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August 10, 2011

Headnote

National Policy 11-203 – *Process for Exemptive Relief Applications in Multiple Jurisdictions* [or MI 11-102 *Passport System*] – Relief granted from paragraph 13.5(2)(b) of NI 31-103 to permit inter-fund trades between public mutual funds, pooled funds and managed accounts – inter-fund trades will comply with conditions in subsection 6.1(2) of NI 81-107 including IRC approval or client consent – trades involving exchange-traded securities are permitted to occur at last sale price as defined in the Universal Market Integrity Rules - relief also subject to pricing and transparency conditions. Exemption also granted from conflict of interest trading prohibition in paragraph 13.5(2)(b) of NI 31-103 to permit in-specie subscriptions and redemptions by separately managed accounts and pooled funds in pooled funds – Portfolio manager of managed accounts is also portfolio manager of pooled funds and is therefore a “responsible person” – Relief subject to certain conditions

Applicable British Columbia Provisions

National Instrument 31-103 – *Registration Requirements and Exemptions* – ss. 13.5, 15.1 National Instrument 81-107 – *Independent Review Committee for Investment Funds* – ss. 6.1(2) and 6.1(4)

In the Matter of
the Securities Legislation of
British Columbia and Ontario
(the Jurisdictions)

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

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Background

¶ 1 The securities regulatory authority or regulator in each of the Jurisdictions (each, a **Decision Maker**) has received an application from the Filer for a decision:

- (a) under section 171 of the *Securities Act*, R.S.B.C. 1996, c. 418 (**Act**) revoking the previous order (**Previous Order**) granted to the Filer on August 29, 2008 (**Revocation Order**); and
- (b) under the securities legislation of the Jurisdictions (the **Legislation**), in particular, under section 15.1 of National Instrument 31-103 - *Registration Requirements and Exemptions* (**NI 31-103**), that the Filer is exempt from the prohibition in paragraph 13.5(2)(b) of NI 31-103 (the **Managed Account Trading Prohibition**) against a registered adviser knowingly causing an investment fund managed by it, to purchase or sell from or to the investment fund a security from or to: (i) an associate of a responsible person; or (ii) another investment fund for which a responsible person acts as an adviser, in order to permit:

(A) the purchase and sale of securities:

- (I) between a Pooled Fund (defined below) and another Pooled Fund, a Public Fund or a Managed Account (defined below); and
- (II) between a Managed Account and a Pooled Fund or a Public Fund;

(each purchased and sale, an **Inter-Fund Trade**)

2. the purchase by a Managed Account of securities of a Pooled Fund or Public Fund, and the redemption of securities held by a Managed Account in a Pooled Fund or Public Fund, or the purchase by a Public Fund or Pooled Fund of securities of another Public Fund or Pooled Fund and the redemption of securities held by a Public Fund or Pooled Fund in another Public Fund or Pooled Fund, and as payment:

- (i) for such purchase, in whole or in part, by the Managed Account making good delivery of portfolio securities to the Pooled Fund or Public Fund;

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- (ii) for such redemption, in whole or in part, by the Pooled Fund or Public Fund making good delivery of portfolio securities to the Managed Account; and
- (iii) for such purchase or redemption by a Pooled Fund or Public Fund, in whole or in part, by making good delivery of portfolio securities that meet the investment criteria of that Pooled Fund or Public Fund;

(each purchase and redemption, an **In Specie Transaction**),

((a) and (b) collectively, the **Requested Relief**).

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

1. the British Columbia Securities Commission (the **BCSC**) is the principal regulator for this application;
2. 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 all of the provinces and territories of Canada, other than British Columbia and Ontario (the **Non-Principal Jurisdictions**); and
3. decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

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

1. **Pooled Fund** means an investment fund managed by the Filer or managed in the future by the Filer, the securities of which are distributed pursuant to exemptions from the prospectus requirement.
2. **Managed Account** means an account over which the Filer has discretionary authority.
3. **Public Fund** means any existing and future mutual fund of which the Filer is the registered adviser and to which National Instrument 81-102 - *Mutual Funds* (**NI 81-102**) applies.

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4. Certain other defined terms have the meanings given to them below under “Representations”.

Representations

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

Existing Decision

1. The Filer previously obtained relief to permit inter-fund trading between the Pooled Funds, the Public Funds and the Managed Accounts from certain of the Jurisdictions on August 29, 2008. The Filer seeks to obtain relief which specifically contemplates In-Specie Transactions by way of this decision. The new relief from NI 31-103 requirements relating to In-Specie Transactions and inter-fund trading will apply in all Jurisdictions. Accordingly, the Filer will no longer rely on the former decision.

