

Headnote

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – offeror granted exemption from Part 2 of National Instrument 62-104 *Take-Over Bids and Issuer Bids* and from the insider bid requirements of Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* in connection with the offeror’s bid for the outstanding securities of a non-reporting issuer.

Applicable Legislative Provisions

National Instrument 62-104 *Take-Over Bids and Issuer Bids*, Part 2; Section 6.1

Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*, Part 2; Section 9.1

Citation: Re Graham Income Trust, 2021 ABASC 152

Date: 20210928

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
Graham Income Trust (the **Filer** or the **Trust**)

Decision

Background

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 under the securities legislation of the Jurisdictions (the **Legislation**) granting the Filer, in connection with the proposed purchase of trust units of the Filer (**Units**) pursuant to a modified Dutch auction issuer bid (the **Offer**), an exemption from the issuer bid requirements contained in Part 2 of National Instrument 62-104 *Take-Over Bids and Issuer Bids* (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 given notice that it intends to rely on subsection 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) in each jurisdiction of Canada, other than Ontario; 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* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

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

1. The Filer is an unincorporated, limited purpose, open-ended mutual fund trust established pursuant to the laws of Alberta. The Filer was settled pursuant to a declaration of trust dated as of November 22, 2005, as amended and restated on August 28, 2019 (the **Declaration**).
2. Graham Group Ltd. (the **Administrator**) became the administrator of the Filer pursuant to an administration agreement dated effective January 1, 2006.
3. The head office of each of the Filer and the Administrator is located in Calgary, Alberta.
4. The Filer's securities, including debt securities, are not traded in Canada or any other country on a marketplace or any other facility for bringing together buyers and sellers of securities where trading data is publicly reported.
5. The Filer is not a reporting issuer in any jurisdiction of Canada and has no intention of becoming a reporting issuer in any jurisdiction.
6. Neither the Filer nor the Administrator are in default of securities legislation in any jurisdiction of Canada.
7. The authorized capital of the Filer consists of an unlimited number of Units. As of May 11, 2021, there are 4,694,552 Units issued and outstanding with 1,315 unitholders (the **Unitholders**), of which 1,171 Unitholders are resident in Canada and 144 are resident in the United States. A total of 257 Unitholders are "Exempt Spouses" as defined in paragraph 16 below.
8. The Trustees and the Filer only invite Eligible Investors (as defined below) to subscribe for Units. The amended and restated unanimous unitholders' agreement of the Filer dated August 28, 2019 (the **UUA**) restricts such class to the following persons:

- (a) an employee, executive officer, trustee (other than any professional trustees which may be engaged by the Filer) or Consultant of the Filer;
- (b) an employee, executive officer, director, trustee (other than any professional trustees which may be engaged by a related entity of the Filer) or Consultant of a related entity of the Filer;
- (c) a Permitted Assign of a person referred to in paragraphs (a) or (b); and
- (d) subject to compliance with applicable securities legislation, any other person, corporate body or entity which is determined by the trustees of the Filer (the **Trustees**) to be an Eligible Investor by virtue of:
 - (i) having a strategic alliance with the Filer or any of the Graham Entities or otherwise and which has been approved to purchase Units by the Trustees; or
 - (ii) having otherwise been an "Eligible Investor" and no longer qualifying by one or more of the preceding criteria to nevertheless be a person permitted to continue to hold Units in accordance with general or specific criteria established from time to time by the Trustees

(collectively, the **Eligible Investors**).

