

Citation: 2023 BCSECCOM 134

**Headnote**

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – National Instrument 81-101 *Mutual Fund Prospectus Disclosure* - A mutual fund manager seeks relief from the prohibition in 5.1(4) of NI 81-101 to permit it to consolidate the simplified prospectus of an alternative mutual fund with the simplified prospectus of a mutual fund that is not an alternative mutual fund - consolidation of these prospectuses must be in compliance with subsections 5.1(1) and (2) of NI 81-101; the fund facts documents prepared must be in compliance with NI 81-101

**Applicable Legislative Provisions**

National Instrument 81-101 *Mutual Fund Prospectus Disclosure*, sections 5.1 and 6.1

March 21, 2023

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  
PenderFund Capital Management Ltd.  
(the Filer)

Decision

**Background**

- ¶ 1 The securities regulatory authority or regulator in each of the Jurisdictions (Decision Maker) has received an application from the Filer, on behalf of Pender Alternative Absolute Return Fund, Pender Alternative Arbitrage Fund, Pender Alternative Arbitrage Plus Fund, Pender Alternative Multi-Strategy Income Fund and Pender Alternative Special Situations Fund (collectively, the Existing Alternative Funds) and any alternative mutual fund established or restructured in the future and managed by the Filer or an affiliate of the Filer (collectively with the Existing Alternative Funds, the Alternative Funds), for a decision under the securities legislation of the Jurisdictions (the Legislation) that grants relief to the Alternative Funds from the restriction in subsection 5.1(4) of National Instrument 81-101 *Mutual Fund Prospectus Disclosure* (NI 81-101), which states that a simplified prospectus for an alternative mutual fund must not be consolidated with a simplified prospectus of another mutual fund if the other mutual

fund is not an alternative mutual fund (the Exemption Sought) to permit the Alternative Funds to consolidate a simplified prospectus for an alternative mutual fund with a simplified prospectus of a non-alternative mutual fund.

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

- (a) the British Columbia Securities Commission is the principal regulator for this application,
- (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 Alberta, Saskatchewan, Manitoba, Québec, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Northwest Territories, Nunavut and Yukon (together with the Jurisdictions, the Canadian Jurisdictions), and
- (c) this 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*, MI 11-102 and National Instrument 81-102 *Investment Funds* (NI 81-102) have the same meaning if used in this decision, unless otherwise defined.

### **Representations**

- ¶ 3 This decision is based on the following facts represented by the Filer:
1. the Filer is a corporation incorporated under the laws of the Province of British Columbia; the Filer's head office is located in Vancouver, British Columbia;
  2. the Filer is registered as (i) an investment fund manager in British Columbia, Ontario, Québec and Newfoundland and Labrador; (ii) a portfolio manager in British Columbia and Ontario; and (iii) an exempt market dealer in British Columbia, Ontario, Alberta, Manitoba and Québec;
  3. the Filer, or an affiliate of the Filer, is, or will be, the investment fund manager of each Alternative Fund;
  4. the Filer is not in default of the securities legislation in any of the Canadian Jurisdictions;
  5. each Alternative Fund is, or will be, established under the laws of British Columbia or Canada as a mutual fund that is a trust or a class of shares of a mutual fund corporation and is, or will be, a reporting issuer in one or more of the Canadian Jurisdictions;
  6. the Existing Alternative Funds are not in default of the securities legislation in any of the Canadian Jurisdiction;

7. the securities of each Alternative Fund are, or will be, qualified for distribution in one or more of the Canadian Jurisdictions using a simplified prospectus and fund facts document prepared and filed in accordance with the securities legislation of such Canadian Jurisdictions; each Alternative Fund is, or will be, subject to the requirements of NI 81-101 and NI 81-102, subject to any exemptions therefrom that may be granted by the securities regulatory authorities;
8. the Filer wishes to be able to combine the simplified prospectus of one or more of the Alternative Funds with the simplified prospectus of one or more mutual funds existing today or created in the future (i) that are reporting issuers to which NI 81-101 and NI 81-102 apply, (ii) that are not alternative mutual funds, and (iii) for which the Filer, or an affiliate of the Filer, acts as the investment fund manager (the Conventional Funds) in order to reduce renewal, printing and related costs; offering the Alternative Funds using the same simplified prospectus as the Conventional Funds would facilitate the distribution of the Alternative Funds in the Canadian Jurisdictions under the same prospectus disclosure and enable the Filer to streamline disclosure across the Filer's fund platform;
9. even though the Alternative Funds are, or will be, alternative mutual funds, they share, or will share, many common operational and administrative features with the Conventional Funds and combining them in the same simplified prospectus will allow investors to more easily compare the features of the Alternative Funds and the Conventional Funds.
10. the ability to file the same simplified prospectus for the Alternative Funds and the Conventional Funds will ensure that the Filer can make corresponding changes to the operational and administrative features of Alternative Funds and the Conventional Funds in a consistent manner, if required;
11. the Filer will prepare a simplified prospectus combining the disclosure about the operational and administrative features of the Conventional Funds and the Alternative Funds in accordance with the requirements of section 5.1(2) of NI 81-101;
12. investors will continue to receive the fund facts document(s) when purchasing securities of the Alternative Funds or Conventional Funds as required by applicable securities legislation; the form and content of the fund facts document(s) of the Alternative Funds and Conventional Funds will not change as a result of the Exemption Sought; and
13. the simplified prospectus of the Alternative Funds and Conventional Funds will continue to be provided to investors, upon request, as required by applicable securities legislation.

### **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 Exemption Sought is granted.

Gordon Johnson  
Vice-Chair  
British Columbia Securities Commission