The Filer

2. The Filer is a corporation incorporated under the laws of British Columbia, with its head office located in Vancouver, British Columbia.
3. The Filer is registered as an exempt market dealer in Ontario and as an adviser in the appropriate categories to provide discretionary advisory services, in each case in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia and the Yukon Territory. The Filer may in the future apply for registration as an adviser in other provinces or territories if it is requested to promote advice to persons in such other provinces or territories.
4. The Filer is, or will be, the investment fund manager and portfolio adviser of each of the Pooled Funds, and the Public Funds and the portfolio adviser of the Managed Accounts.

The Pooled Funds, the Public Funds and the Managed Accounts

5. Each Pooled Fund is, or will be, an investment fund established as a trust, corporation or limited partnership under the laws of Canada or a jurisdiction of Canada.
6. The Pooled Funds are not, and will not be, reporting issuers in any of the Jurisdictions or Non-Principal Jurisdictions.

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7. Securities of the Pooled Funds are, or will be, distributed pursuant to exemptions from the prospectus requirements in the Jurisdictions and Non-Principal Jurisdictions.
8. Each of the Public Funds is, or will be, a reporting issuer whose securities are qualified for distribution in one or more of the provinces and territories of Canada pursuant to a simplified prospectus and annual information form prepared and filed in accordance with the Legislation.
9. The Filer offers investment management services primarily to high net worth individuals, institutions and foundations (**Clients**, each a **Client**) through a Managed Account.

Inter-Fund Trades

10. The Filer may wish to cause a Pooled Fund to engage in an Inter-Fund Trade with another Pooled Fund, a Managed Account or a Public Fund, or cause a Managed Account to engage in an Inter-Fund Trade with a Pooled Fund or Public Fund.
11. When the Filer engages in such Inter-Fund Trades, it will follow the following procedures:
 - (a) the portfolio manager of the Filer will deliver the trade instructions in respect of a purchase or sale of a security by a Pooled Fund, Managed Account or Public Fund ("**Portfolio A**") to a trader on a trading desk of the Filer;
 - (b) the portfolio manager of the Filer will deliver the trade instructions in respect of a sale or a purchase of a security by a Pooled Fund, Managed Account or a Public Fund ("**Portfolio B**") to a trader on a trading desk of the Filer;
 - (c) the portfolio manager of the Filer will request the approval of the chief compliance officer (the "**CCO**") of the Filer or his or her designated alternate during periods when it is not practicable for the CCO to address the matter to execute the trade as an Inter-Fund Trade;
 - (d) once the trader has confirmed that the approval of the CCO is received, the trader on the trading desk will have the discretion to execute the trade as an Inter-Fund Trade between Portfolio A and Portfolio B in accordance with the requirements of paragraphs (c) to

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(g) of Subsection 6.1(2) of National Instrument 81-107 – *Independent Review Committee for Investment Funds* (NI 81-107);

- (e) policies applicable to the trading desk of the Filer will require that all Inter-Fund Trade orders are to be executed on a timely basis; and
 - (f) the trader on a trading desk will advise the portfolio manager(s) of Portfolio A and Portfolio B of the price at which the Inter-Fund Trade occurs.
12. The Filer has appointed the IRC of the Public Funds as the IRC of the Pooled Funds in respect of trades with the Pooled funds and Managed Accounts. The IRC has the same authority regarding Inter-Fund Trades for Pooled Funds as it does for Inter-Trade Funds for Public Funds. The IRC is composed of such members as is required under section 3.7 of NI 81-107 and is obligated to comply with the standard of care set out in section 3.9 of NI 81-107. The IRC reviews all Inter-Fund Trades for Pooled Funds and Public Funds and the IRC will not approve an Inter-Fund Trade unless it has made the determination set out in subsection 5.2(2) of NI 81-107. The IRC may issue standing instructions in respect of Inter-Fund Trades in compliance with section 5.4 of NI 81-107.
13. As the Filer is, or will be, the portfolio adviser of each of the Pooled Funds, the Managed Accounts and the Public Funds, the Filer is, or will be, considered a “responsible person” within the meaning of the Legislation. Accordingly, absent receipt of the Exemption Sought, the Filer is, or will be, prohibited from engaging in Inter-Fund Trades.
14. Because of the various investment objectives and investment strategies utilized by the Pooled Funds, Managed Accounts and Public Funds, it may be appropriate for such Pooled Funds, Public Funds and Managed Accounts to acquire or dispose of the same securities through the same trading system. Authorizing such Inter-Fund Trades may result in such benefits as lower trading costs, reduced market disruption and quicker execution, as well as simpler and more reliable compliance procedures.
15. The Filer has determined that it would be in the best interests of the Pooled Funds, Managed Accounts and the Public Funds for the Requested Relief to be granted because making all of them subject to the same set of rules governing the execution of Inter-Fund Trades will result in:
- (a) cost and timing efficiencies in respect of such Inter-Fund Trades; and

