

ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Bank of Montreal, 2017 ABASC 124

Date: 20170725

Bank of Montreal
(the Bank)

and

BMO Capital Trust II and
BMO Subordinated Notes Trust
(each a Trust and collectively the Trusts)

Background

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

Interpretation

2. Terms defined in the *Securities Act* (Alberta) (**Act**), 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 Trusts and the Bank:

The Bank

- (a) The Bank is a Schedule 1 Bank under the *Bank Act* (Canada) (**Bank Act**).
- (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, an unlimited number of Class A Preferred

Shares issuable in series, and an unlimited number of Class B Preferred Shares issuable in series.

- (f) The Bank's common shares are listed and posted for trading on the Toronto Stock Exchange and the New York Stock Exchange.

BMO Capital Trust II

- (g) BMO Capital Trust II is a trust established under the laws of Ontario by Montreal Trust Company of Canada pursuant to an amended and restated declaration of trust dated as of December 18, 2008.
- (h) BMO Capital Trust II's head office is located in Toronto, Ontario.
- (i) BMO Capital Trust II has a financial year-end of December 31.
- (j) BMO Capital Trust II 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) The Bank is the administrative agent of BMO Capital Trust II pursuant to an amended and restated administration agreement pursuant to which Montreal Trust Company of Canada has delegated to the Bank certain of its obligations in relation to the administration of BMO Capital Trust II, including the day-to-day operations of BMO Capital Trust II and such other matters as may be requested from time to time by Montreal Trust Company of Canada.
- (l) As of the date hereof, the outstanding securities of BMO Capital Trust II consist of:
 - (i) \$450,000,000 principal amount of 10.221% subordinated notes due December 31, 2107 (the **BMO Tier 1 Notes - Series A**); and
 - (ii) 1,000 voting trust units.
- (m) All of the voting trust units referred to in paragraph (l)(ii), which are the only voting securities of BMO Capital Trust II, are held by the Bank.
- (n) No securities of BMO Capital Trust II are currently listed on a "marketplace" as defined in National Instrument 21-101 *Marketplace Operation* (**NI 21-101**).
- (o) BMO Capital Trust II does not (and will not) carry on any operating activity other than in connection with the offering of its securities to the public. The assets of BMO Capital Trust II consist primarily of a senior deposit note issued by the Bank which has been acquired with the proceeds of the offerings of BMO Tier 1 Notes - Series A and BMO Capital Trust II may, from time to time, acquire

additional senior deposit notes (each, a **Bank Deposit Note**) issued by the Bank from the proceeds of the offering of other subordinated notes. The Bank Deposit Notes will generate income to provide BMO Capital Trust II with funds to pay the interest payable on the BMO Tier 1 Notes - Series A and other subordinated notes of BMO Capital Trust II (if any) from time to time.

BMO Subordinated Notes Trust

- (p) BMO Subordinated Notes Trust is a closed-end trust established under the laws of Ontario by Computershare Trust Company of Canada as trustee, pursuant to a declaration of trust dated August 28, 2007.
- (q) BMO Subordinated Notes Trust's head office is located in Toronto, Ontario.
- (r) BMO Subordinated Notes Trust has a financial year-end of December 31.
- (s) BMO Subordinated Notes Trust is a reporting issuer in each of the Reporting Jurisdictions, other than in respect of payment of participation fees under the Fees Rule in Alberta, and is not in default of securities legislation in any jurisdiction of Canada.
- (t) The Bank is the administrative agent of BMO Subordinated Notes Trust pursuant to an administration agreement pursuant to which Computershare Trust Company of Canada has delegated to the Bank certain of its obligations in relation to the administration of BMO Subordinated Notes Trust, including the day-to-day operations of BMO Subordinated Notes Trust and such other matters as may be requested from time to time by Computershare Trust Company of Canada.
- (u) As of the date hereof, the outstanding securities of BMO Subordinated Notes Trust consist of:
 - (i) \$800,000,000 principal amount of 5.75% subordinated notes due September 26, 2022 (the **BMO TSNs - Series A**); and
 - (ii) 1,000 voting trust units.
- (v) All of the voting trust units referred to in paragraph (u)(ii), which are the only voting securities of BMO Subordinated Notes Trust, are held by the Bank.
- (w) No securities of BMO Subordinated Notes Trust are currently listed on a "marketplace" as defined in NI 21-101.
- (x) BMO Subordinated Notes Trust does not (and will not) carry on any operating activity other than in connection with the offering of its securities to the public. The assets of BMO Subordinated Notes Trust consist primarily of a Bank Deposit Note which has been acquired with the proceeds of the offering of BMO TSNs -

Series A and BMO Subordinated Notes Trust may, from time to time, acquire additional Bank Deposit Notes. The Bank Deposit Notes will generate income to provide the BMO Subordinated Trust with funds to pay the interest payable on the BMO TSNs - Series A and other subordinated notes of BMO Subordinated Trust (if any) from time to time.

