

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

**APPLICATION OF TLC VISION CORPORATION
UNDER SECTION 47 OF THE
COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED**

FACTUM OF TLC VISION CORPORATION

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PART I - THE FACTS

The Application

1. This is a motion by TLC Vision Corporation (“TLC Canada” or the “Applicant”) for recognition of the U.S. Plan Confirmation Order (as defined below) of the United States Bankruptcy Court for the District Court of Delaware (the “U.S. Court”), under Chapter 11 of Title 11 of the *United States Code* (“Chapter 11”) in the proceeding commenced by the Applicant (the “Chapter 11 Proceeding”), along with TLC Vision (USA) Corporation (“TLC USA”) and TLC Management Services Inc. (together with the Applicant, the “Debtors”), pursuant to section 49 of the *Companies' Creditors Arrangement Act* (“CCAA”), and for certain related relief.
2. Detailed facts in respect of the Applicant and its business are set out in the Affidavit of Michael Gries, sworn December 21, 2009 (the “Gries Affidavit”), a copy of which is included in the Application Record of TLC Canada, filed in connection with its December 23, 2009 application.

Proceedings to Date

3. On December 21, 2009 (the “Petition Date”), the Debtors filed voluntary petitions under Chapter 11 in the U.S. Court.
4. On December 21, 2009, the Applicant obtained an order under the *Companies’ Creditors Arrangement Act* (Canada) (the “CCAA”) from the Honourable Mr. Justice Cumming of the Ontario Superior Court of Justice (Commercial List) (the “Canadian Court”) which, among other things, granted a stay of proceedings in Canada in respect of TLC Canada.
5. On December 23, 2009, the Applicant, as foreign representative, brought an application to the Canadian Court under the CCAA and an order pursuant to section 47 of the CCAA (as amended from time to time, the “Initial Order”) was granted by the Honourable Mr. Justice Cumming under which, among other things:
 - (1) the Chapter 11 Proceeding was recognized as a “foreign main proceeding” in Canada;
 - (2) the Applicant was determined to be entitled to relief under the CCAA;
 - (3) Alvarez & Marsal Canada ULC was appointed as Information Officer of TLC Canada (subsequently substituted by an affiliate, Alvarez & Marsal Canada Inc., in the Amended and Restated Order of the Canadian Court entered dated December 23, 2009 and entered on January 21, 2010 (the “Amended and Restated Initial Order”)), with rights, powers, duties and limitations upon liabilities set forth in the Initial Order;
 - (4) a stay of proceedings in respect of TLC Canada was granted; and
 - (5) the Canadian Court recognized and gave full force and effect in all provinces and territories in Canada to orders of the U.S. Court:
 - (a) authorizing the Applicant to act as a foreign representative on behalf of the Debtors’ estates in any judicial or other proceedings in a foreign country, including these proceedings;
 - (b) (i) authorizing, but not directing, the Debtors to (a) pay certain accrued prepetition wages, (b) permit employees to use accrued prepetition personal time

off, (c) pay employees' prepetition reimbursable business expenses, (d) make accrued prepetition contributions to employee benefit plans and (e) continue employee benefit plans postpetition; (ii) authorizing related relief; and (iii) authorizing, but not directing, the release of withheld taxes and employee contributions;

(c) authorizing the Debtors to, among other things: (i) obtain postpetition financing, on an interim basis and on a final basis, in the aggregate committed amount of up to \$15 million; (ii) use cash collateral; and (iii) grant adequate protection to Wells Fargo Bank, National Association, as agent for the prepetition lenders;

(d) authorizing the Debtors to maintain existing bank accounts, to continue to use existing business forms, to continue to use certain existing cash management systems, and for related relief;

(e) (i) prohibiting utilities from altering, refusing or discontinuing services to, or discriminating against, the Debtors on account of prepetition amounts due; (ii) determining that the utilities are adequately assured of future payment; (iii) authorizing the Debtors to establish a deposit account and pay the adequate assurance deposit; (iv) establishing procedures to object to the motion seeking such relief; and (v) granting certain related relief;

