

Headnote

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – Transfer of Illiquid Assets from one fund to another exempt from the self-dealing prohibitions in subparagraph 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 – neither fund is a reporting issuer.

Applicable Legislative Provisions

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

Citation: Re Longbow Capital Inc., 2019 ABASC 174

Date: 20191114

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
Longbow Capital Inc. (the **Filer**)

Decision

Background

The securities regulatory authority or regulator in each of the Jurisdictions (**Decision Maker**) has received an application from the Filer (the **Application**) for a decision under the securities legislation of the Jurisdictions (the **Legislation**), pursuant to section 15.1 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**), for exemptive relief from subparagraph 13.5(2)(b)(iii) of 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 permit the sale of Illiquid Assets (as defined in paragraph 8 below) from the Expiring Fund to the 2019 Fund (as defined in paragraphs 3 and 10 below, and each a **Fund** and together, the **Funds**) (the **Exemption Sought**).

The Decision Makers have also received a request from the Filer for a decision that the Application, any supporting documents, all subsequent communications and this decision (together, the **Confidential Materials**) be held in confidence and not be made public until after December 31, 2019 (the **Confidentiality Relief**).

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

- (a) the Alberta Securities Commission is the principal regulator for the 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 British Columbia, Saskatchewan, Manitoba and Québec; 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 National Instrument 14-101 *Definitions*, NI 31-103, National Instrument 45-106 *Prospectus Exemptions* (**NI 45-106**), National Instrument 81-102 *Investment Funds* (**NI 81-102**), National Instrument 81-107 *Independent Review Committee for Investment Funds* (**NI 81-107**) and MI 11-102 have the same meaning if used in this decision, unless otherwise defined herein.

Representations

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

1. The Filer is a corporation incorporated under the laws of Alberta with its head office in Calgary, Alberta.
2. The Filer is registered as: (a) an investment fund manager, restricted portfolio manager and exempt market dealer in Alberta; (b) an investment fund manager and exempt market dealer in Ontario and Québec; and (c) an exempt market dealer in British Columbia, Saskatchewan and Manitoba.
3. Longbow Capital LP 18 (the **Expiring Fund**) is an investment fund, formed as a limited partnership under the laws of the Province of Alberta.
4. The Expiring Fund is not a reporting issuer under applicable securities laws and it is not subject to NI 81-102.
5. Longbow Capital Investment Management #18 Inc. (the **General Partner**), a corporation incorporated under the laws of the Province of Alberta, is the general partner of the Expiring Fund, with the authority to manage and operate the business and affairs of the Expiring Fund.
6. The Filer was retained by the General Partner on behalf of the Expiring Fund to act as the investment fund manager and the portfolio manager of the Expiring Fund.
7. The original term of the Expiring Fund expired on December 31, 2017 and was extended by a unitholder vote to December 31, 2019. Since December 31, 2017, the Filer has been liquidating the Expiring Fund's existing portfolio securities in an orderly manner, subject to market conditions, and proceeds from the sale of the Expiring Fund's assets have been

distributed to unitholders or are being held in cash pending distribution of such assets to unitholders.

8. The Expiring Fund has liquidated all of its assets other than cash and common shares of Spur Petroleum Ltd. (**Spur** and **Spur Shares**, respectively), which are "illiquid assets" as such term is defined in NI 81-102 (the **Illiquid Assets**).
9. Spur is a private company and the Spur Shares are not traded on an exchange.
10. In 2019 the Filer established an investment fund under the laws of the Province of Alberta, called Longbow Spur Co-invest LP (the **2019 Fund**), and the Filer acts as the investment fund manager and portfolio manager of the 2019 Fund. The 2019 Fund is not a reporting issuer under applicable securities laws and it is not subject to NI 81-102. Securities of the 2019 Fund have been and will be sold to investors pursuant to available exemptions from the prospectus requirements. It is anticipated that securities of the 2019 Fund will be sold exclusively to "accredited investors", as such term is defined in NI 45-106, and many of the accredited investors will also be "permitted clients", as such term is defined in NI 31-103.
11. None of the Filer, the Expiring Fund or the 2019 Fund is in default of applicable securities laws.
12. The 2019 Fund's investment objective is to invest solely in a portfolio of Spur Shares. The 2019 Fund has sought and will seek to acquire Spur Shares in the "grey market" from independent third party Spur shareholders and from the Expiring Fund.
13. The 2019 Fund proposes to acquire all of the Spur Shares held by the Expiring Fund. The Illiquid Assets will be sold by the Expiring Fund to the 2019 Fund at fair value based on an independent quote of the fair value of Spur Shares obtained from an independent and experienced broker.
14. Prospective investors in the 2019 Fund will receive disclosure that the 2019 Fund will have purchased the Illiquid Assets from the Expiring Fund and a description of the conflicts of interest related to such purchase prior to subscribing for units, including that a director, officer and shareholder of the Filer, acts as an officer of Spur. The Filer will also disclose how the fair value of the Illiquid Assets will have been determined.
15. It will be neither practical nor economical to make a distribution "in kind" of portions of the Illiquid Assets to unitholders of the Expiring Fund since unitholders will have difficulty finding a market, if any, for these assets. In addition, many of the unitholders in the Expiring Fund have held their interest in the Expiring Fund for approximately 10 years and have indicated to the Filer in informal conversations regarding this specific transaction that they do not want an in kind distribution. The Filer intends to provide a description of the transaction to all unitholders in the Expiring Fund and solicit feedback prior to executing the transaction.
16. Absent the Exemption Sought, the Filer is prohibited by section 13.5(2)(b)(iii) of NI 31-103 from causing the Expiring Fund to sell securities to the 2019 Fund or from causing the

