

## **2003 BCSECCOM 199**

### **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications – relief granted from certain mutual fund self-dealing prohibitions to permit certain mutual funds to purchase, sell or hold securities of Bank of Montreal, parent company of the mutual fund managers, provided that a fund governance mechanism is used

### **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 121(2)(a), 121(3), 123, 127(1)(a) and 130

**IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH  
COLUMBIA, ALBERTA, SASKATCHEWAN, ONTARIO, QUEBEC,  
NOVA SCOTIA, AND NEWFOUNDLAND AND LABRADOR**

**AND**

**IN THE MATTER OF THE MUTUAL RELIANCE REVIEW SYSTEM  
FOR EXEMPTIVE RELIEF APPLICATIONS**

**AND**

**IN THE MATTER OF BMO INVESTMENTS INC. (“BII”)  
BMO HARRIS INVESTMENT MANAGEMENT INC. (“BHIMI”)  
BMO NESBITT BURNS INC. (“BNBI”)  
GUARDIAN GROUP OF FUNDS LTD. (“GGOF”)  
JONES HEWARD INVESTMENT COUNSEL INC. (“JHIC”)  
THE FUNDS SET OUT AT APPENDIX “A”**

### **MRRS DECISION DOCUMENT**

WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in each of British Columbia, Alberta, Saskatchewan, Ontario, Quebec, Nova Scotia and Newfoundland and Labrador (the “Jurisdictions”) has received an application from BII, BHIMI, BNBI, GGOF and JHIC (BII and GGOF have not applied in Quebec, JHIC’s application in Quebec is conditional on its registration as an advisor in Quebec) for a decision under the securities legislation of the Jurisdictions (the “Legislation”) that the following provisions of the Legislation do not apply so as to prevent the funds set out at Appendix “A” or other mutual funds of which BII, BHIMI, BNBI, GGOF or JHIC is or may be the manager or the portfolio manager (individually, a “Fund”, and, collectively, the “Funds”) from investing in, or continuing to hold an investment in, common shares of the Bank of Montreal:

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- (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 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 provisions of (a) and (b) being, collectively, the “Investment Restrictions”);

AND WHEREAS under the Mutual Reliance Review System for Exemptive Relief Applications (the “System”), the Ontario Securities Commission is the principal regulator for this application;

AND WHEREAS, unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 Definitions or in Québec Commission Notice 14- 101;

AND WHEREAS BII, BHIMI, BNBI, GGOF and JHIC have represented to the Decision Makers that:

1. Each of the Funds is or will be a mutual fund within the meaning of the Legislation that is a reporting issuer subject to National Instrument 81-102 and that is not in default under the Legislation.
2. BII, BHIMI, BNBI, GGOF or JHIC act, or will in the future act, as managers or portfolio managers of the Funds for purposes of the Legislation.
3. BII acts as principal distributor of certain of the Funds for the purposes of the Legislation.
4. Other than as set out in Appendix “A”, securities of the Funds currently in existence are offered in all provinces and territories in Canada.

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5. Each of BII, BHIMI, BNBI, GGOF and JHIC is a direct or indirect subsidiary of Bank of Montreal and, as a result, Bank of Montreal is a substantial security holder of each of BII, BHIMI, BNBI, GGOF and JHIC.
6. Certain directors and/or officers of BII, BHIMI, BNBI, GGOF or JHIC who are responsible persons in respect of the Funds are or may also be directors and/or officers of Bank of Montreal. The directors and/or officers of BII, BHIMI, BNBI, GGOF or JHIC who are directors and/or officers of Bank of Montreal will not participate in the formulation of, or have access prior to implementation to, investment decisions made on behalf of the Funds by BII, BHIMI, BNBI, GGOF or JHIC, respectively.
7. BII, BHIMI, BNBI, GGOF and JHIC are prohibited by the Investment Restrictions from causing the investment portfolios of the Funds to invest in common shares of Bank of Montreal because:
  - (a) Bank of Montreal is a substantial security holder of the management company and/or distribution company of the Funds; and
  - (b) Certain directors and/or officers of BII, BHIMI, BNBI, GGOF or JHIC are or may be directors and/or officers of Bank of Montreal.
8. For purposes of the requirement of section 11.3(b) of Part B of Form 81-101 FI - Contents of Simplified Prospectus - under National Instrument 81-101, the broad based securities market index that is relevant to comparing the performance of many of the Funds is the S&P/TSX Composite Total Return Index (the "S&P/TSX Index"). In addition investors and/or their advisors may compare the performance of a Fund to one or more of the S&P/TSX Composite Capped Total Return Index (the "S&P/TSX Capped Index"), the S&P/TSX 60 Index (the "S&P/TSX 60 Index"), and the S&P/TSX Financial Services Index (the "S&P/TSX Financial Services Index")
9. The common shares of Bank of Montreal are represented in each of the indices referred to in paragraph 8 above in approximately the following percentages as at November 30, 2002:

S&P/TSX Index 3%  
S&P/TSX Capped Index 3%  
S&P/TSX 60 Index 4%  
S&P/TSX Financial Services Index 11%
10. The S&P/TSX Financial Services Index is the largest industry sector sub-index of the S&P/TSX Index, representing approximately 32.49% of the

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index. Bank securities represent approximately 63.9% of the S&P/TSX Financial Services Index and approximately 20.8% of the S&P/TSX Index and the S&P/TSX Capped Index.

11. As demonstrated by the information set out in paragraphs 8, 9, and 10 above, in the context of the Canadian capital markets, the ability to invest in common shares of Bank of Montreal is extremely important to the Funds. Bank of Montreal is a large issuer in each of the indices referred to above and it has a significant impact on the returns of each of such indices. It is not prudent for a portfolio manager to arbitrarily exclude securities of such an issuer from the universe of securities available for investment.
12. Each of BII, BHIMI, BNBI, GGOF and JHIC consider that it would be in the best interests of investors in the Funds to be permitted to invest in common shares of Bank of Montreal, where such investment is consistent with the investment objectives of the Funds.
13. Each of BII, BHIMI, BNBI, GGOF and JHIC have agreed that, before a Fund or which it acts as manager or portfolio manager makes an investment in common shares of the Bank of Montreal, it will appoint an independent committee ("Independent Committee"), to review such Funds' purchases, sales and continued holdings of common shares of Bank of Montreal to ensure that they have been made free from any influence by Bank of Montreal and without taking into account any consideration relevant to Bank of Montreal or any associate or affiliate of Bank of Montreal.
14. In reviewing the Funds' purchases, sales and continued holdings of common shares of Bank of Montreal, such Independent Committee will take into consideration the best interest of unitholders of the Funds and no other factors.
15. Any compensation to be paid to members of an Independent Committee relating to this Decision will be paid on a per meeting plus expenses basis and will be allocated among the appropriate Funds in a manner that is considered by such Independent Committee to be fair and reasonable to the Funds.

AND WHEREAS under the System this MRRS Decision Document evidences the decision of each Decision Maker (collectively, the "Decision");

AND WHEREAS each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the Decision has been met;

THE DECISION of the Decision Makers under the Legislation is that:

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16. each of BII, BHIMI, BNBI, GGOF, JHIC and the Funds are exempt as the case may be from the Investment Restrictions so as to enable the Funds to invest, or continue to hold an investment in, common shares of Bank of Montreal; and
17. this 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;

provided that:

- (a) before a Fund for which it acts as manager or portfolio manager makes an investment in common shares of the Bank of Montreal, BII, BHIMI, BNBI, GGOF or JHIC, as appropriate, has appointed an Independent Committee to review the Funds' purchases, sales and continued holdings of common shares of Bank of Montreal;
- (b) such Independent Committee has at least three members and no member of the Independent Committee shall be an employee, director, officer or associate of (i) Bank of Montreal (ii) any of BII, BHIMI, BNBI, GGOF, JHIC or any portfolio manager of the Funds; or (iii) any associate or affiliate of Bank of Montreal, BII, BHIMI, BNBI, GGOF, JHIC or any other portfolio manager of the Funds;
- (c) such Independent Committee has a written mandate describing its duties and standard of care which, at a minimum, sets out these conditions;
- (d) the members of such Independent Committee 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;
- (e) none of the Funds relieves the members of an Independent Committee from liability for loss that arises out of a failure to satisfy the standard of care set out in paragraph (d);
- (f) none of the Funds indemnifies the members of an Independent Committee against legal fees, judgments and amounts paid in settlement as a result of a breach of the standard of care set out in paragraph (d);