(f) (i) authorizing, but not directing, the Debtors to pay, in the ordinary course of the Debtors' business, prepetition sales, gross receipts, utility-users, federal excise and use, real estate, property and business taxes, and certain other governmental taxes, regulatory fees, including, but not limited to, county/state licensing regulatory fees, and permit or other licensing fees to the respective federal, state and local taxing authorities and other governmental agencies, and (ii) directing financial institutions to honor and process checks and transfers related to the above taxes and fees;

(g) (i) authorizing the Debtors to honor two prepetition insurance premium financing agreements and renew such agreements in the ordinary course of business, without need for further authority or approval from the U.S. Court;

and (ii) authorizing the Debtors' banks or financial institutions to honor and process checks and transfers related to such obligations and agreements;

(h) providing for the joint administration of the Debtors' separate Chapter 11 cases for procedural purposes only; and

(i) authorizing, but not directing, the Debtors, in their sole discretion, to enter into trade agreements with certain critical vendors and to pay prepetition obligations in connection therewith.

6. On January 21, 2010, the Applicant, as foreign representative, brought a motion to the Canadian Court under the CCAA and the Amended and Restated Initial Order was granted by the Honourable Mr. Justice Cumming under which:

- (1) Alvarez & Marsal Canada Inc. was substituted as Information Officer, as described above; and
- (2) Schedule "C" to the Amended and Restated Initial Order was amended to include the complete Cross-Border Insolvency Protocol (the "Protocol"), as Schedule "C" had previously contained in an incomplete copy of the Protocol.

7. On January 26, 2010, the Applicant, as foreign representative, brought a motion to the Canadian Court under the CCAA and orders were granted by the Honourable Mr. Justice Cumming under which, among other things:

- (1) the First Report of the Information Officer dated January 25, 2010 and the activities described therein were approved;
- (2) the Canadian Court recognized and gave full force and effect in all provinces and territories in Canada to orders of the U.S. Court:
 - (a) authorizing TLC Canada to reject its unexpired nonresidential real property lease dated as of October 23, 2001 for premises located at 5280 Solar Drive, Mississauga, Ontario, Canada by and between TLC Canada, as tenant, and Canada Mortgage and Housing Corporation;

- (b) establishing bar dates for filing proofs of prepetition unsecured and secured claims and administrative expenses in the Chapter 11 Proceeding (the “U.S. Claims Bar Date Order”); and
- (c) (i) prohibiting utility companies from altering, refusing or discontinuing services to, or discriminating against, the Debtors on account of prepetition amounts due; (ii) determining that utility companies are adequately assured of future payment; (iii) authorizing the Debtors to establish the Utility Deposit Account and pay the Adequate Assurance Deposit; (iv) establishing procedures to object to the motion; and (v) granting certain related relief in the Chapter 11 Proceeding.

8. On February 18, 2010, the Applicant, as foreign representative, brought a motion to the Canadian Court under the CCAA and the Second Amended and Restated Initial Order was granted by the Honourable Mr. Justice Campbell under which, among other things:

- (1) the Second Report of the Information Officer dated February 16, 2010 and the activities described therein were approved; and
- (2) the Canadian Court recognized and gave full force and effect in all provinces and territories in Canada to orders of the U.S. Court:
 - (a) approving the Plan Sponsor Agreement among the Debtors and Charlesbank Equity Fund VII (the “Plan Sponsor”) and/or certain of its affiliates dated February 3, 2010 (the “Plan Sponsor Agreement”) and break-up fee and expense reimbursement provision set forth in the Plan Sponsor Agreement; and
 - (b) authorizing the Debtors to, among other things: (a) obtain secured, superpriority postpetition financing, junior in priority to the prepetition secured claims and to the adequate protection claims and liens granted to the lenders (the “Prepetition Lenders”) from time to time party to that certain Amended and Restated Credit Agreement dated as of June 21, 2007 by and among TLC USA, the Applicant (as guarantor) and the other additional guarantors party thereto, and with administrative priority

