

2.1.10 Leith Wheeler Investment Counsel Ltd.

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – Capital accumulation plan sponsors, portfolio manager providing non-discretionary advice to plan sponsors, and mutual funds managed by portfolio manager exempted from the dealer registration and prospectus requirements in the Legislation in respect of trades in securities of mutual funds to tax-assisted and non-tax assisted capital accumulation plans, subject to conditions – Securities Act (Ontario).

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., ss. 25(1)(a), 53, 74(1).

February 4, 2022

**IN THE MATTER OF  
THE SECURITIES LEGISLATION OF  
ONTARIO  
(the Jurisdiction)**  
**AND**  
**IN THE MATTER OF  
THE PROCESS FOR EXEMPTIVE RELIEF  
APPLICATIONS  
IN MULTIPLE JURISDICTIONS**  
**AND**  
**IN THE MATTER OF  
LEITH WHEELER INVESTMENT COUNSEL LTD.  
(the Filer)**  
**DECISION**

Background

The principal regulator in the Jurisdiction has received an application from the Filer for a decision, on behalf of the Filer (including its respective directors, officers, representatives and employees acting on its behalf), any Plan Sponsor (as defined herein) and any Fund (as defined herein), under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) for a ruling that:

- (a) the dealer registration requirements contained in the Legislation shall not apply to the Filer (including its respective directors, officers, representatives and employees acting on its behalf) or any Plan Sponsor of a CAP (as defined herein) or a Non-Tax Assisted CAP (as defined herein) that uses the services of the Filer in respect of its CAP or Non-Tax Assisted CAP in respect of trades in the securities of the Funds to a CAP or a Non-Tax Assisted CAP sponsored by the Plan Sponsor for which the Filer provides services, subject to

certain terms and conditions (the **Dealer Registration Relief**); and

- (b) the prospectus requirements contained in the Legislation shall not apply in respect of the distribution of securities of Funds to CAPs or Non-Tax Assisted CAPs sponsored by a Plan Sponsor for which the Filer provides services (the **Prospectus Relief**),

(the Dealer Registration Relief and the Prospectus Relief are collectively, the **Exemption Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

- (a) the Ontario Securities Commission is the principal regulator for this application, and
- (b) the Filer has provided notice that subsection 4.7(1) of Multilateral Instrument 11-102 Passport System (**MI 11-102**) is intended to be relied upon in the jurisdictions of (i) Québec, Newfoundland and Labrador, the Yukon Territory and Nunavut in respect of the Exemption Sought with respect to CAPs, and (ii) Alberta, British Columbia, Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Nunavut, the Yukon Territory and the Northwest Territories in respect of the Exemption Sought with respect to Non-Tax Assisted CAPs.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

For the purposes of this decision, the following terms have the following meanings:

- (a) **CAP** has the meaning given to the term “capital accumulation plan” as defined in section 1.1 of the CAP Guidelines (as defined herein), namely, a tax assisted investment or savings plan that permits the members of the CAP to make investment decisions among two or more options offered within the plan. CAPs include a defined contribution registered pension plan, a group registered retirement savings plan, a group registered education savings plan, a group tax-free savings plan or a deferred profit sharing plan, and in Québec and Manitoba, include a simplified pension plan.
- (b) **CAP Guidelines** means the *Guidelines for Capital Accumulation Plans* published in

May 2004 by the Joint Forum of Financial Market Regulators.

- (c) **Fund** means a mutual fund as defined in section 1 of the Legislation, whether offered by prospectus or pursuant to prospectus exemptions in the Legislation, and which in both cases, comply with Part 2 of National Instrument 81-102 *Investment Funds (NI 81-102)* and are established and managed by the Filer, but does not include an exchange-traded fund.
- (d) **Member** means a current or former employee, or a person who belongs, or did belong, to a trade union or association, or
  - (i) his or her spouse
  - (ii) a trustee, custodian or administrator who is acting on his or her behalf, or for his or her benefit, or on behalf of, or for the benefit of, his or her spouse or
  - (iii) his or her holding entity, or a holding entity of his or her spouse
  - (iv) that has assets in a CAP or a Non-Tax Assisted CAP and also includes any person who is eligible to participate in a CAP or Non-Tax Assisted CAP.
- (e) **Non-Tax Assisted CAP** means an investment or savings plan that meets the definition of CAP in the CAP Guidelines and that is administered in accordance with the CAP Guidelines, but for the fact that it is an investment or savings plan that is non-tax assisted.
- (f) **Plan** means, depending on the context in which it is used, a CAP or a Non-Tax Assisted CAP or both of them.
- (g) **Plan Sponsor** means any employer, trustee, trade union or association or a combination of them that establishes a CAP or a Non-Tax Assisted CAP and uses the services of the Filer in respect of such CAP or Non-Tax Assisted CAP, and includes a Service Provider, to the extent that the Plan Sponsor has delegated some or all of its responsibilities to the Service Provider.
- (h) **Service Provider** means a person or company that provides services to a Plan Sponsor to design, establish, or operate a CAP or a Non-Tax Assisted CAP.

