

2009 BCSECCOM 752

December 1, 2009

Headnote

National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – Securities Act s. 88 - *Cease to be a reporting issuer in BC* - The issuer's securities are traded only on a market or exchange outside of Canada - Canadian residents own less than 2% of the issuer's securities and represent less than 2% of the issuer's total number of security holders; the issuer does not intend to do a public offering of its securities to Canadian residents, will not be a reporting issuer in any Canadian jurisdiction, is subject to the reporting requirements of foreign securities law, and all shareholders receive the same disclosure

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, s. 88

In the Matter of
the Securities Legislation of
British Columbia, Alberta, Saskatchewan, Manitoba,
Ontario, Québec, Nova Scotia, New Brunswick,
Prince Edward Island, Newfoundland and Labrador and Yukon
(the “Jurisdictions”)

and

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

and

In the Matter of
Foster’s Group Limited
(the “Filer”)

Decision

Background

The local securities regulatory authority or regulator in each of the Jurisdictions (“Decision Maker”) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the “Legislation”) that the Filer is not a reporting issuer under the Legislation (the “Exemptive Relief Sought”).

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

- (a) the Ontario Securities Commission is the principal regulator for this application; and
- (b) the decision is the decision of the principal regulator and evidences the decision of each other Decision Maker.

Interpretation

Terms defined in National Instrument 14-101 Definitions 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 a corporation incorporated under and regulated by the Australian Corporations Act 2001 (the “Australian Corporations Act”). Prior to July 2, 2001, the name of the Filer was Foster’s Brewing Group Limited, having changed its name from Elders IXL Limited in 1990. The Filer is a reporting issuer in each of the Jurisdictions;
2. The Filer’s registered and head office is located at 77 Southbank Boulevard, Southbank Victoria 3006, Australia;
3. The Filer is a premium global drinks company delivering a total portfolio of beer, wine, spirits, cider and non-alcohol beverages.
4. As of August 1, 2009, the Filer had 1,927,753,029 ordinary shares (the “Shares”) issued and outstanding worldwide and 128,947 registered holders of Shares worldwide. As of August 1, 2009, the Filer had 36,046,812 American Depositary Receipts (“ADRs”) issued and outstanding worldwide, with each ADR representing one Share of the Filer. The only issued and outstanding class of shares of the Filer are the Shares;
5. As at November 13, 2008, the Filer had 1,921,670,803 Shares issued and outstanding worldwide and 130,782 registered holders of Shares worldwide. As at December 31, 2008, the Filer had 39,347,116 ADRs issued and outstanding worldwide, with each ADR representing one Share of the Filer;
6. Since November 13, 2008, the Filer has not conducted an offering of its securities in Canada;

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7. The Shares of the Filer are listed on the Australian Securities Exchange (the “ASX”). The Filer is not in default of any reporting or other requirement of the ASX or the Australian Corporations Act;
8. No securities of the Filer have ever been listed, traded, or quoted on a marketplace in Canada as defined in National Instrument 21-101 *Marketplace Operation*, (“NI 21-101”), except the ADRs as explained in more detail below. The Filer does not intend to have any of its securities listed, traded or quoted on such a marketplace in Canada;
9. The only distributions of Shares in Canada have been to employees of the Filer and its affiliates under the employee prospectus exemption under section 2.24 of National Instrument 45-106 *Prospectus and Registration Exemptions* as part of the Filer’s employee share participation program (“ESPP”).
10. The ESPP, which was established in 2004, is a global program and allows eligible employees of the Filer who meet the minimum service period of 6 months to be granted ordinary shares up to a value of AUD \$1,000, subject to performance of the Filer and approval by the Filer’s board (the “Board”). Shares issued under the ESPP are ordinary shares receiving all benefits of share ownership such as the right to vote and the right to dividends. The ESPP provides that annual offers may be made if the Filer achieves designated financial performance targets which, unless the Board decides otherwise, requires the percentage growth in the Filer’s normalised consolidated net profit on a year on year basis to be at or greater than the percentage increase in the consumer price index over that year. Only one offer under the ESPP may be made in each financial year. Grants have been made annually, typically at the end of the year, since the ESPP was established.
11. Currently there are 43 employees in Canada that participate in the ESPP. There was no distribution of Shares under the employee share participation program in 2008. The next distribution of Shares is expected to be in December 2009. At that time, the Filer expects an increase in employee shareholders in Canada of approximately 23, meaning a total of 66 employees participating in the ESPP. Employees will be entitled to up to approximately 185 shares per employee. Consequently, the impact on the number of Shares held by Canadian employees will not result in a more significant shareholder base in Canada.
12. On April 2, 1987, the Filer entered into a deposit agreement with the Bank of New York (the “Depository”) pursuant to which worldwide holders of Shares were permitted to exchange such shares for ADRs evidencing American Depositary Shares which represent Shares deposited with the Depository;