pursuant to the terms and conditions of that certain Junior Secured Superpriority Debtor-in-Possession Credit Agreement dated as of February 3, 2010 (the “DIP Credit Agreement”), by and among the Debtors, the lenders party thereto from time to time (the “DIP Lenders”), and the Plan Sponsor, as collateral agent and administrative agent, for and on behalf of itself and the DIP Lenders in the Chapter 11 Proceeding, on an interim basis and on a final basis, in an aggregate amount not to exceed \$25 million; (b) use cash collateral in the Chapter 11 Proceeding; and (c) grant adequate protection in the Chapter 11 Proceeding to Wells Fargo Bank, N.A., as collateral agent and administrative agent for the Prepetition Lenders; and

(3) certain amendments were made to the Amended and Restated Initial Order.

9. On March 16, 2010, the Applicant, as foreign representative, brought a motion to the Canadian Court under the CCAA and an order was granted by the Honourable Mr. Justice Campbell under which, among other things, the Canadian Court recognized and gave full force and effect in all provinces and territories in Canada to:

- (1) the order of the U.S. Court amending the U.S. Claims Bar Date Order in the Chapter 11 Proceeding; and
- (2) the final order of the U.S. Court approving the debtor-in-possession financing contemplated by the DIP Credit Agreement in the Chapter 11 Proceeding.

10. On March 30, 2010, the Applicant, as foreign representative, brought a motion to the Canadian Court under the CCAA and an order was granted by the Honourable Mr. Justice Campbell under which, among other things:

- (1) the Third Report of the Information Officer dated March 29, 2010 and the activities described therein were approved; and
- (2) the Canadian Court recognized and gave full force and effect in all provinces and territories in Canada to the order of the U.S. Court approving: (1) the Fourth Amended Disclosure Statement With Respect to the Joint Chapter 11 Plan of Reorganization Dated as of March 24, 2010; (2) procedures for the solicitation

and tabulation of votes to accept or reject the Fourth Amended Joint Chapter 11 Plan of Reorganization dated as of March 24, 2010 (the “Filed Plan”); and (3) related notice and objection procedures in the Chapter 11 Proceeding (the “U.S. Disclosure Statement Order”).

Recognition of the U.S. Plan Confirmation Order

The Confirmed Plan

11. The Confirmed Plan (as defined below)¹ provides for the separate classification of Claims and Interests into the following Classes based upon differences in the nature and/or priority of such Claims and Interests:

- (1) Class A1 (Other Secured Claims against TLC USA) provides for the separate classification of all Secured Claims (other than Prepetition Lender Secured Claims) against TLC USA.
- (2) Class A2 (Essential Trade Claims) provides for the separate classification of Claims against TLC USA held by entities deemed to be essential by TLC USA, consistent with that certain *Corrected Order Authorizing, But Not Directing, the Debtors to Enter Into Trade Agreements With Critical Vendors and to Pay Prepetition Obligations In Connection Therewith* (the “Essential Trade Order”), which authorized the Debtors to make payment in full satisfaction of prepetition Claims of such parties.
- (3) Class A3 (Other Priority Claims) provides for the separate classification of any Claim against Debtor TLC USA entitled to priority pursuant to Chapter 11, other than a Priority Tax Claim or an Administrative Claim.
- (4) Class A4 (Prepetition Lender Secured Claims) provides for the separate classification of the Claims of the Prepetition Lenders and the Prepetition Agent against TLC USA under the Prepetition Credit Agreement.

¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Confirmed Plan.

