

ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re CIBC Capital Trust, 2017 ABASC 94

Date: 20170601

Canadian Imperial Bank of Commerce and CIBC Capital Trust

Background

1. The Executive Director of the Alberta Securities Commission has received an application from Canadian Imperial Bank of Commerce (the **Bank**) and CIBC Capital Trust (the **Trust**) for a decision pursuant to section 3 of Alberta Securities Commission Rule 13-501 *Fees* (the **Fees Rule**) waiving the requirement for the Trust to pay the participation fee as set out in subsection 15(1) of the Fees Rule, subject to certain conditions.

Interpretation

2. Terms defined in the *Securities Act* (Alberta), National Instrument 14-101 *Definitions*, National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (SEDAR)* or the Fees Rule have the same meaning if used in this decision, unless otherwise defined herein.

Representations

3. This decision is based on the following facts represented by the Trust and the Bank:

The Bank

- (a) The Bank is a Schedule 1 Bank under the *Bank Act* (Canada).
- (b) The Bank's head and registered office is located in Toronto, Ontario.
- (c) The Bank has a financial year-end of October 31.
- (d) The Bank is a reporting issuer in each of the provinces and territories of Canada (the **Reporting Jurisdictions**), and is not in default of securities legislation in any jurisdiction of Canada.
- (e) As of the date hereof, the authorized share capital of the Bank consists of an unlimited number of common shares (**Bank Common Shares**), an unlimited amount of class A preferred shares and an unlimited amount of class B preferred shares without nominal or par value issuable in series.
- (f) The Bank Common Shares are listed and posted for trading on the Toronto Stock Exchange and the New York Stock Exchange.

The Trust and the Trust Securities

- (g) The Trust is a trust established under the laws of the Province of Ontario pursuant to a declaration of trust dated as of January 19, 2009.
- (h) The Trust's head and registered office is located in Toronto, Ontario.
- (i) The Trust has a financial year-end of December 31.
- (j) The Trust is a reporting issuer in each of the Reporting Jurisdictions and, other than in respect of payment of participation fees under the Fees Rule in Alberta, is not in default of securities legislation in any jurisdiction of Canada.
- (k) Pursuant to an administration agreement dated as of January 19, 2009, between Computershare Trust Company of Canada, as trustee of the Trust (the **Trustee**) and the Bank, the Trustee has delegated to the Bank certain of its duties in relation to the administration of the Trust. The Bank, as administrative agent, provides advice and counsel with respect to management of the assets of the Trust and other matters as may be requested by the Trustee from time to time and administers the day-to-day operations of the Trust.
- (l) As of the date hereof, the outstanding securities of the Trust consist of:
 - (i) 9.976% CIBC Tier 1 Notes – Series A due June 30, 2108 (**CIBC Tier 1 Notes – Series A**);
 - (ii) 10.25% CIBC Tier 1 Notes – Series B due June 30, 2108 (**CIBC Tier 1 Notes – Series B** and collectively with the CIBC Tier 1 Notes – Series A, the **CIBC Notes**); and
 - (iii) voting trust units (the **Voting Trust Units** and, collectively with the CIBC Notes, the **Trust Securities**).
- (m) All of the Voting Trust Units, which are the only voting securities of the Trust, are held by the Bank.
- (n) No Trust Securities are currently listed on a “marketplace” as defined in National Instrument 21-101 *Marketplace Operation*.
- (o) The Trust was established for the purpose of effecting offerings of Trust Securities in order to provide the Bank with a cost effective means of raising capital for Canadian bank regulatory purposes by means of: (i) creating and selling the Trust Securities; and (ii) acquiring and holding assets (collectively, the **Trust Assets**), which consist primarily of one or more senior unsecured deposit notes of the Bank (**Deposit Notes**). The Trust Assets generate income for

distribution to holders of Trust Securities. The Trust does not and will not carry on any operating activity other than in connection with holding the Trust Assets and the issuance of Trust Securities.

