Accordingly, SSI is or will be the distribution company of each of the Funds.
2. Scotia Cassels is a corporation established under the laws of Canada and is registered as an adviser in Ontario in the categories of investment counsel and portfolio manager and is registered under the equivalent categories in the other Jurisdictions.
3. Scotia Capital is a corporation established under the laws of the Province of Ontario, is registered as a dealer in Ontario in the category of investment dealer and is registered under the equivalent category in the other Jurisdictions. Scotia Capital is a member of the Investment Dealers Association of Canada.
4. Scotia Capital or Scotia Cassels are or will be the portfolio advisors of certain of the Funds and the portfolio manager of certain of the Funds. Accordingly, in respect of each of these Funds, either Scotia Capital or Scotia Cassels is or will be the Fund's management company.
5. Each of the Funds is or will be a mutual fund within the meaning of the Legislation and is or will be a reporting issuer subject to National Instrument 81-102.
6. Each of the Scotia Mutual Funds is not in default under the Legislation.
7. Securities of the Funds are or will be offered to the public in all provinces and territories of Canada.
8. SSI is a wholly owned subsidiary of Scotiabank. Each of Scotia Capital and Scotia Cassels is a subsidiary of Scotiabank. Accordingly, Scotiabank is a substantial security holder of each of SSI, Scotia Capital, and Scotia Cassels.
9. Certain directors and/or officers of Scotia Capital and Scotia Cassels who are, or may be, responsible persons in respect of certain of the Funds are or may also be officers of Scotiabank. These directors and/or officers of Scotia Capital

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and Scotia Cassels who are officers of Scotiabank will not participate in the formulation of, or have access prior to implementation, to investment decisions made on behalf of the Funds by Scotia Capital or Scotia Cassels.

10. SSI is prohibited by the Investment Restrictions from causing the investment portfolios of the Funds to invest in Common Shares of Scotiabank because Scotiabank is a substantial securityholder of SSI, the manager and the distribution company of the Funds.
11. Scotia Capital and Scotia Cassels are prohibited by the Investment Restrictions from causing the investment portfolios of certain of the Funds to invest in Common Shares of Scotiabank because:
  - a) Scotiabank is a substantial security holder of the management company or distribution company of the Funds; and
  - b) certain directors and/or officers of Scotia Capital and Scotia Cassels are or may also be officers of Scotiabank.
12. For purposes of the requirement of section 11.3(b) of Part B of Form 81-101FI – Contents of Simplified Prospectus – under National Instrument 81-101, the broad based securities market index that is relevant for the purposes of comparing the performance of many of the Funds is the S&P/TSX Composite Total Return Index (the “Composite Index”). In addition, investors and/or their advisors may compare the performance of a Fund to one or more of the S&P/TSX 60 Index (the “60 Index”), and the S&P/TSX Financial Services Index (the “Financial Services Index”).
13. As at September 30, 2004, the Common Shares of Scotiabank are represented in each of the indices referred to in paragraph 12 above in approximately the following percentages:

Composite Index	4.32%
60 Index	5.74%
Financial Services Index	13.09%
14. The Financial Services Index is the largest industry sector sub-index of the Composite Index, representing approximately 31% of the Composite Index in 2003. In 2003, bank securities represented approximately 66% of the Financial Services Index and approximately 21% of the Composite Index.