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- (g) none of the Funds incurs the cost of any portion of liability insurance that insures a member of an Independent Committee for a liability for loss that arises out of a failure to satisfy the standard of care set out in paragraph (d);
- (h) the cost of any indemnification or insurance coverage paid for by BII, BHIMI, BNBI, GGOF, JHIC, any portfolio manager of the Funds, or any associate or affiliate of BII, BHIMI, BNBI, GGOF, JHIC or portfolio managers of the Funds to indemnify or insure the members of an Independent Committee in respect of a loss that arises out of a failure to satisfy the standard of care set out in paragraph (d) is not paid either directly or indirectly by the Funds;
- (i) such Independent Committee reviews the Funds' purchases, sales and continued holdings of common shares of Bank of Montreal regularly, but not less frequently than quarterly or such shorter period as the Independent Committee may require;
- (j) such Independent Committee forms the opinion, at any time, after reasonable inquiry that the decisions made on behalf of each Fund by the Fund's manager or portfolio manager to purchase, sell or continue to hold common shares of Bank of Montreal were, and continue to be, in the best interests of the Fund and:
  - (i) represent the business judgement of the Fund's manager or portfolio manager, uninfluenced by considerations other than the best interests of the Fund;
  - (ii) have been made free from any influence by Bank of Montreal and without taking into account any consideration relevant to Bank of Montreal or any associate or affiliate of Bank of Montreal; and
  - (iii) do not exceed the limitations of the applicable legislation.
- (k) the determination made by an Independent Committee pursuant to paragraph (j) above is included in detailed written minutes provided to the Fund's manager or portfolio manager not less frequently than quarterly;
- (l) the reports required to be filed pursuant to applicable legislation with respect to every purchase and sale of common shares of Bank of Montreal are filed on SEDAR in respect of the relevant Fund;

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- (m) such Independent Committee advises the Decision Makers in writing of
  - (i) any determination by it that condition (j) has not been satisfied with respect to any purchase, sale or holding of common shares of Bank of Montreal,
  - (ii) any determination by it that any other condition of this Decision has not been satisfied,
  - (iii) any action it has taken or proposes to take following the determinations referred to above, and
  - (iv) any action taken, or proposed to be taken, by the manager or portfolio manager of a Fund in response to the determinations referred to above;
- (n) the relationship between the Bank of Montreal and BII, BHIMI, BNBI, GGOF or JHIC, as appropriate, (and as the initial information stated in the describing paragraph), the existence, purpose, duties and obligations of an Independent Committee, the names of its members, whether and how they are compensated by the Funds, and the fact that they meet the requirements of condition (b) are disclosed:
  - (i) in a press release issued, and a material change report filed, prior to first reliance on the Decision;
  - (ii) in item 12 of Part A of the simplified prospectus of the Funds; and
  - (iii) on BII, BHIMI, BNBI, GGOF or JHIC's internet website.

DATED February 4, 2003.

Howard I. Wetston

Robert L. Shirriff

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## APPENDIX “A” FUNDS

### BMO HARRIS INVESTMENT MANAGEMENT INC. (BMO HARRIS PRIVATE PORTFOLIOS)

BMO Harris Canadian Dividend Income Portfolio\*  
BMO Harris Canadian Income Equity Portfolio\*  
BMO Harris Canadian Conservative Equity Portfolio\*  
BMO Harris Canadian Growth Equity Portfolio\*  
BMO Harris Canadian Special Growth Portfolio\*  
BMO Harris U.S. Equity Portfolio\*  
BMO Harris U.S. Growth Equity Portfolio\*

### BMO INVESTMENTS INC. (BMO MUTUAL FUNDS)

BMO Asset Allocation Fund  
BMO Monthly Income Fund  
BMO Dividend Fund  
BMO Equity Fund  
BMO NAFTA Advantage Fund  
BMO Special Equity Fund  
BMO Global Balanced Class  
BMO RSP Global Balanced Fund  
BMO Global Opportunities Class  
BMO RSP Global Opportunities Fund  
BMO Global Financial Services Class  
BMO RSP Global Financial Services Fund

### GUARDIAN GROUP OF FUNDS LTD. (GGOF GROUP OF FUNDS)

GGOF Dividend Growth Fund  
GGOF Monthly Dividend Fund  
GGOF Canadian Value Balanced Fund  
GGOF Canadian Value Fund  
GGOF Canadian Equity Fund  
GGOF Canadian Large Cap Fund  
GGOF Canadian Growth Balanced Fund  
GGOF Canadian Growth Fund



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BMO NESBITT BURNS INC. (BMO NESBITT BURNS GROUP OF FUNDS)

BMO Nesbitt Burns Canadian Stock Selection Fund

BMO Nesbitt Burns U.S. Stock Selection Fund

BMO Nesbitt Burns Balanced Fund

BMO Nesbitt Burns RRSP Stock Selection Fund.\* reporting issuers in each of the provinces only and not the territories