The Existing Continuous Disclosure Exemption

- (p) Pursuant to a decision dated April 22, 2009 (the **Continuous Disclosure Exemption Decision**) granted to the Trust by the Ontario Securities Commission as principal regulator, on behalf of itself and the securities regulatory authorities of the other Reporting Jurisdictions under the passport system contemplated by Multilateral Instrument 11-102 *Passport System*, the Trust was granted an exemption from:
 - (i) most requirements of National Instrument 51-102 *Continuous Disclosure Obligations* (**NI 51-102**), including the requirement to file interim financial statements and audited annual financial statements;
 - (ii) the requirement to file interim and annual certificates pursuant to Parts 4, 5 and 6 of National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*.
- (q) The Continuous Disclosure Exemption Decision is subject to conditions, including that the Bank make continuous disclosure filings on its own behalf and that such continuous disclosure filings are filed, in accordance with the Bank's filing deadlines, on the Trust's SEDAR profile. Except as set out in the Continuous Disclosure Exemption Decision, no continuous disclosure documents concerning only the Trust are filed.

Innovative Instruments – Capital Regulatory Requirements

- (r) The Trust was established by the Bank in order to comply with the regulatory requirements of the Office of the Superintendent of Financial Institutions (**OSFI**) relating to the issuance of innovative capital instruments in effect at the time the CIBC Notes were issued.
- (s) OSFI maintains strict guidelines and standards (the **OSFI Guidelines**) with respect to the capital adequacy requirements of federally regulated financial institutions, including the Bank, and, in particular, specifies minimum required amounts of capital to be maintained by such institutions. At the time the CIBC Notes were issued, Tier 1 capital consisted of common shareholders' equity, qualifying non-cumulative perpetual preferred shares, qualifying innovative instruments and qualifying non-controlling interests arising on consolidation from Tier 1 capital instruments. Innovative instruments, such as the CIBC Notes, were required to satisfy the detailed requirements of the OSFI Guidelines to be included in the Tier 1 capital of the Bank, including the requirement that such

instruments be issued by a special purpose vehicle (such as the Trust), whose primary purpose was to raise innovative Tier 1 capital in compliance with the OSFI Guidelines. OSFI approved the inclusion of the CIBC Notes as Tier 1 capital of the Bank. If the Bank could have issued the CIBC Notes directly, this capital would have been included in the calculation of the participation fee payable by the Bank.

Analysis

- (t) Subsection 15(1) of the Fees Rule requires all reporting issuers to pay a participation fee at the time of filing their annual financial statements.
- (u) The Bank is a Class 1 reporting issuer and the Trust is a Class 2 reporting issuer. The participation fee for both Class 1 and Class 2 reporting issuers is based on the reporting issuer's capitalization for the previous financial year.
- (v) The Bank will pay the required participation fee at the time of filing its annual financial statements, expected to be the maximum fee payable of \$48,000.
- (w) Absent the relief granted herein, the Trust would also be required to pay a participation fee at the time of filing its annual financial statements, expected to be \$28,000.
- (x) Subsection 17(1) of the Fees Rule provides an exemption from the requirement to pay a participation fee for any reporting issuer that is a subsidiary as defined therein, provided that certain requirements are satisfied.
- (y) The Bank and the Trust meet all of the substantive requirements to rely on the exemption in subsection 17(1) of the Fees Rule, except that the Trust is not a subsidiary as defined therein and does not satisfy the requirement in paragraph 17(1)(b). Paragraph 17(1)(b) requires that the audited financial statements of the parent prepared in accordance with National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards* require the consolidation of the parent and the subsidiary.
- (z) According to International Financial Reporting Standards, the accounting principles applicable to the Bank, the Bank may not consolidate the Trust because the assets of the Trust consist primarily of Bank Deposit Notes, which are liabilities of the Bank. As a result the Trust is not entitled to rely on the exemption in subsection 17(1) of the Fees Rule.
- (aa) Despite this accounting treatment, the Trust is a subsidiary of the Bank as such term is defined in section 4 of the *Securities Act* (Alberta) and as defined under the *Bank Act* (Canada).

Decision

4. The decision of the undersigned under the Fees Rule is that the requirement for the Trust to pay the participation fee as set out in subsection 15(1) therein shall not apply to the Trust, for so long as:
- (a) the Bank and the Trust continue to satisfy all of the conditions contained in the Continuous Disclosure Exemption Decision; and
 - (b) under the Fees Rule when calculating its participation fee, the Bank includes the capitalization of the Trust calculated in accordance with section 21 of the Fees Rule, and the Bank has paid the participation fee calculated on this basis.

“original signed by”
Tom Graham, CA
Director, Corporate Finance
Alberta Securities Commission