

Headnote

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – Transfer of assets from two funds to a new fund, which will become a mutual fund trust, in exchange for units in the new fund is exempt from the self-dealing prohibitions in paragraph s.13.5(2)(b)(iii), National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* - funds managed and advised by the same portfolio manager – funds transferring assets to the new fund are not reporting issuers.

Applicable Legislative Provisions

National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*, ss. 13.5(2)(b)(iii), 15.1

Citation: Re Palisade Capital Management Ltd., 2016 ABASC 141

Date: 20160526

In the Matter of the
Securities Legislation of Alberta and Ontario (the **Jurisdictions**)

and

In the Matter of
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of
Palisade Capital Management Ltd.
(the **Manager** or **Filer**)

DECISION

Background

The securities regulatory authority or regulator in each of the Jurisdictions (the **Decision Maker**) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the **Legislation**) for relief from sub-paragraph 13.5(2)(b)(iii) of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**), which prohibits a registered adviser from knowingly causing an investment portfolio managed by it, including an investment fund for which it acts as an adviser, to purchase or sell a security from or to the investment portfolio of an investment fund for which a responsible person acts as an adviser in order to effect the Restructuring, defined in paragraph 14 below (the **Exemption Sought**).

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

- (a) the Alberta Securities Commission is the principal regulator for this application;
- (b) the Filer has provided notice that Section 4.7(1) of Multilateral Instrument 11-102 *Passport System (MI 11-102)* is intended to be relied upon by the Filer in British Columbia and Manitoba; and
- (c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

Terms defined in MI 11-102, NI 31-103 and National Instrument 14-101 *Definitions* have the same meaning in this decision unless otherwise defined herein.

Representations

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

1. The Palisade Capital Fund (the **Capital Fund**) is an unincorporated pool of RRSP eligible securities and cash in which each investor holds a pro-rata undivided interest in such securities and cash. The Capital Fund is an open-ended mutual fund.
2. The Filer acts as the investment fund manager and portfolio manager of the Capital Fund.
3. The Palisade Capital Limited Partnership (the **Limited Partnership**) was formed as a limited partnership under the laws of the Province of Alberta on May 8, 1998. The Limited Partnership is an open-ended mutual fund.
4. Palisade Capital Holdings Ltd. (the **General Partner**), a corporation incorporated under the *Business Corporations Act (Alberta)*, is the general partner of the Limited Partnership and, pursuant to the Partnership Agreement, has the exclusive authority to manage and operate the business and affairs of the Limited Partnership.
5. The Filer was retained by the General Partner on behalf of the Limited Partnership to act as the investment fund manager and portfolio manager of the Limited Partnership.
6. Interests in the Capital Fund and Limited Partnership are collectively **Units** and the holders of Units are collectively the **Unitholders**.
7. The Filer is a company organized under the laws of Alberta, with a head office in Alberta. The Filer has no branch or sub-branch offices.

8. The Filer is registered as an investment fund manager, portfolio manager and exempt market dealer under securities legislation in Alberta and as an exempt market dealer under the securities legislation in British Columbia, Manitoba and Ontario and is not currently in default of any requirement of securities legislation in any of these jurisdictions.
9. The Capital Fund and Limited Partnership are not reporting issuers under applicable securities laws, are not subject to National Instrument 81-102 *Investment Funds (NI 81-102)* and are not in default of any requirement of securities legislation in British Columbia, Alberta, Manitoba and Ontario.
10. The Units were issued in British Columbia, Alberta, Manitoba and Ontario by each of the Capital Fund and the Limited Partnership pursuant to prospectus exemptions under National Instrument 45-106 *Prospectus Exemptions (NI 45-106)*. Units have also been issued in the United States pursuant to relevant exemptions. Upon the Restructuring (defined in paragraph 14 below), any Units of Unitholders in the United States (the **U.S. Unitholders**) will be redeemed for cash.
11. The Palisade Select Fund (the **New Fund**) is an open-end pooled fund trust formed under the laws of the Province of Alberta pursuant to a Declaration of Trust dated April 18, 2016, for the purpose of engaging in the business of investing in securities. The New Fund is a “unit trust” as defined under the Income Tax Act (Canada) (the **Tax Act**) and will become a “mutual fund trust” as defined under the Tax Act once distribution requirements are satisfied.
12. The Filer is the investment fund manager and portfolio manager of the New Fund.
13. The New Fund is not, and will not be, a reporting issuer under applicable securities laws and is not, and will not be, subject to NI 81-102.
14. As disclosed in a notice by the Filer to Unitholders on December 17, 2015, the assets of the Capital Fund and the Limited Partnership will be transferred to the New Fund on the Effective Date in exchange for Class 1, Series A-2 Units of the New Fund (**Series A-2 Units**), and all Units will be redeemed at the net asset value per Unit of the respective fund as at the Effective Date (defined below) either for cash or for Series A-2 Units, as per the specific election of each Unitholder (the **Restructuring**). Following the Restructuring, the Capital Fund and the Limited Partnership will be wound up.
15. The investment objectives and portfolios of the Capital Fund and the Limited Partnership are substantially similar. Both the Capital Fund and the Limited Partnership are currently

