

## 2007 BCSECCOM 642

### Headnote

The filer is a reporting issuer that wants shareholders that acquired restricted period securities under an exemption to be able to resell the securities without a prospectus - The shareholders acquired securities under an exemption that are subject to a restricted period; the risk of the securities being resold to a purchaser in BC during the restricted period is de minimis as the shareholders are outside of BC and there is no public market for the securities in BC; due to their circumstances, it would prejudice the shareholders if their securities continued to bear a restricted period legend; the primary market for the securities is outside Canada; if securities were resold into BC during the restricted period, prospectus-level disclosure and continuous disclosure of the filer would be available on SEDAR

### Exemption Order

#### Leading Brands, Inc.

#### Section 76 of the *Securities Act*, R.S.B.C. 1996, c. 418

### Background

- ¶ 1 Leading Brands, Inc. (Leading Brands) has applied for an exemption from the requirement to file and obtain receipts for a preliminary prospectus and prospectus in section 61 of the Act (the prospectus requirement) for certain potential trades.

### Representations

- ¶ 2 Leading Brands represents that:
1. it is existing under the *Business Corporations Act* (British Columbia) and has its head office and management in British Columbia;
  2. it is a reporting issuer in British Columbia but is not a reporting issuer (or equivalent) in any other jurisdiction in Canada;
  3. it is not in default of securities legislation in British Columbia;
  4. its common shares are registered under section 12 of the *United States Securities Exchange Act of 1934*;
  5. its common shares are quoted on the NASDAQ Capital Market (NASDAQ) and none of its securities are listed or quoted on any other market or exchange;

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6. its authorized capital consists of 500,000,000 common shares, without par value, and 20,000,000 preferred shares without par value, of which 19,952,591 common shares (and no preferred shares) were issued and outstanding as of October 10, 2007;
7. on August 9, 2007, Leading Brands completed a private placement to six U.S. resident institutional investors, all of whom are U.S. accredited investors (the Holders), of 3,300,001 common shares (the Shares) and 1,650,001 common share purchase warrants to raise gross proceeds of US\$9,900,003;
8. Leading Brands relied upon the registration and prospectus exemptions in BC Instrument 72-503 *Distribution of Securities Outside British Columbia* to issue the Shares and all of the certificates for the Shares were legended with a US legend and with the legend prescribed in section 2.5(2)3(a) of National Instrument 45-102 *Resale of Securities* (the Canadian Legend), which expires December 10, 2007;
9. on September 24, 2007, Leading Brands filed a Form F-3 registration statement (the US Prospectus) with the United States Securities and Exchange Commission to qualify the immediate resale of the Shares, which became “effective” on October 9, 2007;
10. the terms of the private placement require Leading Brands, to either file a prospectus in British Columbia to qualify the resale of the Shares or to seek an exemption from the prospectus requirement in British Columbia;
11. Leading Brands was not eligible to use the United States Multijurisdictional Disclosure System and was therefore unable to use one prospectus in both British Columbia and the United States;
12. Leading Brands is not qualified under National Instrument 44-101 *Short Form Prospectus Distributions* (NI 44-101) to file a prospectus in the form of a short form prospectus for a distribution of any of its securities in British Columbia because its equity securities are not listed and posted for trading on a short form eligible exchange, as defined in NI 44-101;
13. Leading Brands is not qualified to file a short form prospectus that is a base shelf prospectus under National Instrument 44-102 *Shelf Distributions* because it is not qualified under section 2.2 of NI 44-101 to file a prospectus in the form of a short form prospectus;

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14. if Leading Brands were to file a prospectus to qualify the resale of the Shares in British Columbia, the prospectus will have to be a long form prospectus;
15. as the US prospectus is now “effective”, Leading Brands is able to remove the US legend from the certificates for the Shares and, but for the Canadian Legend, the Holders would be able to resell the Shares in the United States without restrictions;
16. so long as the Canadian Legend remains on the certificates for the Shares, the Holders will not be able to trade them on NASDAQ as the delivery of legended certificates does not constitute good delivery under NASDAQ rules;
17. Leading Brands has been advised by the Holders that the Canadian Legend impacts negatively on certain financial tests applicable to the Holders;
18. as far as Leading Brands is aware, none of the Holders have indicated any intention to resell the Shares to anyone in British Columbia or elsewhere;
19. Leading Brands has filed on SEDAR (as defined in National Instrument 13-101 *System for Electronic Document Analysis and Retrieval*) all of the documents it is required to file on the United States Securities and Exchange Commission's electronic data gathering, analysis and retrieval system (EDGAR) pursuant to the *Securities Exchange Act of 1934*, including its annual reports on Form 20-F; and
20. if Leading Brands were to file its US Prospectus on SEDAR, Leading Brands' disclosure record on SEDAR would provide a similar level of disclosure to that which would exist if Leading Brands filed a long form prospectus in British Columbia.

### **Order**

¶ 3 Because it is not prejudicial to the public interest, the Commission orders, under section 76 of the Act, that the first trade of the Shares is exempt from the prospectus requirement provided that:

1. Leading Brands is and has been a reporting issuer in a jurisdiction of Canada for the four months immediately preceding the trade;
2. Leading Brands files the US Prospectus on SEDAR;
3. either

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- (a) at least four months have passed since the distribution date, or
- (b) the trade is made through NASDAQ or to a person or company outside of Canada;
- 4. the trade is not a control distribution;
- 5. no unusual effort is made to prepare the market or to create a demand for the security that is the subject of the trade;
- 6. no extraordinary commission or consideration is paid to a person or company in respect of the trade; and
- 7. if the selling security holder is an insider or officer of Leading Brands, the selling security holder has no reasonable grounds to believe that Leading Brands is in default of securities legislation.

¶ 4 October 18, 2007

Martin Eady, CA  
Director, Corporate Finance  
British Columbia Securities Commission