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13. The ADRs were listed on the International Division of the Montreal Exchange from March 16, 1989 until December 3, 1999 and on the Toronto Stock Exchange from June 15, 1989 until September 19, 2000. The ADRs currently trade over-the-counter in the United States under the symbol “FBRWY”;
14. The Filer filed its continuous disclosure material in Canada pursuant to the Legislation of the Jurisdictions as modified by the following orders (collectively the “Orders”): Ontario (June 6, 1989), Newfoundland (May 30, 1989), Nova Scotia (June 14, 1989), Prince Edward Island (June 26, 1989), New Brunswick (June 30, 1989), Manitoba (January 13, 1989), Québec (November 1, 1988); Saskatchewan (October 24, 1989); Alberta (July 20, 1989); British Columbia (August 17, 1989, June 18, 1990 and April 11, 1991); Northwest Territories (June 12, 1989 and February 20, 1990); Yukon (November 25, 1988). The Filer complied with the terms of the Orders;
15. The Orders provided that the Filer is exempt from the proxy solicitation requirements so long as Canadian residents holding securities of the Filer (“Canadian Holders”) receive the same notices, reports and communications (including proxy solicitations) sent to Australian resident holders that are prepared in accordance with Australian law. Canadian Holders of ADRs need not receive the proxy materials provided they receive, through the Depositary, a summary of the notice of meeting and a statement requesting voting instructions;
16. Pursuant to the Orders, the Filer sends with its annual financial statements (“Annuals”) a statement which compares Australian GAAP with Canadian GAAP, and a statement which indicates that it has elected to prepare Annuals in accordance with Australian GAAP;
17. Pursuant to the Orders, the Filer need not file material change reports in the form required under the Legislation so long as it files contemporaneously with the Decision Makers all press releases and reports of material change required to be filed in Australia;
18. Since the March 30, 2004 effective date of National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* (“NI 71-102”), the Filer has relied on and complied with the exemptions from Canadian continuous disclosure requirements afforded to “designated foreign issuers” (as such term is defined in NI 71-102) under Part 5 of NI 71-102 and paid all related applicable filing and participation fees in each of the Jurisdictions;

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19. The Filer is not in default of securities legislation in any jurisdiction in Canada;
20. The Filer analyses its share register on a regular basis by using a third party specialist firm, Orient Capital Pty Ltd. Through this process Shares registered in the names of nominee companies but beneficially owned by others are identified including those with addresses in Canada;
21. Procedures for tracing the beneficial ownership of shares of an Australian listed corporation are detailed in Chapter 6C, Part 6C.2 (the “Tracing Provisions”) of the Australian Corporations Act;
22. Recipients of notices under the Tracing Provisions are required to reply within two business days with details regarding the beneficial ownership of shares in respect of which a notice is given. Failure to do so is an offence under the Australian Corporations Act;
23. Pursuant to the procedures detailed in the Tracing Provisions, notices were issued to each of registered holders of Shares holding the top 75 largest positions (the “Top 75”) registered holders to identify the ultimate beneficial owners of Shares. The Top 75 registered holders represent approximately 78% of the Filer’s Shares on a worldwide basis;
24. The Top 75 registered holders did not include CDS or Depository Trust Company (“DTC”). The searches conducted by the Filer’s agents using the Tracing Provisions were designed to turn up the names of Canadian intermediaries and ultimate beneficial owners of Shares. This process did not identify any Shares held by CDS or DTC;
25. As at November 13, 2008, the Filer has concluded that, on a worldwide basis, approximately 18,873,456 Shares, or 0.98% of the outstanding Shares were beneficially owned, directly or indirectly, by persons with addresses in Canada. At the same time, there were 365 direct and indirect beneficial holders of Shares resident in Canada representing approximately 0.28% of the total number of the Filer’s shareholders worldwide;
26. The particulars of Canadian Holders are as follows:

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Canadian Shareholders Holding Shares Directly

Jurisdiction	Number of Holders	Number of Shares Held
Ontario	127	629,135
Quebec	61	16,689
British Columbia	59	43,564
Manitoba	21	6,209
Alberta	27	7,824
Saskatchewan	12	3,785
Newfoundland	8	2,140
New Brunswick	1	480
Nova Scotia	1	240
Total	317	710,066

Canadian Shareholders Holding Shares Indirectly

Jurisdiction	Number of Holders	Number of Shares Held
Ontario	37	15,126,552
Quebec	9	2,981,188
British Columbia	1	23,846
Alberta	1	31,804
Total	48	18,163,390

27. Accordingly, Canadian Holders (i) do not beneficially own directly or indirectly more than 2% of the total number of Shares of the Filer worldwide;

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and (ii) do not represent more than 2% of the total number of owners directly or indirectly of Shares of the Filer worldwide.