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- (b) less complicated and more reliable compliance procedures, as well as simplified and more efficient monitoring thereof, for the Filer in connection with such Inter-Fund Trades.
- 16. The Filer, the Pooled Funds and the Public Funds are not in default of securities legislation in any of the Jurisdictions.

In-Specie Transactions

- 17. Investments in individual securities may at certain times not be appropriate in certain circumstances for the Filer's Clients. Consequently, the Filer may, where authorized under the agreement relating to the Managed Account, from time to time invest Client assets in securities of any one or more of the Funds in order to give its Clients the benefit of asset diversification and economies of scale regarding minimum commission charges on portfolio trades and generally to facilitate portfolio management.
- 18. The Filer wishes to be able to enter into transactions that permit payment, in whole or in part, for units of a Fund (**Fund Securities**) purchased by a Managed Account to be made by making good delivery of portfolio securities, held by such Managed Account, to a Fund, provided those portfolio securities meet the investment criteria of the Fund.
- 19. Similarly, following a redemption of Fund Securities by a Managed Account, the Filer wishes to be able to enter into transactions that permit payment, in whole or in part, of redemption proceeds to be satisfied by making good delivery of portfolio securities held in the investment portfolio of a Fund to such Managed Account, provided those portfolio securities meet the investment criteria of the Managed Account.
- 20. The Filer anticipates that such In-Specie Transactions will typically occur following a redemption of Fund Securities where a Managed Account invested in such Fund has experienced a change in circumstances which results in the Managed Account being an ideal candidate for direct holdings of individual portfolio securities rather than Fund Securities, or vice versa.
- 21. In addition, the Filer wishes to be able to enter into In-Specie Transactions for purchases and redemptions of Fund Securities between two Funds. This will occur where, as part of its portfolio management, a Fund wishes to obtain exposure to certain investments or category of asset classes invested in by a second Fund by investing in Fund Securities of that

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second Fund. The Filer wishes to be able to enter into transactions that permit payment, in whole or in part, for the Fund Securities to be made by making good delivery of portfolio securities held by the Fund to the second Fund in which it seeks to invest. Similarly, following a redemption of Fund Securities, the Filer wishes to be able to enter into transactions that permit payment, in whole or in part, of the redemption proceeds to be satisfied by making good delivery of portfolio securities held in the investment portfolio of the Fund being redeemed, provided those portfolio securities meet the investment criteria of the Fund accepting those portfolio securities.

22. Each agreement in respect of a Managed Account or other documentation will contain the authorization of the Client for the Filer to engage in In-Specie Transactions on behalf of the Managed Account.
23. The Filer will value portfolio securities under an In-Specie Transaction using the same values to be used on that day to calculate the net asset value for the purpose of the issue price or redemption price of Fund Securities.
24. Each Fund will keep written records of the In-Specie Transactions, including records of each purchase and sale of portfolio securities and the terms thereof, for a period of five years commencing after the end of the financial year in which the trade occurred, the most recent two years in a reasonably accessible place.
25. Since the Filer is the portfolio manager of the Managed Accounts and the Funds, the Filer would be considered a "responsible person" within the meaning of NI 31-103.
26. Prior to entering into an In-Specie Transaction involving a Fund and/or Managed Account, the proposed transaction will be reviewed to determine that the transaction represents the business judgment of the Filer, uninfluenced by considerations other than the best interests of the Fund and/or Managed Account.