- (5) Class A5 (General Unsecured Claims) provides for the separate classification of all Allowed Claims against Debtor TLC USA, but excluding Administrative Claims, Priority Tax Claims, Professional Fee Claims, Other Secured Claims, Essential Trade Claims, Other Priority Claims, Prepetition Lender Claims, Medical Pending Litigation Claims, Subordinated Claims, and Intercompany Claims.
- (6) Class A6 (Medical Pending Litigation Claims) provides for the separate classification of litigation Claims against TLC USA that: (1) relate to litigation that is currently pending; (2) arise from medical procedures or care rendered at centers operated by non-Debtor affiliates; and (3) may be covered by insurance held by TLC USA or one of its non-Debtor affiliates. Each Class A6 Medical Pending Litigation Claim is, in the first instance, a direct liability against a non-Debtor affiliate of TLC USA and each Class A6 Claim is able to be satisfied entirely by such non-Debtor and/or applicable insurance.
- (7) Class A7 (Subordinated Claims) provides for the separate classification of the Claims against TLC USA subject to subordination under Chapter 11.
- (8) Class A8 (Intercompany Claims) provides for the separate classification of all Claims of Debtors TLC Canada and TLC MSI against Debtor TLC USA.
- (9) Class A9 (TLC USA Common Stock and Interests) provides for the separate classification of all authorized, issued and outstanding shares of common stock of, and Interests in, TLC USA as of the Petition Date, including, without limitation all issued, outstanding and unexpired options, warrants, conversion, privilege or other legal or contractual rights to acquire shares of TLC USA Common Stock or Interests. TLC USA Common Stock and Interests also includes any contingent, disputed or unliquidated Claims related to or in connection with any of the foregoing.
- (10) Class B1 (Other Secured Claims against TLC Canada) provides for the separate classification of all Secured Claims (other than Prepetition Lender Secured Claims) against TLC Canada.

- (11) Class B2 (Other Priority Claims) provides for the separate classification of any Claim against Debtor TLC Canada entitled to priority pursuant to Chapter 11, other than a Priority Tax Claim or an Administrative Claim.
- (12) Class B3 (Essential Trade Claims) provides for the separate classification of Claims against TLC Canada held by entities deemed to be essential by TLC Canada, consistent with the Essential Trade Order, which authorized the Debtors to make payment in full satisfaction of prepetition Claims of such parties.
- (13) Class B4 (Prepetition Lender Secured Claims) provides for the separate classification of the Claims of the Prepetition Lenders and the Prepetition Agent against TLC Canada under the Prepetition Credit Agreement.
- (14) Class B5 (General Unsecured Claims) provides for the separate classification of all Allowed Claims against Debtor TLC Canada, but excluding Administrative Claims, Priority Tax Claims, Professional Fee Claims, Other Secured Claims; Essential Trade Claims, Other Priority Claims, Prepetition Lender Claims Medical Pending Litigation Claims, and Intercompany Claims.
- (15) Class B6 (Medical Pending Litigation Claims) provides for the separate classification of litigation Claims against TLC Canada that: (1) relate to litigation that was pending against a Debtor as of the Petition Date; (2) arise from medical procedures or care rendered at centers operated by the Debtors and their non-Debtor affiliates; and (3) may be covered by insurance held by the Debtors or one of its non-Debtor affiliates. Each Class B6 Medical Pending Litigation Claim is, in the first instance, a direct liability against a non-Debtor affiliate of TLC Canada and each Class B6 Claim is able to be satisfied entirely by such non-Debtor and/or applicable insurance.
- (16) Class B7 (Intercompany Claims) provides for the separate classification of all Claims of Debtors TLC USA and TLC MSI against Debtor TLC Canada.
- (17) Class B8 (TLC Canada Common Stock and Interests) provides for the separate classification of all authorized, issued and outstanding shares of common stock of, and Interests in, TLC Canada as of the Petition Date, including, without limitation

all issued, outstanding and unexpired options, warrants, conversion, privilege or other legal or contractual rights to acquire shares of TLC Canada Common Stock or Interests. TLC Canada Common Stock and Interests also includes any contingent, disputed or unliquidated Claims related to or in connection with any of the foregoing.