## Representations

This decision is based on the following facts represented by the Filer:

1. The Filer is a corporation organized under the laws of Canada with its head office in Vancouver, British Columbia.
2. The Filer is registered in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, Nova Scotia, New Brunswick, Newfoundland and Labrador, Prince Edward Island and the Yukon as a portfolio manager and an exempt market dealer, in Northwest Territories as a portfolio manager, and in British Columbia, Ontario, Québec and Newfoundland and Labrador as an investment fund manager.
3. The Filer's principal business is to provide investment management services through investment funds and discretionary managed accounts to individuals, families, foundations, endowments, not-for-profit organizations, institutions and multi-employer pension and benefit plans.
4. The Filer serves as the manager and principal portfolio advisor for each of its Funds, and for certain of its Funds has retained arm's length sub-advisors for all or a portion of the assets of the Funds. The Filer expects to establish additional Funds in the future.
5. The Filer may provide non-discretionary advice to Plan Sponsors, including doing research and providing recommendations regarding investments Plan Sponsors might select as investment options within a Plan.
6. The investment options for the Members of Plans will include Funds and may also include other investment options, such as segregated funds managed by insurance companies. Where the investment options include Funds, the Funds will comply with Part 2 of NI 81-102 in respect of its investment restrictions and practices. None of the Funds will be exchange-traded funds.
7. Plan Sponsors may wish to offer Funds or model portfolios comprised of securities of Funds as investment options within their CAPs pursuant to the CAP Blanket Exemption and to retain the Filer to provide certain services in relation to the CAPs. However, it is not practicable for the Filer to provide such services unless the Filer receives the Exemption Sought from the dealer and prospectus requirements to allow it to provide Funds to Members who are located in the provinces of Ontario, Québec, Newfoundland and Labrador, the Yukon Territory and Nunavut.
8. It is possible that a Plan Sponsor with whom the Filer deals may also establish or have established a Non-Tax Assisted CAP. Accordingly, the Filer wishes to also provide the services that the Filer

provides to Plan Sponsors in respect of CAPs to Non-Tax Assisted CAPs, should the Plan Sponsor desire it to do so.