Decision

- ¶ 4 Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Requested Relief is granted, provided that:

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For Inter-Fund Trades:

1. the Inter-Fund Trade is consistent with the investment objective of the Pooled Fund or the Managed Account or the Public Fund, as applicable;
2. the Filer refers an Inter-Fund Trade that involves a Pooled Fund trading with another Pooled Fund, Public Fund or Managed Account to the IRC of the Pooled Fund in the manner contemplated by section 5.1 of NI 81-107 and the Filer and the IRC of the Pooled Fund comply with section 5.4 of NI 81-107 in respect of any standing instructions the IRC provides in connection with the Inter-Fund Trade;
3. if the Inter-Fund Trade is between two Pooled Funds, the IRC of each Pooled Fund has approved the Inter-Fund Trade in respect of that Pooled Fund in accordance with the terms of subsection 5.2(2) of NI 81-107;
4. if the Inter-Fund Trade is between a Managed Account and a Pooled Fund or Public Fund, the discretionary management agreement or other documentation in respect of the Managed Account contains the authorization of the Client for the Filer to engage in Inter-Fund Trades and the IRC of the Pooled Fund or the Public Fund has approved the Inter-Fund Trade in respect of the Pooled Fund in accordance with the terms of Section 5.2(2) of NI 81-107;
5. if the Inter-Fund Trade is between a Pooled Fund and a Public Fund, the IRC of the Pooled Fund and the Public Fund has approved the Inter-Fund Trade in respect of that Public Fund in accordance with the terms of Section 5.2(2) of NI 81-107; and
6. the Inter-Fund Trade complies with paragraphs (c) to (g) of subsection 6.1(2) of NI 81-107 except that for the purposes of paragraph (e) of subsection 6.1(2) in respect of exchange traded securities, the current market price of the security may be the Last Sale Price.

For In-Specie Transactions:

7. in connection with an In-Specie Transaction where a Managed Account acquires Fund Securities:
 - (a) the Filer obtains the prior written consent of the Client of the Managed Account before it engages in any In-Specie Transaction;

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- (b) the Fund would, at the time of payment, be permitted to purchase the securities;
 - (c) the securities are acceptable to the Filer as portfolio manager of the Fund and consistent with the Fund's investment objective;
 - (d) the value of the securities is at least equal to the issue price of the Fund Securities of the Fund for which they are used as payment, valued as if the securities were portfolio assets of that Fund;
 - (e) the account statement next prepared for the Managed Account describes the securities delivered to the Fund and the value assigned to such securities; and
 - (f) the Fund will keep written records of each In-Specie Transaction in a financial year of the Fund, reflecting details of the securities delivered to the Fund and the value assigned to such securities, for five years after the end of the financial year, the most recent two years in a reasonably accessible place;
8. in connection with an In-Specie Transaction where a Managed Account redeems Fund Securities:
- (a) the Filer obtains the prior written consent of the Client of the Managed Account before it engages in an In-Specie Transaction and such consent has not been revoked;
 - (b) the securities are acceptable to the Filer as portfolio manager of the Managed Account and consistent with the Managed Account's investment objective;
 - (c) the value of the securities is equal to the amount at which those securities were valued in calculating the net asset value per Fund Security used to establish the redemption price;
 - (d) the account statement next prepared for the Managed Account describes the securities delivered to the Managed Account and the value assigned to such securities; and
 - (e) the Fund will keep written records of each In-Specie Transaction in a financial year of the Fund, reflecting details of the securities delivered by the Fund and the value assigned to such securities, for five years

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after the end of the financial year, the most recent two years in a reasonably accessible place;

9. in connection with an In-Specie Transaction where a Fund purchases Fund Securities:
 - (a) the Fund would, at the time of payment, be permitted to purchase the securities;
 - (b) the securities are acceptable to the Filer as portfolio manager of the Fund and consistent with such Fund's investment objective;
 - (c) the value of the securities is equal to the issue price of the Fund Securities of the Fund, valued as if the securities were portfolio assets of that Fund; and
 - (d) the Fund will keep written records of each In-Specie Transaction in a financial year of the Fund, reflecting details of the securities delivered to the Fund and the value assigned to such securities, for five years after the end of the financial year, the most recent two years in a reasonably accessible place;
10. in connection with an In-Specie Transaction where a Fund redeems Fund Securities:
 - (a) the securities are acceptable to the Filer as portfolio manager of the Fund and consistent with the Fund's investment objective;
 - (b) the value of the securities is equal to the amount at which those securities were valued in calculating the net asset value per security used to establish the redemption price; and
 - (c) the Fund will keep written records of each In-Specie Transaction in a financial year of the Fund, reflecting details of the securities delivered by the Fund and the value assigned to such securities, for five years after the end of the financial year, the most recent two years in a reasonably accessible place;

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11. the Filer does not receive any compensation in respect of any In-Specie Transaction and, in respect of any delivery of securities further to an In-Specie Transaction, the only charges paid by the Managed Account or the applicable Fund is the commission charged by the dealer executing the trade (if any) and/or any administrative charges levied by the custodian.

Sandra Jakab
Director, Capital Markets Regulation
British Columbia Securities Commission