- (18) Class C1 (Other Secured Claims against TLC MSI) provides for the separate classification of all Secured Claims (other than Prepetition Lender Secured Claims) against TLC MSI.
- (19) Class C2 (Other Priority Claims) provides for the separate classification of any Claim against Debtor TLC MSI entitled to priority pursuant to section 507(a) of the Bankruptcy Code, other than a Priority Tax Claim or an Administrative Claim.
- (20) Class C3 (General Unsecured Claims) provides for the separate classification of all Allowed Claims against Debtor TLC MSI, but excluding Administrative Claims, Priority Tax Claims, Professional Fee Claims, Other Secured Claims, Other Priority Claims, Prepetition Lender Claims, Medical Pending Litigation Claims, and Intercompany Claims.
- (21) Class C4 (TLC MSI Common Stock and Interests) provides for the separate classification of all authorized, issued and outstanding shares of common stock of, and Interests in, TLC MSI as of the Petition Date, including, without limitation all issued, outstanding and unexpired options, warrants, conversion, privilege or other legal or contractual rights to acquire shares of TLC MSI Common Stock or Interests. TLC MSI Common Stock and Interests, also includes any contingent, disputed or unliquidated Claims related to or in connection with any of the foregoing.
- (22) Class C5 (Prepetition Lender Secured Claims) provides for the separate classification of the Claims of the Prepetition Lenders and the Prepetition Agent against TLC MSI under the Prepetition Credit Agreement.
- (23) Class C6 (Intercompany Claims) provides for the separate classification of all Claims of Debtors TLC Canada and TLC USA against Debtor TLC MSI.

- (24) Class C7 (Medical Pending Litigation Claims) provides for the separate classification of litigation Claims against TLC MSI that: (1) relate to litigation that is currently pending; (2) arise from medical procedures or care rendered at centers operated by non-Debtor affiliates of TLC MSI; and (3) may be covered by insurance held by TLC MSI or one of its non-Debtor affiliates. Each Class C7 Medical Pending Litigation Claim is, in the first instance, a direct liability against a non-Debtor affiliate of TLC MSI and each Class C7 Claim is able to be satisfied entirely by such non-Debtor and/or applicable insurance.

Declaration of Michael F. Gries, Debtors' Chief Restructuring Officer, in Support of Confirmation of Debtors' Fourth Amended Joint Chapter 11 Plan of Reorganization Dated as of March 24, 2010 ("Gries Declaration"), Affidavit of Tim Robbins sworn May 6, 2010 ("Robbins Affidavit"), para. 13 and Exhibit "D", Applicant's Motion Record, Tabs 2 and 2(D), pp. 25 and 73-76

12. The Plan provides for the satisfaction by the Buyer Parties in full in cash on the Effective Date of the Prepetition Lender Secured Claims, which are obligations of the Debtors and the Non-Debtor Affiliates. The Plan also provides the means through which the Debtors and the Non-Debtor Affiliates may continue to operate as a viable enterprise.

Gries Declaration, Robbins Affidavit, para. 13 and Exhibit "D", Applicant's Motion Record, Tabs 2 and 2(D), pp. 25 and 77

13. The Plan provides for Holders of General Unsecured Claims to receive from the Buyer Parties their pro rata share of cash and the proceeds of the General Unsecured Creditor Note, which will provide Holders of such Claims with significant distributions that may equal up to 100% of the Allowed amount of such Claims.

Gries Declaration, Robbins Affidavit, para. 13 and Exhibit "D", Applicant's Motion Record, Tabs 2 and 2(D), pp. 25 and 77

14. The Plan allows for Medical Pending Litigation Claims to be satisfied from the Debtors' insurance and from insurance and other assets of the Non-Debtor Affiliates and employees and contractors of the Non-Debtor affiliates. The Non-Debtor Affiliates and their employees and contractors are the primary named defendants in the suits that give rise to the Medical Pending Litigation Claims and include the parties who provided medical care to the patient-plaintiffs.

The Non-Debtor Affiliate defendants to these suits will benefit greatly from the Plan's satisfaction of Prepetition Lender Secured Claims, of which they are obligors.