2019 Fund to purchase securities from the Expiring Fund, because both Funds are managed by the Filer.

17. The 2019 Fund will only purchase the Spur Shares from the Expiring Fund that will be consistent with, or necessary to meet, its investment objectives. The Expiring Fund will only sell the Spur Shares to the 2019 Fund if the Filer determines that disposing of such Spur Shares would be appropriate for the Expiring Fund.
18. The decision to sell the Spur Shares on behalf of the Expiring Fund to the 2019 Fund has been made based on the judgment of responsible persons uninfluenced by considerations other than the best interests of the Funds.
19. The Filer will refer the purchase of the Spur Shares from the Expiring Fund to the 2019 Fund to an independent review committee (the **IRC**) for review. The IRC will oversee the transactions described herein after making the determinations provided under paragraphs 5.2(2)(a), (b) and (d) of NI 81-107. The IRC of the Funds will be composed in accordance with section 3.7 of NI 81-107 and will be subject to all of the provisions set out in section 3.9 of NI 81-107.
20. The Filer will receive no remuneration with respect to any purchase or sale of Spur Shares between the Funds other than the carried interest on distributions of the Expiring Fund in connection with its dissolution in accordance with the limited partnership agreement of the Expiring Fund.
21. With respect to the delivery of Spur Shares, the only expenses which will be incurred by the Expiring Fund will be nominal administrative charges levied by the custodian and/or record keeper of the Expiring Fund for recording the trades.
22. For each purchase or sale of securities between the Funds, each of the Funds will keep written records in a financial year of the respective Fund. These records will reflect details of the securities received or delivered by the respective Fund and the value assigned to such securities. These records will be retained for five years after the end of the financial year in which the trade occurred, and for the most recent two years, these records will be kept in a reasonably accessible place.
23. The Expiring Fund has been audited since inception and will have final audited financial statements prepared for the year ended December 31, 2019. The 2019 Fund will not be audited as the limited partners of the 2019 Fund have waived any requirement for an audit of the financial statements of the 2019 Fund.

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 the decision.

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted, provided that:

- a) The Illiquid Assets are securities of a private company that are not traded on an exchange. The Illiquid Assets will be sold by the Expiring Fund to the 2019 Fund at fair value based on an independent quote of the fair value of Spur Shares obtained from an independent broker;
- b) The Filer will refer the purchase of the Spur Shares from the Expiring Fund to the 2019 Fund to an IRC for review. The IRC will oversee the transactions described herein after making the determinations provided under paragraphs 5.2(2)(a), (b) and (d) of NI 81-107. The IRC of the Funds will be composed in accordance with section 3.7 of NI 81-107 and will be subject to all of the provisions set out in section 3.9 of NI 81-107;
- c) The Filer will receive no remuneration with respect to any purchase or sale of Spur Shares between the Funds other than the carried interest on distributions of the Expiring Fund in connection with its dissolution in accordance with the limited partnership agreement of the Expiring Fund;
- d) With respect to the delivery of Spur Shares, the only expenses which will be incurred by the Expiring Fund will be nominal administrative charges levied by the custodian and/or record keeper of the Expiring Fund for recording the trades; and
- e) The Funds will keep written records of the transactions reflecting the details of the portfolio securities delivered by the Expiring Fund to the 2019 Fund and the value assigned to such securities, for five years after the end of the financial year in which the trade occurred, and for the most recent two years, these records will be kept in a reasonably accessible place.

The further decision of the Decision Makers is that the Confidentiality Relief is granted.

This decision replaces the decision in *Re Longbow Capital Inc.*, 2019 ABASC 168 relating to the same subject matter, dated November 6, 2019, which is hereby revoked.

“original signed by”

Lynn Tsutsumi
Director, Market Regulation
Alberta Securities Commission