9. The following definitions are drawn from the UUA.

- (a) "**Defined Spouse**" means a Unitholder who is a spouse of an Eligible Investor, which shall include:
 - (i) a person to whom the Eligible Investor is legally married and who is not living separate and apart from the Eligible Investor; or
 - (ii) where the Eligible Investor is not legally married, a person who has lived with the Eligible Investor in a common law relationship for not less than a one year period.
- (b) "**holding entity**" means a person that is controlled by an individual.
- (c) "**Permitted Assign**" means, at any time for a person who at such time is an employee, executive officer, director, Trustee or Consultant of the Filer or of a related entity of the Filer:
 - (i) an RRSP, RRIF or TFSA of the person;
 - (ii) a Defined Spouse of this person;

- (iii) an RRSP, RRIF or TFSA of the Defined Spouse of the person; or
 - (iv) a holding entity of the person or of the Defined Spouse of the person.
- 10. The issued and outstanding Units were issued to Eligible Investors under the exemption from the prospectus requirement in section 2.24 of National Instrument 45-106 *Prospectus Exemptions*. No Units have been issued in reliance on subsection (d) of the definition of Eligible Investor above.
- 11. All Unitholders are parties to the UUA which contains restrictions on the transfer of Units. The UUA prohibits Unitholders from selling, assigning or transferring any Units owned or controlled by them to any person, other than where such sale, assignment or transfer is approved by the Trustees and is made to a Permitted Assign of that Eligible Investor who has signed on and agreed to be bound by the terms of the UUA. All Units owned beneficially by Canadian residents are held by a single registered Unitholder, Canaccord Genuity Corp., in an account for those beneficial Unitholders, and all Units of U.S. resident Unitholders are held by Pershing LLC in accounts for those beneficial Unitholders.
- 12. The Declaration and the UUA provide for the redemption of Units by the Filer, which redemption would be made in accordance with the determination of a prescribed redemption price in the Declaration and quarterly limits (\$60,000, unless waived from time to time).
- 13. The Declaration also provides that the Filer may purchase for cancellation Units by private agreement or pursuant to tenders from time to time, which purchase provision is not restricted to a specific purchase price. This provision (the **Tender Provision**) provides that the Filer may from time to time purchase for cancellation some or all of the Units (or other securities of the Filer which may be issued and outstanding from time to time) by private agreement or pursuant to tenders received by the Filer upon request, provided in each case that the Trustees have determined that such purchases are in the best interests of the Filer.
- 14. As the number of Units which have presently been tendered for redemption (or for which a notice of intention to redeem has been given) exceeds the available budget for Unit redemption, in accordance with a policy of the Filer, Units are held in a queue and redeemed on a priority basis in accordance with the principles established in the policy.
- 15. The Filer wishes to acquire Units from Eligible Investors who do not otherwise qualify under the applicable Exempt Bid provisions; namely Defined Spouses (and their RRSP, RRIF, TFSA or holding entity) of persons described in paragraph (a) or (b) of the definition of Eligible Investor (the **Exempt Spouses**).
- 16. All Unitholders, including the Exempt Spouses, continue to have access to Filer disclosure information including, *inter alia*, audited annual financial statements, quarterly unaudited financial statements and an annual unitholder meeting (and related information circular) for the purposes of electing the Trustees and appointment auditors, and any special business that may be properly brought before a meeting.

17. The Trustees and Administrator believe that if funds in excess of the general redemption budget are made available for redemptions at a price less than the prescribed redemption price under the Declaration, certain Unitholders will accept that price in order to accelerate the redemption of their Tendered Units. Such a response would benefit the Filer as well as those tendering Unitholders and be equitable to all Unitholders. Accordingly, the Trustees have determined that it is in the best interest of the Filer and its Unitholders to allocate on an unconditional basis a fixed amount of funds (expected to be approximately \$10,000,000) in addition to the general redemption budget (**Bid Funds**) on a one-time basis to initiate the Offer.
18. The Offer will be a modified Dutch auction issuer bid made to all Unitholders in reliance on the private purchase/tender provision of the Declaration, pursuant to which the Filer will allocate the Bid Funds for repurchase of Units from Unitholders who tender in the range of the Offer price (the **Tendered Units**). In the event that the aggregate purchase price of all Tendered Units exceeds the available Bid Funds, Tendered Units will be repurchased at prices ranging upwards from the lowest price at which such units are tendered until the Bid Funds are exhausted.

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.

“original signed by”

Timothy Robson
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