Gries Declaration, Robbins Affidavit, para. 13 and Exhibit "D", Applicant's Motion Record, Tabs 2 and 2(D), pp. 25 and 77-78

Solicitation and Vote Tabulation

15. Pursuant to the U.S. Disclosure Statement Order, Epiq Bankruptcy Solutions, LLC was appointed to assist the Debtors in connection with, among other things, soliciting, receiving and tabulating ballots accepting or rejecting the Confirmed Plan.

Declaration of Stephenie Kjontvedt of Epiq Bankruptcy Solutions, LLC Certifying Voting on, and Tabulation of Ballots Accepting and Rejecting, the Debtors' Fourth Amended Joint Chapter 11 Plan of Reorganization (the "Kjontvedt Declaration"), Robbins Affidavit, para. 11 and Exhibit "C", Applicant's Motion Record, Tabs 2 and 2(C), pp. 24 and 61-62

16. Subsequent to solicitation of the Filed Plan, the Debtors made certain non-material modifications to the Filed Plan (as modified, the "Modified Plan") and also filed a Plan Supplement dated April 23, 2010 (as amended, supplemented and otherwise modified, the "Plan Supplement") with the U.S. Court.

Robbins Affidavit, para. 10, Applicant's Motion Record, Tab 2, p. 24

17. On May 3, 2010, the Declaration of Stephenie Kjontvedt of Epiq Bankruptcy Solutions, LLC Certifying Voting on, and Tabulation of Ballots Accepting and Rejecting, the Debtors' Fourth Amended Joint Chapter 11 Plan of Reorganization (the "Kjontvedt Declaration"), which includes the final tabulation of votes cast in respect of the Confirmed Plan (the "Vote Tabulation"), was filed with the U.S. Court.

Kjontvedt Declaration, Robbins Affidavit, para. 11 and Exhibit "C", Applicant's Motion Record, Tabs 2 and 2(C), pp. 24 and 61

18. The Vote Tabulation is summarized below:

VOTING CLASS	TOTAL BALLOTS COUNTED			
	ACCEPT		REJECT	
	AMOUNT	NUMBER	AMOUNT	NUMBER
TLC Vision USA Corporation				
Class A1 Other Secured Claims	\$72,676.00 100%	1 100%	\$0.00 0.00%	0 0.00%
Class A5 General Unsecured Claims	\$7,669,148.80 100%	10 100%	\$0.00 0.00%	0 0.00%
Class A6 Medical Pending Litigation Claims	\$25,000,000.00 100%	1 100%	\$0.00 0.00%	0 0.00%
TLC Vision Corporation				
Class B1 Other Secured Claims	\$7,691,676.30 100%	1 100%	\$0.00 0.00%	0 0.00%
Class B5 General Unsecured Claims	\$7,811,639.82 100%	9 100%	\$0.00 0.00%	0 0.00%
Class B6 Medical Pending Litigation Claims	Ballots were received, but were not tabulated. Claims subject to filed objection.			
TLC Management Services, Inc.				
Class C7 Medical Pending Litigation Claims	Ballots were received, but were not tabulated. Claims subject to filed objection.			

Kjontvedt Declaration, Robbins Affidavit, para. 11 and Exhibit “C”, Applicant’s Motion Record, Tabs 2 and 2(C), pp. 24 and 65

U.S. Plan Confirmation Order

19. On May 6, 2010, the U.S. Court made an order (the “U.S. Plan Confirmation Order”) confirming the Modified Plan and the Plan Supplement (together, the “Confirmed Plan”) in the Chapter 11 Proceeding.

20. The Confirmed Plan is the result of extensive good faith, arms’-length negotiations among the Debtors, the Official Committee of Unsecured Creditors, the Plan Sponsor, the Prepetition Lenders and various other parties and is overwhelmingly supported by creditors.