invested in Canadian publicly listed companies, with an emphasis on the energy exploration and production, infrastructure and oilfield services sectors, including a component of income-producing entities. The investment objectives of the New Fund are, and the portfolio of the New Fund will be, substantially similar to those of the Capital Fund and the Limited Partnership. The portfolio of assets to be transferred to the New Fund pursuant to the Restructuring will be consistent with the investment objectives of the New Fund.

16. The Filer, on behalf of the Capital Fund, the Limited Partnership and the New Fund, intends to effect the Restructuring on June 30, 2016 (the **Effective Date**), subject to regulatory approval and the satisfaction of all other conditions precedent to the proposed transaction.
17. Senior management and the board of directors of the Filer presented the Restructuring to the Filer's advisory board (the **Advisory Board**) for comment and recommendation. The Advisory Board provided a positive recommendation on the basis that the Restructuring was in the best interest of the Unitholders.
18. The Advisory Board is made up of individuals who meet the definition of independence in National Instrument 81-107 *Independent Review Committee for Investment Funds* with the exception that the members of the Advisory Board hold Units.
19. The Restructuring is not a matter that requires approval by the Unitholders.
20. No redemption fees or other fees or commissions will be payable by Unitholders in connection with the Restructuring. No sales charges will be payable in respect of the acquisition of the investment portfolios of the Capital Fund and the Limited Partnership by the New Fund pursuant to the Restructuring.
21. The Capital Fund, the Limited Partnership and the New Fund will not bear any of the costs and expenses in connection with the Restructuring. Such costs and expenses will be borne by the Filer. The New Fund will bear the organizational expenses of its establishment.
22. The Restructuring will be a taxable event. Due to the timing of the Restructuring, it is anticipated that the majority of Unitholders will be in a tax loss situation relative to their adjusted cost base.
23. The sale of the assets of the Capital Fund and the Limited Partnership to the New Fund and the corresponding purchase of such assets by the New Fund may be considered a purchase or sale of securities caused by a registered adviser that manages the investment

portfolios of the Capital Fund, the Limited Partnership and the New Fund from the Capital Fund and the Limited Partnership to, or by, the New Fund from investment funds for which a responsible person acts as an adviser, contrary to sub-paragraph 13.5(2)(b)(iii) of NI 31-103.

24. Completion of the restructuring will involve the following principal steps:
- (a) prior to the Effective Date, delivery of a completed letter of direction by each Unitholder to the Filer setting out what portion, if any, of the Unitholder's Units will be exchanged for Series A-2 Units and what portion, if any, will be redeemed for cash;
 - (b) where a Unitholder elects to exchange some or all of its Units for Series A-2 Units (a **Converting Unitholder**), delivery of a completed subscription agreement by the Converting Unitholder for Series A-2 Units;
 - (c) valuation of the investment portfolios of the Capital Fund and the Limited Partnership in accordance with their constating documents at the close of business on the Effective Date;
 - (d) as necessary, completion of sales of securities held by the Capital Fund and the Limited Partnership on a pro rata basis across the portfolios of assets held by the funds to finance any redemptions in connection with the Restructuring and the remaining liabilities of the Capital Fund and the Limited Partnership;
 - (e) transfer of the remaining assets of the Capital Fund and the Limited Partnership to the custodial account of the New Fund in exchange for Series A-2 Units at a price of \$10 per unit, with the aggregate number of Series A-2 Units received by the Capital Fund and the Limited Partnership having an aggregate net asset value equal to the value of the assets acquired by the New Fund from the Capital Fund and the Limited Partnership;
 - (f) distribution of Series A-2 Units from the New Fund to Converting Unitholders, with each Converting Unitholder receiving the number of Series A-2 Units that would be equal to the net asset value of the Units previously held by the Converting Unitholder as of the close of business on the Effective Date;
 - (g) payment of redemption proceeds to U.S. Unitholders and to other Unitholders for any Units not exchanged for Series A-2 Units;