9. The Filer will not engage in discretionary decision-making with respect to Plans or Member accounts and will not select investments for the Plans or Member accounts or provide investment advice to Members. The Filer does not provide custodial services in respect of the Plans or the Funds.
10. The Filer intends to only service Plans which, to the extent that they offer investment funds as investment options within the Plans, will only offer the Filer's proprietary funds as investment options within the Plan. As such, the Plans could offer other investment options (e.g. segregated funds), but the only investment funds offered therein would be those established and managed by the Filer.
11. For Plan Sponsors that offer model portfolios comprised of securities of Funds managed by the Filer, the Filer will be responsible to the applicable Plan Sponsor or Service Provider to maintain the specified targeted percentage investment in each Fund within the agreed tolerance range for each model portfolio subject to any adjustments agreed to or recommended by the Filer from time to time, and to provide such other services in connection with the model portfolios as agreed by the Plan Sponsor or Service Provider.
12. Members and in some cases, the Plan Sponsor, will make initial investment decisions to invest in Funds chosen by the Plan Sponsor, although the Plan Sponsor may establish a default option if the Member fails to make an investment choice, and subsequent changes to those investment decisions, with or without the assistance of an advisor selected by the Member (which will not be the Filer). Plan Sponsors may facilitate access to a registrant for advice to Members. The applicable investment instructions of Members will be transmitted by the Plan Sponsor to the Filer. The interest in the securities of Funds will be registered in the name of the applicable Plan Sponsor or the Filer for the account of the relevant Plan. The Filer will process the trades in the Funds as instructed and will establish and maintain the records reflecting the interest of each Plan in each Fund, and the Filer or a Service Provider will maintain records reflecting the interest of each Member or Plan Sponsor, as the case may be, in each Fund.
13. The Filer, the Plan Sponsors and the Funds will trade within the Plans or to Members of the Plans in accordance with the conditions set out in proposed amendments to National Instrument 45-106 *Prospectus Exemptions* related to CAPs, which were published by the Canadian Securities Administrators (the **CSA**) on October 21, 2005 (the **Proposed CAP Exemption**) and adopted in the form of a blanket exemption in all jurisdictions, other than in Ontario, Québec, Newfoundland and Labrador, the Yukon Territory and Nunavut (the **CAP Blanket Exemption**). The Proposed CAP Exemption and the CAP Blanket Exemption contemplate both dealer registration and prospectus exemptions, where required.
14. Although no equivalent to the CAP Blanket Exemption has been adopted in the jurisdictions of Ontario, Québec, Newfoundland and Labrador, the Yukon Territory and Nunavut, CSA Notice 81-405 *Request for Comment on Proposed Exemptions for Certain Capital Accumulation Plans* published (the **CAP Staff Notice**) states that, in Ontario, the conditions described in the Proposed CAP Exemption will form the basis of the circumstances in which staff of the Ontario Securities Commission expects that they could recommend that the Ontario Securities Commission grant discretionary relief to an applicant. The jurisdictions in which no equivalent to the CAP Blanket Exemption was adopted made it clear that they would be prepared to grant discretionary relief on terms similar to those contained in the Proposed CAP Exemption. The CAP Staff Notice stated that the purpose of the Proposed CAP Exemption was to remove existing barriers to trading mutual fund securities with members of CAPs where there is no valid regulatory reason for having such barriers.
15. As Plan Sponsors will typically approach consultants and other parties, such as the Filer, for assistance with respect to securities regulatory issues (when the investment choices are Funds), the Filer is seeking an exemption on behalf of the Filer, Plan Sponsors and Funds, as applicable, from the dealer registration and prospectus requirements, including the obligation to deliver a prospectus, where required, provided the conditions as described in this decision are adhered to.
16. The Filer is not in default of securities legislation in any jurisdiction.
17. The Filer may be requested by a Plan Sponsor to provide services to a Non-Tax Assisted CAP established by the Plan Sponsor for the benefit of individual Members. These Non-Tax Assisted CAPs would not constitute CAPs, as defined in the CAP Guidelines, the Proposed CAP Exemption or the CAP Blanket Exemption, since they are not "tax-assisted" under applicable legislation. Non-Tax Assisted CAPs are intended as non-registered employee savings plans to which excess contributions of Members that cannot be invested in a CAP because of legislative limits for such CAP investments will be invested on behalf of the Members.
18. Non-Tax Assisted CAPs are established in conjunction with CAPs because Canadian tax legislation imposes a limit on the amounts that may be contributed to a CAP. The benefit formula under a Plan Sponsor's benefit program sometimes

results in contributions that exceed that tax limit. A Plan Sponsor may establish a Non-Tax Assisted CAP to allow for those excess contributions to be invested in the same manner as the tax assisted contributions. These excess contributions to Non-Tax Assisted CAPs are not expected to be significant and in any event will be limited by the calculation set out in the conditions to this decision and subject to the remaining conditions set out in this decision.

- 19. Non-Tax Assisted CAPs will operate in the same manner as CAPs in terms of the relationship between Members and Plan Sponsors, and the duties, rights and responsibilities of Members and Plan Sponsors and the services that the Filer will provide. The only significant difference between the two types of Plans is the tax assisted nature of one and not the other.
- 20. Each Member of a Non-Tax Assisted CAP of a Plan Sponsor that the Filer provides services to will also be a member of the Plan Sponsor's CAP.
- 21. The Filer will provide services in respect of the Non-Tax Assisted CAPs in accordance with the CAP Guidelines and, in the case of the Non-Tax Assisted CAPs, in a similar fashion to the related CAPs for the applicable Members. The Filer will only provide services in respect of Non-Tax Assisted CAPs which originate out of CAPs of a Plan Sponsor also serviced by the Filer.

**Decision**

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted provided that:

- 1. For the Dealer Registration Relief:
  - (a) the Plan Sponsor selects the Funds that Members will be able to invest in under the Plans;
  - (b) the Plan Sponsor establishes a policy, and provides Members with a copy of the policy and any amendments to it, describing what happens if a Member does not make an investment decision;
  - (c) in addition to any other information that the Plan Sponsor believes is reasonably necessary for a Member to make an investment decision within the Plan, and unless that information has previously been provided, the Plan Sponsor provides the Member with the following information about each Fund the Member may invest in:
    - (i) the name of the Fund;
    - (ii) the name of the manager of the Fund and its portfolio adviser;