28. The Filer analysed the holdings of ADRs by obtaining a Depository Trust Company List and through conducting a geographic analysis, a process by which the depository employs an agent to contact brokers holding ADRs and request that the brokers identify the address of beneficial holders by province, state and territory. No other firm has analyzed the share capital of the Filer, other than Broadbridge Financial Solutions, which analyzed the ADRs;
29. As of November 13, 2008, Canadian Holders held approximately 43,000 Shares represented by ADRs (or approximately 0.002% of the 1,921,670,803 Shares of the Filer that are currently issued and outstanding worldwide).
30. There are approximately 23 direct and indirect beneficial Canadian Holders of Shares represented by ADRs representing 0.018% of the total number of holders of Shares of the Filer worldwide;
31. Accordingly, if the 43,000 ADRs held by Canadian residents were exchanged for Shares, Canadian Holders would (i) still not beneficially own directly or indirectly more than 2% of the total number of Shares of the Filer worldwide; and (ii) still not represent more than 2% of the total number of owners directly or indirectly of the Shares of the Filer worldwide;
32. The Filer is subject to the reporting requirements of the ASX and the Australian Corporations Act (the "Australian Reporting Requirements"). The Australian Reporting Requirements are similar in nature and scope to the reporting requirements under National Instrument 51-102 *Continuous Disclosure Obligations*;
33. The Filer delivers to Canadian Holders all disclosure material required by Australian Reporting Requirements to be delivered to shareholders. The disclosure material is also either on the website of the Australian Securities and Investments Commission ("ASIC") or the ASX (as the case may be) at www.asic.gov.au and www.asx.com.au, respectively, or directly by conducting searches from ASIC or the ASX. The annual and half-yearly reports of the Filer and its media releases are also available for viewing or to download on the Filer's website – www.fostersgroup.com (or www.fosters.com.au);
34. The Filer's annual report, which incorporates the principal annual financial statements, notes to the financial statements and a directors' report about the statement and notes, is sent to shareholders including the Canadian Holders

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who have indicated in writing that they prefer to receive such material. Under the Australian Reporting Requirements, the Filer is not required to provide copies of the annual report to all shareholders, only to those shareholders who have requested such material;

35. The Filer is subject to, and in compliance with, the ASX Listing Rules and its policies, including the reporting obligations pursuant thereto which are substantially similar to those imposed on reporting issuers under the Legislation;
36. Pursuant to the Australian Reporting Requirements, Canadian Holders:
 - (a) are able to receive Annual Reports (including financial statements), upon written request;
 - (b) will receive notices of meetings accompanied by explanatory memoranda;
 - (c) will receive take-over documentation (including bid offers and responses); and
 - (d) will receive details of share issues, share buy-backs, rights issues and option issues, if permitted by Canadian law;
37. Canadian Holders would have the same civil remedies under Australian law as securityholders resident in Australia in the event of a misrepresentation in the continuous disclosure documents of the Filer;
38. In the last twelve (12) months, the Filer has not conducted an offering of its securities in Canada or taken any other steps that indicate there is a market for its securities in Canada. The Filer has no plans to seek a public offering of its securities in Canada.
39. The Filer does not intend to make any further distributions of securities in Canada with the exception of such distributions as may be required by employment arrangements of certain employees in Canada as described in paragraph 9;
40. The Filer has undertaken in favour of each of the Decision Makers that it will continue to concurrently deliver to its securityholders resident in Canada, all disclosure material it is required by Australian Reporting Requirements to deliver to Australian resident security holders; and

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41. The Filer issued a press release in Canada on January 14, 2009 indicating that it has applied to securities regulatory authorities for a decision that it is not a reporting issuer in Canada, and that if that decision is made, the issuer will no longer be a reporting issuer in any jurisdiction in Canada;

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 Exemptive Relief Sought is granted.

Carol S. Perry

Mary Condon