The Existing Continuous Disclosure Exemptions

- (y) Pursuant to decisions dated February 23, 2009 and November 30, 2007 (the **Continuous Disclosure Exemption Decisions**) granted to BMO Capital Trust II and BMO Subordinated Notes Trust, respectively, 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*, each of the Trusts was granted an exemption from:
 - (i) most requirements of National Instrument 51-102 *Continuous Disclosure Obligations*, including the requirement to file interim financial statements and audited annual financial statements, management's discussion and analysis and annual information forms; and
 - (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*.
- (z) The Continuous Disclosure Exemption Decisions are 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 each Trust's SEDAR profile (for so long as each Trust is a reporting issuer). Except as set out in the Continuous Disclosure Exemption Decisions, no continuous disclosure documents concerning only the Trusts are required to be filed.

Innovative Instruments – Capital Regulatory Requirements

- (aa) The Trusts were established by the Bank solely for the purpose of effecting the offerings of securities in order to provide the Bank with a cost-effective means of raising capital for regulatory purposes under the Bank Act. BMO Tier 1 Notes – Series A qualify as Tier 1 Capital of the Bank, and BMO TSNs - Series A qualify as Tier 2B Capital of the Bank under the Innovative Capital Guidelines issued by the Office of the Superintendent of Financial Institutions (Canada) (**OSFI**) pursuant to the Bank Act.
- (bb) 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 BMO Tier 1 Notes – Series A and BMO TSNs –Series A were issued, Tier 1 capital consisted primarily of common shareholders’ equity, qualifying non-cumulative perpetual preferred shares, qualifying innovative instruments and qualifying non-controlling interests while Tier 2 Capital primarily consisted of subordinated debt, qualifying innovative instruments, and the allowable portion of the Bank’s general allowance. Innovative instruments, such as the BMO Tier 1 Notes — Series A and BMO TSNs Series A, were required to satisfy the detailed requirements of the OSFI Guidelines to be included in the Bank’s regulatory capital. Accordingly, BMO Tier 1 Notes — Series A and BMO TSNs Series A were issued by a special purpose vehicle, whose primary purpose is to raise innovative Tier 1 and Tier 2B capital, as applicable. Utilizing the special purpose vehicle generated cost-effective capital for the Bank. OSFI approved the inclusion of the BMO Tier 1 Notes — Series A and BMO TSNs Series A as Tier 1 and Tier 2B, as applicable, capital of the Bank. If the Bank had issued Tier 1 and Tier 2B capital directly, this capital would be included in the calculation of the participation fee payable by the Bank.

Analysis

- (cc) 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.
- (dd) The Bank is a Class 1 reporting issuer and each of BMO Capital Trust II and BMO Subordinated Notes 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.
- (ee) The Bank paid the required participation fee at the time of filing its annual financial statements, being the maximum fee payable of \$48,000.
- (ff) Absent the relief granted herein, BMO Capital Trust II and BMO Subordinated Notes Trust would also each be required to pay a participation fee at the time of filing its annual financial statements, expected to be \$14,000 and \$19,000, respectively.
- (gg) 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.
- (hh) The Bank and the Trusts meet all of the substantive requirements to rely on the exemption in subsection 17(1) of the Fees Rule, except that neither of the Trusts is a subsidiary as defined therein as neither satisfy the requirement in paragraph 17(1)(b) of that rule. Paragraph 17(1)(b) of the Fees Rule 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.

- (ii) According to International Financial Reporting Standards, the accounting principles applicable to the Bank, the Bank may not consolidate any of the Trusts' financial statements. Accordingly, the Trusts may not, from a technical accounting perspective related to which entity has decision-making control, be considered to be subsidiaries of the Bank for the purposes of the Fees Rule. As a result, the Trusts are not entitled to rely on the exemption in subsection 17(1) of the Fees Rule.
- (jj) Despite this accounting treatment, each Trust is a subsidiary of the Bank as such term is defined in section 4 of the Act and as defined under the Bank Act.

Decision

- 4. The decision of the undersigned under the Fees Rule is that the requirement for each of the Trusts to pay the participation fee as set out in subsection 15(1) therein shall not apply to a Trust, for so long as:
 - (b) the Bank and the applicable Trust continue to satisfy all of the conditions contained in the Continuous Disclosure Exemption Decisions; and
 - (c) under the Fees Rule when calculating its participation fee, the Bank includes the capitalization of the applicable Trust calculated in accordance with section 20 of the Fees Rule, and the Bank has paid the participation fee calculated on this basis.

"original signed by"
Lara Gaede
Chief Accountant and CFO
Alberta Securities Commission