- (iii) the fundamental investment objective of the Fund;
- (iv) the investment strategies of the Fund or the types of investments the Fund may hold;
- (v) a description of the risks associated with investing in the Fund;
- (vi) where a Member can obtain more information about each Fund's portfolio holdings; and
- (vii) where a Member can obtain more information generally about each Fund, including any continuous disclosure;
- (d) the Plan Sponsor provides Members with a description and amount of any fees, expenses and penalties relating to the Plan, as the case may be, that are borne by Members, including:
  - (i) any costs that must be paid when a Fund is bought or sold;
  - (ii) costs associated with accessing or using any of the investment information, decision-making tools or investment advice provided by the Plan Sponsor;
  - (iii) the management fees paid by the Funds;
  - (iv) the operating expenses paid by the Funds;
  - (v) record keeping fees;
  - (vi) any costs for transferring among investment options, including penalties, book and market value adjustments and tax consequences;
  - (vii) account fees; and
  - (viii) fees for services provided by the Filer,

provided that the Plan Sponsor may disclose the fees, penalties and expenses on an aggregate basis, if the Plan Sponsor discloses the nature of the fees, expenses and penalties, and the aggregated fees do not include fees that arise because of a choice that is specific to a particular Member;

- (e) the Plan Sponsor has, within the past year, provided the Members with performance information about each Fund the Members may invest in, including:
  - (i) the name of the Fund for which the performance is being reported;
  - (ii) the performance of the Fund, including historical performance for one, three, five and ten years if available;

- (iii) a performance calculation that is net of investment management fees and mutual fund expenses;
  - (iv) the method used to calculate the Fund's performance return calculation, and information about where a Member could obtain a more detailed explanation of that method;
  - (v) the name and description of a broad-based securities market index, selected in accordance with National Instrument 81-106 *Investment Fund Continuous Disclosure*, for the Fund, and corresponding performance information for that index; and
  - (vi) a statement that past performance of the Fund is not necessarily an indication of future performance;
- (f) the Plan Sponsor has, within the past year, informed Members if there were any changes in the choice of Funds that Members could invest in and where there was a change, provided information about what Members needed to do to change their investment decision, or make a new investment;
- (g) the Plan Sponsor provides Members with investment decision-making tools that the Plan Sponsor reasonably believes are sufficient to assist them in making an investment decision within the Plan;
- (h) the Plan Sponsor must provide the information required by paragraphs (b), (c), (d) and (g) prior to the Member making an investment decision under the Plan;
- (i) if the Plan Sponsor makes investment advice from a registrant available to Members, the Plan Sponsor must provide Members with information about how they can contact the registrant;
- (j) the maximum amount that may be contributed in respect of a Member to a Non-Tax Assisted CAP in a given year is limited to any positive difference between:
- (i) the maximum amount that the Member and the Plan Sponsor would have been able to contribute for that year to the applicable CAP under the terms of the applicable CAP if contributions to the applicable CAP were not restricted to the maximum dollar limit provided in the *Income Tax Act (Canada)* (the **ITA**); and
  - (ii) the maximum dollar limit provided in the ITA for the applicable CAP,

purchase limit", as defined in the ITA, for the year.

In this paragraph (j), the amount determined under (i) shall be no more than 18% of the Member's "earned income" as defined in the ITA and the "maximum dollar limit" means the "RRSP dollar limit" as defined in the ITA (in the case where the applicable CAP is an RRSP), the "money purchase limit" as defined in the ITA (in the case where the applicable CAP is a DCPP), one-half of the "money purchase limit" (in the case where the applicable CAP is a DPSP) or any applicable maximum fixed dollar contribution prescribed under the ITA (in the case of any other type of CAP).

2. For the Prospectus Relief:

- (a) the conditions set forth in paragraph 1 above are met;
  - (b) the Funds comply with Part 2 of NI 81-102; and
  - (c) where a Member chooses to invest in a publicly available Fund selected by the Plan Sponsor as an investment option for a Non-Tax Assisted Plan, the current prospectus of the Fund and/or Fund Facts as permitted by the Legislation, will be made available, upon demand, to the Member;
3. before the first time a Fund relies on this Decision, the Fund files a notice in the form found in Appendix C of the Proposed CAP Exemption in each jurisdiction in which the Fund expects to distribute its securities;
4. this Decision, as it relates to the jurisdiction of a Decision Maker with respect to the Dealer Registration Relief will terminate upon the coming into force in securities rules of a registration exemption for trades in a security of a mutual fund to a CAP or 90 days after the Decision Maker publishes in its Bulletin a notice or a statement to the effect that it does not propose to make such a rule;
5. this Decision, as it relates to the jurisdiction of a Decision Maker with respect to the Prospectus Relief will terminate upon the coming into force in securities rules of a prospectus exemption for the distribution of a security of a mutual fund to a CAP or 90 days after the Decision Maker publishes in its Bulletin a notice or a statement to the effect that it does not propose to make such a rule.

"Cathy Singer"  
Commissioner  
Ontario Securities Commission

"Mary Anne De Monte-Whelan"  
Commissioner  
Ontario Securities Commission

Application File #: 2021/0776

provided that this maximum amount that may be contributed in respect of a Member to the Non-Tax Assisted CAP in a given year shall not exceed an amount equal to the "money