- (h) redemption and cancellation of Units by the Capital Fund and the Limited Partnership;
 - (i) commencement of operation of the New Fund as an open-ended mutual fund trust;
 - (j) as soon as possible following the restructuring, wind up and termination of both the Capital Fund and the Limited Partnership.
25. The assets of the Capital Fund and the Limited Partnership will be valued in accordance with the valuation policies and procedures prescribed by their respective fund agreements and, at this value, the assets of the Capital Fund and the Limited Partnership will subsequently be exchanged for Series A-2 Units as described above.
26. The Capital Fund, the Limited Partnership and the New Fund follow substantially similar valuation procedures for calculating net asset value and have similar redemption policies.
27. Unitholders will retain a right to redeem Units at each quarter end up to and including the Effective Date.
28. Because the transfer of assets pursuant to the Restructuring will take place at a value determined by common valuation procedures and the issuance of Series A-2 Units will be based upon the net asset value of the assets received by the New Fund and notice and redemption rights have been provided to Unitholders, it is the Filer's submission that any potential conflict of interest has been adequately addressed and as a result there is no conflict of interest for the Filer in effecting the Restructuring.
29. In addition to the issuance of the Series A-2 Units to Converting Unitholders, the New Fund is offering Class 1, Series A-1 Units (the **Offered Units**) on a continuous basis to accredited investors pursuant to prospectus exemptions under NI 45-106 in the provinces of British Columbia, Alberta, Manitoba, Ontario and Saskatchewan. The Manager will not engage in activities requiring registration as a dealer in Saskatchewan with respect to purchases of Offered Units by residents of Saskatchewan until the Manager has obtained the requisite registrations required to undertake such activities in that Province.
30. Series A-2 Units and Offered Units are identical except that they have different initial performance incentive fee (**PIF**) high water marks. Series A-1 units will have an initial high water mark equivalent to the issue price of the units. Series A-2 units will have an initial PIF high water mark set at a premium to the initial subscription price equivalent to the higher of the percentage difference between the net asset value per unit (**NAVPU**) of the Capital Fund and the Limited Partnership on June 30, 2014 and their respective

NAVPU on June 30, 2016. Effectively, there will not be a reset of the existing pre-restructuring PIF high water mark applicable to all Series A-2 Units held by Converting Unitholders.

31. The New Fund will have an annual base management fee of 1.0% per annum, plus a third party expense cap of 0.5% per annum. The Capital Fund and Limited Partnership each have an annual base management fee of 0.6% per annum, plus an expense cap of 1.5% per annum. The management fee is higher for the New Fund and its expense cap is lower because certain items that were considered to be expenses for the Capital Fund and Limited Partnership have now been included as items provided by the Manager in exchange for the management fee. The overall combined management fee and expense cap is lower for the New Fund as compared to the Capital Fund and Limited Partnership.
32. In the absence of the Exemption Sought, the Filer would be prohibited from knowingly causing the purchase and sale of the assets of the Capital Fund and the Limited Partnership in connection with the Restructuring.
33. The effect of the Restructuring is that Converting Unitholders will become holders of Series A-2 Units and the New Fund will own directly the equivalent amount of the assets previously owned by the Capital Fund and Limited Partnership representing the interests of the Converting Unitholders.
34. The Filer believes that the Restructuring is in the best interest of the Unitholders because the Restructuring:
 - (a) improves operating efficiencies, including more efficient reporting through third party administration;
 - (b) does not interfere with the ability of Unitholders to obtain liquidity from the Capital Fund or the Limited Partnership on any calendar quarter-end;
 - (c) does not involve a reset of the PIF high water mark as the PIF high water mark on the Series A-2 units post-restructuring will be set at a premium to the initial issue price to reflect the pre-restructuring PIF high water mark;
 - (d) eliminates the incremental costs associated with running two pools with the same mandate;
 - (e) allows the Units to be more widely accepted among investment dealers; and
 - (f) is being executed at a trough in the market cycle to limit taxability related to the

effective disposition of the Units.

35. No illiquid asset (as that term is defined in NI 81-102) will be transferred to the New Fund pursuant to the Restructuring as the Capital Fund and the Limited Partnership do not hold any illiquid assets.
36. The transfer of the assets of the Capital Fund and the Limited Partnership will not adversely impact the liquidity of the New Fund.
37. The effect of the Restructuring is consistent with the right of the Filer to force redemptions as disclosed to Unitholders in the respective fund agreements at the time of their investments in the Capital Fund or the Limited Partnership.

Decision

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

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted.

“original signed by”

Lynn Tsutsumi, CA

Director, Market Regulation