Gries Declaration, Robbins Affidavit, para. 13 and Exhibit “D”, Applicant’s Motion Record, Tabs 2 and 2(D), pp. 25 and 78

21. The Debtors believe that the Plan Sponsor will satisfy its obligations under the Confirmed Plan and that, with the significantly deleveraged capital structure that will be the result of the Confirmed Plan, the businesses of the reorganized Debtors and their non-debtor affiliates will be viable, profitable and not likely to be subject to further liquidation or financial reorganization (except as otherwise contemplated in the Confirmed Plan).

Gries Declaration, Robbins Affidavit, para. 13 and Exhibit “D”,
Applicant’s Motion Record, Tabs 2 and 2(D), pp. 25 and 80-81

22. The Information Officer recommends that the Canadian Court recognize and give full force and effect to the U.S. Plan Confirmation Order.

Fourth Report of the Information Officer

23. The Applicant is now seeking recognition of the U.S. Plan Confirmation Order and related relief pursuant to section 49 of the CCAA.

PART II - THE LAW

Purpose and Interpretation of the CCAA

24. The CCAA is remedial legislation, and it is to be given a liberal interpretation to facilitate its objectives.

Stelco Inc. (Bankruptcy), Re, 2005 CanLII 10641 at para. 24 (Ont. C.A.) (“*Stelco*”), Brief of Authorities of the Applicant, Tab 1

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311 at paras. 22 and 25 (B.C.C.A.), Brief of Authorities of the Applicant, Tab 2

Re Babcock & Wilcox Canada Ltd. (2000), 18 C.B.R. (4th) 157 at para. 13 (Ont. S.C.J.) (“*Babcock*”), Brief of Authorities of the Applicant, Tab 3

Governing Principles and Statutory Scheme of Part IV of the CCAA

25. Section 18.6 was added to the CCAA in 1997 in order to enhance the ability of parties to deal effectively with international insolvencies. In 2009, Part IV - Cross Border Insolvencies (“Part IV”) was added to the CCAA, and replaced Section 18.6.

26. The purposes of former section 18.6 and Part IV are substantially the same -- namely, to grant the Court broad powers to recognize foreign proceedings and to grant relief in Canada that will result in the better coordination of Canadian and foreign insolvency proceedings.

27. Where there are no express contradictions in the language of the statutory provisions, the Applicant submits that the principles set out in the caselaw under former section 18.6 ought to be applicable in respect of applications made under Part IV.

28. Section 44 sets out the purpose of Part IV of the CCAA: to provide mechanisms for dealing with cross-border insolvencies, and to promote cooperation between courts and to promote efficiency, fairness and commercial certainty:

The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
- (d) the protection and the maximization of the value of debtor company's property; and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.

CCAA, R.S.C. 1985, c. C-36, section 44, Schedule "A"

29. If the court is satisfied that the application for the recognition relates to a "foreign proceeding", and that the applicant is a "foreign representative" in respect of that foreign proceeding, then section 47(1) mandates that the court shall make an order recognizing the foreign proceeding.

CCAA, R.S.C. 1985, c. C-36, section 47(1), Schedule "A"

30. On December 23, 2009, the Applicant, as foreign representative, brought an application in respect of the recognition of the Chapter 11 Proceeding, among other things, and the Initial Order was granted by the Canadian Court.

Principles of Comity and Jurisdiction of the Court

31. In considering applications for relief that were made under former section 18.6 of the CCAA, Courts recognized that in the context of cross-border insolvencies comity is to be encouraged. Efforts are made to complement, coordinate, and where appropriate, accommodate insolvency proceedings commenced in foreign jurisdictions. As set out above, it is submitted that this principle also should apply to applications made under Part IV, and indeed section 44 of the CCAA expressly reflects that this is a purpose of Part IV.

Lear Canada (Re), 2009 CanLII 37931 (ON S.C.) at para. 11, Brief of Authorities of the Applicant, Tab 4

32. The objective of cross-border insolvency coordination is to ensure that creditors are treated as equitably and fairly as possible, wherever they are located. Harmonizing insolvency proceedings in the United States and Canada creates the most stable conditions under which a successful reorganization can be achieved.

