

2012 BCSECCOM 177

April 20, 2012

Headnote

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – Takeover Bids and Issuer Bids – Exemption from the issuer bid requirements of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* – An issuer requires an exemption from all issuer bid requirements – An issuer requires an exemption from all issuer bid requirements in connection with a repurchase of its securities – Issuer is a “foreign private issuer” under U.S. securities laws; issuer would be eligible to use MJDS procedures to conduct its issuer bid in Canada except that it is not a “US issuer” under National Instrument 71-101 *The Multijurisdictional Disclosure System*; issuer bid will be made in compliance with applicable laws of the United States and issuer bid rules of NASDAQ; the issuer’s BC shareholders will receive same information as shareholders in the U.S.

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, s. 114(2)

Multilateral Instrument 62-104, Part 2

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
Leading Brands, Inc.
(the Filer)

Decision

Background

- ¶ 1 The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction of the principal regulator (the Legislation) for relief from the requirements in relation to issuer bids in Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* (MI

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62-104), which relate to issuer bids and, among other things, commencement and delivery of an issuer bid circular and any notices of change of variation thereto, minimum deposit period and withdrawal rights, take-up and payment, including proportionate take up, for securities tendered to an issuer bid, disclosure, restrictions upon purchases of securities, formal valuation, identical consideration and collateral benefits (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 Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in Alberta.

Interpretation

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

Representations

- ¶ 3 This decision is based on the following facts represented by the Filer:
- 1. the Filer is a British Columbia incorporated corporation;
 - 2. the authorized capital of the Filer consists of 500,000,000 common shares without par value and 20,000,000 preferred shares without par value and issuable in one or more series; as of January 3, 2012, there were 3,262,668 common shares (the Shares) (and no preferred shares) issued and outstanding;
 - 3. the Filer is a reporting issuer under the British Columbia Securities Act (the Act) but is not a reporting issuer (or equivalent) in any other jurisdiction in Canada;
 - 4. the Filer is not in default of securities legislation in any jurisdiction;
 - 5. the Shares of the Filer are registered under section 12 of the United States Securities Exchange Act of 1934 (1934 Act); the Filer is considered to be a “foreign private issuer” under the 1934 Act;
 - 6. the Filer’s Shares have been quoted on the NASDAQ Capital Market (formerly called the SmallCap Market) (NASDAQ) since August 3, 1993 and

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trade under the symbol “LBIX”; none of the Filer’s securities are listed or quoted in Canada or on any other market or exchange;

7. to the best of the Filer’s knowledge, a total of 1,202,171 Shares (out of the 3,262,668 Shares issued and outstanding), representing approximately 36.84% of the total number of Shares, are held by Shareholders whose last address as shown on the books of the Filer is in Canada (the Canadian Holdings);
8. all nine of the Filer’s directors and officers are Canadian; their aggregate holdings, including their respective affiliates, are 731,318 Shares representing approximately 22.41% of the Shares; approximately 470,853 Shares, or 14.43% of the outstanding Shares, are held in Canadian Holdings by Shareholders who are not directors or officers, or their respective affiliates, of the Filer;
9. the Filer proposes to conduct an issuer bid (the Offer) by way of an offer to purchase (the Offer to Purchase), in compliance with U.S. securities law requirements and applicable NASDAQ rules and policies, for up to US\$800,000 of its Shares (or such greater amount as the Filer may elect to pay, subject to applicable law), which will be mailed to all holders (the Shareholders) of the Filer’s Shares;
10. the Filer intends to conduct the Offer via a modified “Dutch Auction” tender offer where the Filer will specify the price range per Share, based on the market price of the Shares prior to the Offer, within which the Filer is willing to repurchase the Shares under the Offer;
11. the Offer will constitute an “issuer bid” under the Legislation; the Filer satisfies some, but not all, of the conditions in relation to the foreign issuer bid exemption from the issuer bid requirements contained in the Legislation;
12. the Filer would be eligible to use the multijurisdictional disclosure system to conduct its issuer bid in Canada under National Instrument 71-101 *The Multijurisdictional Disclosure System* except that it is not a “U.S. issuer” as defined in that instrument;
13. the Offer will be conducted in accordance with applicable U.S. securities laws, including the 1934 Act, rules of the SEC, and NASDAQ rules and policies;
14. all directors and officers of the Filer have voluntarily agreed to not participate in the Offer; and

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15. all Canadian Shareholders will be entitled to participate in the Offer on terms that are at least favourable as the terms that apply to Shareholders in other jurisdictions.

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) the Offer to Purchase is made, and the Offer is carried out, in accordance with all applicable U.S. securities laws and NASDAQ rules and policies;
- (b) the Offer to Purchase be filed on SEDAR and sent to all Canadian Shareholders; and
- (c) Canadian Shareholders in Canada are entitled to participate in the Offer on terms at least as favourable as the terms that apply to Shareholders in any foreign jurisdiction.

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British Columbia Securities Commission