

2009 BCSECCOM 154

February 12, 2009

Headnote

Multilateral Instrument 11-102 *Passport System – Securities Act*, s. 48, 76
Exemption from registration and prospectus requirements for situations other than a corporate acquisition or reorganization; trades to business associates; debt settlements; or trades involving employee investment plans and consultants – An issuer wants relief from the registration and prospectus requirements under securities legislation in connection with securities it is going to issue - Trades to franchisees in connection with national and regional advertising programs of franchisor; trades are to a defined group of purchasers which may exceed 50; any one purchaser cannot own more than one of the issuer's securities; first trade in preferred shares other than to issuer is a distribution

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 34(1)(a), 48, 61 and 76

In the Matter of
the Securities Legislation of
British Columbia
(the Jurisdiction)

and

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

and

In the Matter of
McDonald's Restaurants of Canada Limited (MRCL) and Regional Marketing
Forum of British Columbia and Yukon Inc. (RMF BC/Yukon) (the Filers)

Decision

Background

- ¶ 1 The principal regulator in the Jurisdiction has received an application from the Filers (the Application) for a decision under the securities legislation of the Jurisdiction of the principal regulator (the Legislation) for relief from the prospectus requirement and the dealer registration requirement in connection with

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distributions to Franchisees (as defined below) of Class A Shares (as defined below) (the Exemption Sought).

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

- (a) the British Columbia Securities Commission is the principal regulator for this Application, and
- (b) the Filers have provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in the Yukon Territory.

Interpretation

- ¶ 2 Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

“Class A Shares” means class A special shares of RMF BC/Yukon.

“Franchisees” means franchisees of MRCL licensed to own or operate McDonald’s restaurants in British Columbia or the Yukon Territory.

Representations

- ¶ 3 This decision is based on the following facts represented by the Filers:
- 1. RMF BC/Yukon was incorporated pursuant to the provisions of the *Canada Business Corporations Act* (CBCA) on November 28, 2008; RMF BC/Yukon’s head office is located in Burnaby, British Columbia;
 - 2. RMF BC/Yukon is not a reporting issuer in any jurisdiction of Canada;
 - 3. the authorized capital of RMF BC/Yukon consists of an unlimited number of voting common shares (Common Shares) and an unlimited number of voting Class A Shares, of which 1 Common Share and 1 Class A Share are issued and outstanding as of the date of this decision;
 - 4. the issued and outstanding Common Share is held by MRCL;
 - 5. the issued and outstanding Class A Share is held by a Franchisee located in Langley, British Columbia;
 - 6. the issued and outstanding shares of RMF BC/Yukon to date were both issued in reliance upon the “private issuer” exemption contained in section 2.4 of

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National Instrument 45-106 *Prospectus and Registration Exemptions* (the Private Issuer Exemption);

7. RMF BC/Yukon and MRCL are not in default of securities legislation in any jurisdiction of Canada;
8. as of the date of this decision, MRCL has a total of approximately 270 franchisees, 38 of whom are Franchisees;
9. MRCL and each franchisee contribute a specified percentage of their respective revenues from the McDonald's restaurants they own or operate (the Contributions) to (i) a national fund established for the purposes of advertising, marketing and promotion nationally in Canada to benefit McDonald's restaurants, and (ii) one or more of eight regional marketing funds established for the purposes of advertising, marketing and promotion of McDonald's restaurants (each, an RMF and collectively, the RMFs); the specified percentage is set out in a pledge agreement (Pledge Agreement) which is signed by each holder of a Common Share and a Class A Share;
10. each RMF receives, manages and applies the Contributions received from MRCL and franchisees to regional advertising and promotion for the benefit of the McDonald's restaurants in the respective region in which the MRCL and franchisees' McDonald's restaurants are located;
11. RMF BC/Yukon is the RMF for MRCL and the Franchisees and its by-laws provide that the primary purpose of RMF BC/Yukon is to engage in the promotion of public interest in the products offered for sale by its security holders and other Franchisees through the use of regional and local marketing in the Province of British Columbia and the Yukon Territory;
12. the by-laws of RMF BC/Yukon provide that:
 - (a) each Franchisee that executes a Pledge Agreement is entitled to become a holder of a Class A Share;
 - (b) only 1 Class A Share is issued to a Franchisee regardless of the number of restaurants owned or operated by the Franchisee;
 - (c) no Class A Share may be issued to a non-Franchisee;
 - (d) the holders of Class A Shares are entitled to elect a majority of the members of the board of directors; and

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- (e) the board of directors administers the affairs of RMF BC/Yukon, including the approval of the annual marketing plan, annual budget and expenditures to be made by RMF BC/Yukon within the approved annual budget;

13. the articles of incorporation of RMF BC/Yukon (the Articles) provide that:

- (a) the transfer of both the Common Shares and the Class A Shares are restricted in that no Common Shares may be transferred without the consent of 75% of the holders of the Common Shares and no Class A Shares may be transferred (the Share Restrictions);
- (b) in the event a Franchisee ceases to be a Franchisee, its Class A Share will be redeemed by RMF BC/Yukon, for the prescribed redemption amount of \$1.00; and
- (c) in the event of the liquidation, dissolution or winding-up of RMF BC/Yukon, the holders of the Class A Shares will be entitled to a share in the remaining property in the proportion that the Contribution of the holders of the Class A Shares is of the aggregate Contribution of the holders of the Class A Shares and the holders of the Common Shares over the past 12 month period of RMF/BC Yukon prior to the liquidation, dissolution or winding-up or such shorter period as the RMF BC/Yukon has been in existence;

14. if the holders of Class A Shares do not dispense of the requirement to appoint an auditor at RMF BC/Yukon's initial annual general meeting or any subsequent annual general meeting, RMF BC/Yukon will provide audited financial statements to its shareholders;

15. RMF BC/Yukon wishes to issue Class A Shares to additional Franchisees, such that the total number of security holders of RMF BC/Yukon will, at some point, exceed 50 persons;

16. once the total number of security holders exceeds 50 persons, RMF BC/Yukon will not be able to rely upon the Private Issuer Exemption to effect such future distributions of the Class A Shares to Franchisees and such distributions will be subject to the requirements of sections 34 and 61 of the *Securities Act*, R.S.B.C. 1996, c. 418; and

17. RMF BC/Yukon proposes to issue Class A Shares to Franchisees without incurring the time and expense involved in preparing and filing a prospectus, having to satisfy ongoing continuous disclosure requirements and having to retain a registered dealer to effect such securities issuances.

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Decision

- ¶ 4 The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted provided that:

- (a) at the time of any distribution of a Class A Share, the Articles contain the Share Restrictions;
- (b) at the time of any distribution of a Class A Share, RMF BC/Yukon is not a reporting issuer in British Columbia;
- (c) any certificates respecting the Common Shares or Class A Shares issued subsequent to the date of this decision must contain a legend describing the Share Restrictions;
- (d) prior to any issuance of a Class A Share, RMF BC/Yukon shall deliver to each prospective purchaser:
 - (i) a copy of the Articles and by-laws of RMF BC/Yukon;
 - (ii) a copy of this decision document; and
 - (iii) a statement that as a result of this decision, certain protections, rights and remedies provided by the Legislation, including statutory rights of rescission or damages, will not be available to purchasers of such shares and that certain restrictions are imposed on the disposition of such shares; and
- (e) except for a trade to RMF BC/Yukon, the first trade in a Class A Share by a person who acquires such share is a distribution, unless the conditions set out in subsection 2.6(3) of National Instrument 45-102 *Resale of Securities* are satisfied.

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