



Ontario  
Securities  
Commission

Commission des  
valeurs mobilières  
de l'Ontario

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**IN THE MATTER OF  
THE *SECURITIES ACT*, RSO 1990, c S.5**

**- AND -**

**IN THE MATTER OF  
BMO NESBITT BURNS INC., BMO PRIVATE INVESTMENT COUNSEL INC.,  
BMO INVESTMENTS INC. and BMO INVESTORLINE INC.**

**ORAL REASONS FOR DECISION  
(Subsections 127(1) and 127(2) of the *Securities Act*)**

**Hearing:** December 15, 2016

**Decision:** December 15, 2016

**Panel:** Timothy Moseley - Commissioner and Chair of the Panel  
Garnet Fenn - Commissioner  
William J. Furlong - Commissioner

**Appearances:** Yvonne B. Chisholm - For Staff of the Commission  
Linda Fuerst - For BMO Nesbitt Burns Inc.,  
BMO Private Investment Counsel Inc.,  
BMO Investments Inc. and  
BMO InvestorLine Inc.

## ORAL REASONS FOR DECISION

*The following text has been prepared for the purpose of publication in the Ontario Securities Commission Bulletin and is based on portions of the transcript of the hearing. The excerpts from the transcript have been edited and supplemented, and the text has been approved by the Chair of the Panel for the purpose of providing a public record of the decision.*

Chair of the Panel:

- [1] Staff of the Commission has made allegations against BMO Nesbitt Burns Inc., BMO Private Investment Counsel Inc., BMO Investments Inc. and BMO InvestorLine Inc., all of which are indirect subsidiaries of the Bank of Montreal (the "**BMO Registrants**"). Staff's allegations relate to matters that were reported by the BMO Registrants promptly to Staff beginning in February 2015.
- [2] Staff alleges that each of the BMO Registrants failed to establish, maintain and apply appropriate controls and procedures with respect to supervision, as a result of which certain clients paid excess fees. Staff also alleges that these inadequacies were not detected or corrected by the BMO Registrants in a timely manner.
- [3] Staff alleges that the excess fees fell into two categories. First, for some clients with fee-based accounts, certain products with embedded trailer fees held in those accounts were incorrectly included in the calculation of account fees, as a result of which, Staff says, some clients paid excess fees. Second, some clients were not advised that they qualified for a mutual fund series that had a lower management expense ratio than the series of the same fund in which the client was invested.
- [4] Had Staff's allegations been proven at a contested hearing, the inadequacies referred to would have constituted a breach of section 11.1 of National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations*. That section requires registered firms such as the BMO Registrants to establish, maintain and apply policies and procedures that establish a sufficient system of controls and supervision. However, this is not a contested hearing. Staff and the BMO Registrants have entered into a settlement agreement in which the BMO Registrants neither admit nor deny Staff's allegations and the facts underlying those allegations.
- [5] Our obligation is to consider whether the settlement agreement should be approved and whether it would be in the public interest to issue the order contemplated by that agreement and proposed by the parties.
- [6] The settlement agreement is the product of negotiation between Staff and the BMO Registrants. The Commission respects that process and accords significant deference to the resolution reached by the parties. However, we must still be satisfied that the measures called for in the settlement agreement are appropriate and in the public interest.
- [7] This Panel had the opportunity to meet with counsel for Staff and for the BMO Registrants in a confidential pre-settlement conference. We reviewed the proposed settlement agreement and we heard submissions from counsel.

- [8] All of the factors that we have heard today from counsel are relevant to our decision. There are several factors that, for us, are particularly important.
- [9] First, the BMO Registrants will be accountable for paying compensation totalling almost \$50 million to the affected clients. The basis on which the compensation is calculated is set out in the settlement agreement, and Commission Staff will oversee the process through which the affected clients will be compensated.
- [10] Second, the BMO Registrants have committed to produce enhanced policies and procedures designed to prevent a recurrence of the alleged inadequacies. These revised policies and procedures will be subject to review and approval by Staff.
- [11] Third, the BMO Registrants have made a voluntary payment of \$2.1 million to the Commission for the benefit of third parties or for investor education, and an additional voluntary payment of \$90,000 to reimburse the Commission for costs.
- [12] Fourth, the BMO Registrants discovered the inadequacies and promptly self-reported them to Staff. Following that self-reporting, the BMO Registrants provided prompt, detailed and candid co-operation to Staff. The BMO Registrants had already formulated an intention to pay appropriate compensation to affected clients.
- [13] Fifth, there is no allegation or evidence of dishonest conduct on the part of the BMO Registrants.
- [14] Finally, Staff submitted that based on all the facts underlying the alleged inadequacies, and that are relevant to this settlement, the compensation plan called for in the agreement is appropriate in all the circumstances and is in the public interest. Based on the facts alleged and on those submissions, in our view the compensation called for in the settlement agreement is appropriate.
- [15] This settlement is like all settlements in at least one way, in that it resolves a proceeding in a timely and efficient way that saves the substantial costs and delay that would be incurred as a result of a contested hearing. The affected clients, among others, benefit significantly by a resolution of this nature at this stage.
- [16] Unlike most settlements, this is a settlement where the respondents neither admit nor deny the accuracy of the facts alleged by Staff or Staff's conclusions. It is difficult to secure the Commission's approval of a so-called no-contest settlement.
- [17] However, taking into account the BMO Registrants' self-identification, prompt self-reporting, measures to adopt new policies and controls, significant voluntary payments, payment of compensation to affected clients, and prompt, complete and candid co-operation with Staff, and with reference to the factors identified in section 17 of *OSC Staff Notice 15-702 – Revised Credit for Co-operation Program*,<sup>1</sup> in our view it is appropriate to approve a no-contest settlement in this case.
- [18] When compliance inadequacies occur, and they do from time to time, it is critical that the registrant responds in the responsible way that the BMO Registrants have. The *Credit for Co-operation Program* was designed specifically for cases

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1 (2014), 37 OSCB 2583.

such as this, and the BMO Registrants have earned the benefit of the credit called for by that program.

- [19] Finally, this settlement should make it clear that registered firms must have in place robust and effective compliance systems, a principal purpose of which is to provide reasonable assurance that investors are protected and that they are treated fairly.
- [20] For all these reasons, we approve the settlement agreement as requested and we conclude that it is in the public interest to issue an order substantially in the form of Schedule 'A' to that agreement.

Approved by the Chair of the Panel on the 21st day of December, 2016.

*"Timothy Moseley"*

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Timothy Moseley