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15. As demonstrated by the information set out in paragraphs 12, 13 and 14 above, in the context of the Canadian capital markets, the ability to invest in Common Shares of Scotiabank is important to the Funds. Scotiabank is the second largest bank issuer by market capitalization and index weighting in each of the indices referred to above and it has a significant impact on the returns of each of such indices. Scotia Capital and Scotia Cassels are of the view that it is not prudent for a portfolio manager to arbitrarily exclude securities of such an issuer from the universe of securities available for investment.
16. SSI, Scotia Capital and Scotia Cassels consider that it would be in the best interests of investors in the Funds if Scotia Capital and Scotia Cassels were permitted to invest the portfolios of the Funds in Common Shares of Scotiabank where such investment is consistent with the investment objectives of the Funds.
17. SSI has appointed an independent Board of Advisors (the “Board of Advisors”), which will review each Fund’s purchases, sales and continued holdings of Common Shares of Scotiabank to ensure that these investment decisions: have been made free from any influence by Scotiabank, have not taken into account any consideration relevant to Scotiabank or any associate or affiliate of Scotiabank, and do not cause the portfolio of the Fund to exceed the investment concentration limits for the Fund in any one issuer.
18. In reviewing the Funds’ purchases, sales and continued holdings of Common Shares of Scotiabank, the Board of Advisors will take into account the best interests of the unitholders of the Funds and no other factors.
19. In addition to an annual fee, compensation to be paid to members of the Board of Advisors will be paid on a per meeting plus expenses basis and will be allocated among the Funds in a manner that is considered by the Board of Advisors to be fair and reasonable to the Funds.

### **Decision**

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make this Decision has been met.

The decision of the Decision Makers under the Legislation is that SSI, Scotia Capital, Scotia Cassels and the Funds are exempt from the Investment Restrictions so as to enable the Funds to invest, or continue to hold an investment, in Common Shares of Scotiabank provided that:

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1. SSI has appointed a Board of Advisors to review the Funds' purchases, sales and continued holdings of Common Shares of Scotiabank;
2. the Board of Advisors has at least three members, each of whom is independent of
  - (a) Scotiabank,
  - (b) SSI,
  - (c) Scotia Capital, Scotia Cassels or any other portfolio advisor of the Funds, or
  - (d) any associate or affiliate of Scotiabank, SSI, Scotia Capital, Scotia Cassels or any other portfolio advisor of the Funds.

A member of the Board of Advisors is not independent if the member has a direct or indirect material relationship with the Filers, the Funds, or an entity related to the Filers. A material relationship is any relationship that a reasonable person would consider might interfere with the exercise of the member's independent judgement regarding conflicts of interest facing the Filers;

3. the Board of Advisors has a written mandate describing its duties and standard of care which, at a minimum, sets out the conditions of this Decision;
4. the members of the Board of Advisors exercise their powers and discharge their duties honestly, in good faith and in the best interests of investors in the Funds and, in doing so, exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances;
5. none of the Funds relieves the members of the Board of Advisors from liability for loss that arises out of a failure to satisfy the standard of care set out in paragraph 4;
6. none of the Funds indemnifies the members of the Board of Advisors against legal fees, judgements and amounts paid in settlement as a result of a breach of the standard of care set out in paragraph 4;
7. none of the Funds incurs the cost of any portion of liability insurance that insures a member of the Board of Advisors for a liability for loss that arises out of a failure to satisfy the standard of care set out in paragraph 4;

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8. the cost of any indemnification or insurance coverage paid for by SSI, Scotia Capital, Scotia Cassels, any other portfolio advisor of the Funds, or any associate or affiliate of SSI, Scotia Capital, Scotia Cassels or any other portfolio advisor of the Funds to indemnify or insure the members of the Board of Advisors in respect of a loss that arises out of a failure to satisfy the standard of care set out in paragraph 4 is not paid either directly or indirectly by the Funds;
9. prior to effecting a purchase pursuant to this Decision, SSI has in place written policies and procedures to ensure that there is compliance with the conditions of this Decision;
10. the Board of Advisors reviews the Funds' purchases, sales and continued holdings of Common Shares of Scotiabank on a regular basis, but not less frequently than once every calendar quarter;
11. the Board of Advisors forms the opinion after reasonable inquiry that the decisions made on behalf of each Fund by Scotia Capital, Scotia Cassels or the Fund's other portfolio advisors to purchase, sell or continue to hold Common Shares of Scotiabank were, and continue to be, in the best interests of the Fund and:
  - (a) represent the business judgement of Scotia Capital, Scotia Cassels or the Fund's other portfolio advisors, uninfluenced by considerations other than the best interests of the Fund,
  - (b) have been made free from any influence by Scotiabank and without taking into account any consideration relevant to Scotiabank or any associate or affiliate of Scotiabank, and
  - (c) do not exceed the limitations of the applicable legislation;
12. the determination made by the Board of Advisors pursuant to paragraph 11 above is included in detailed written minutes provided to SSI, Scotia Capital or Scotia Cassels, not less frequently than quarterly;
13. in respect of the relevant Fund, within 30 days after the end of each month in which Scotia Capital, Scotia Cassels or the Fund's other portfolio advisor purchases or sells Common Shares of Scotiabank on behalf of one or more Funds, a Filer will file on SEDAR:
  - (a) reports disclosing:

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- (i) the name of each Fund that purchased or sold during the month,
  - (ii) the date of each purchase and sale,
  - (iii) the volume weighted average price paid or received for the Common Shares of Scotiabank by each Fund on a given date, and
  - (iv) whether a purchase, sale or equity position was determined by the Board of Advisors to not comply with paragraph 11 above and, if so, why the purchase, sale or equity position was either completed, continued or not liquidated notwithstanding the Board of Advisors' determination;
- (b) a certificate of Scotia Capital, Scotia Cassels or the Fund's other portfolio advisors certifying that:
  - (i) at the time of each trade the trade represented the business judgement of the portfolio advisor of the Fund uninfluenced by considerations other than the best interest of the Fund and was, in fact, in the best interests of the Fund,
  - (ii) the trades were made free from any influence by Scotiabank or any affiliate or associate thereof and without taking any consideration relevant to Scotiabank or any associate or affiliate thereof, and
  - (iii) the trades were not part of a series of transactions aiming to support or otherwise influence the price of the Common Shares of Scotiabank; and
- (c) a certificate by each member of the Board of Advisors certifying that after reasonable inquiry the member formed the opinion that the policies and procedures referred to in paragraph 9 above are adequate and effective to ensure compliance with this Decision and that the decision made on behalf of each Fund by Scotia Capital, Scotia Cassels or the Fund's other portfolio advisors to purchase Common Shares for the Fund and the purchase by the Fund:
  - (i) was made in compliance with the conditions of this Decision;
  - (ii) represented the business judgment of Scotia Capital, Scotia Cassels or the Fund's other portfolio advisors uninfluenced by considerations other than the best interests of the Fund; and



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(iii) was, in fact, in the best interests of the Fund;

14. the Board of Advisors advises the Decision Makers in writing of:

- (a) any determination by it that paragraph 11 has not been satisfied with respect to any purchase, sale or holding of Common Shares of Scotiabank,
- (b) any determination by it that any other condition of this Decision has not been satisfied,
- (c) any action it has taken or proposes to take following the determinations referred to above, and
- (d) any action taken, or proposed to be taken, by Scotiabank, SSI, Scotia Capital, Scotia Cassels or any other portfolio advisor of the Funds in response to the determinations referred to above;

15. the existence, purpose, duties and obligations of the Board of Advisors, the names of its members, whether and how they are compensated by the Funds, and the fact that they meet the requirements of paragraph 2 are disclosed:

- (a) in a press release issued, and a material change report filed, prior to reliance on the Decision,
- (b) in item 12 of Part A of the simplified prospectus of the Funds, and
- (c) on SSI's internet website; and

16. the Decision, as it relates to the Jurisdiction of a Decision Maker, will terminate one year after the publication in final form of any legislation or rule of that Decision Maker dealing with mutual fund governance in a manner that conflicts with or makes inapplicable any provision of this Decision.

Paul M. Moore  
Vice Chair

Wendell S. Wigle  
Commissioner

ONTARIO SECURITIES COMMISSION