Re Matlack Inc. (2001), 26 C.B.R. (4th) 45 (Ont. S.C.J.) at para. 3, Brief of Authorities of the Applicant, Tab 5

33. The provisions of Part IV should reflect a broad and flexible approach in keeping with the general provisions of the CCAA, and consistent with the approach taken by the Court under former section 18.6 of the CCAA.

Babcock at para. 13, Brief of Authorities of the Applicant, Tab 3

34. In keeping with the purposes of Part IV, the Court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

CCAA, R.S.C. 1985, c. C-36, section 52, Schedule "A"

Recognition of the U.S. Plan Confirmation Order

35. If an order recognizing a foreign proceeding is made, as is the case in this proceeding, the court may, on application by the foreign representative who applied for the order, if the court is

satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate.

CCAA, R.S.C. 1985, c. C-36, section 49, Schedule "A"

36. In keeping with the purposes of Part IV, the Court is given wide latitude to make orders under Part IV on any terms and conditions that the court considers appropriate in the circumstances.

CCAA, R.S.C. 1985, c. C-36, section 50, Schedule "A"

37. However, nothing in Part IV prevents the Court from refusing to do something that would be contrary to public policy.

CCAA, R.S.C. 1985, c. C-36, section 61(2), Schedule "A"

38. In the context of cross-border insolvency proceedings and in the interests of comity and cooperation between the courts of Canada and the United States, Canadian courts have made orders recognizing and giving full force and effect to orders of U.S. courts confirming plans of reorganization.

Re Laidlaw (2003), 39 C.B.R. (4th) 239 (Ont. S.C.J.) at para. 6 ("Laidlaw"), Brief of Authorities of the Applicant, Tab 6

Re Loewen Group Inc. (2001), 32 C.B.R. (4th) 54 (Ont. S.C.J.) at para. 1, Brief of Authorities of the Applicant, Tab 7

39. Canadian courts have looked to prior orders made in the relevant Canadian insolvency proceeding, particularly orders determining that the U.S. court is the appropriate forum for adjudicating, determining, compromising or otherwise affecting all claims against the debtor companies, in considering whether it is appropriate to recognize and give full force and effect in Canada to orders of U.S. courts confirming plans of reorganization in the context of cross-border insolvency proceedings.

Laidlaw at para. 5, Brief of Authorities of the Applicant, Tab 6

40. Pursuant to the U.S. Claims Bar Date Order, as amended, which has been recognized and given full force and effect in Canada, stakeholders of the Debtors are subject to the claims process contained therein.

41. Canadian courts have also looked to the level of support among creditors in considering whether it is appropriate to recognize and give full force and effect in Canada to orders of U.S. courts confirming plans of reorganization in the context of cross-border insolvency proceedings.

Laidlaw at para. 5, Brief of Authorities of the Applicant, Tab 6

42. The Confirmed Plan is the result of extensive good faith, arms'-length negotiations among the Debtors, the Official Committee of Unsecured Creditors, the Plan Sponsor, the Prepetition Lenders and various other parties and is overwhelmingly supported by creditors, as evidenced by the Vote Tabulation.

Bankruptcy Order

43. The CCAA and the BIA create a complementary and interrelated scheme for dealing with the property of insolvent companies. The scheme occupies the field and there is no gap in the federal insolvency regime.

Re Ivaco Inc. (2006), 25 C.B.R. (5th) 176 (Ont. C.A.) at paras. 63 and 64, Brief of Authorities of the Applicant, Tab 8

Conclusion

44. This Honourable Court has previously made the Initial Order, which recognized the Chapter 11 Proceeding as a foreign main proceeding. The Applicant, as foreign representative, is applying to this Honourable Court for recognition of the U.S. Plan Confirmation Order and for certain related relief, which is necessary for the protection of the Debtors' property and the interests of a creditor or creditors and is not contrary to public policy.

45. It is respectfully submitted that when the principles outlined above are applied in this case, an orders pursuant to section 49 of the CCAA to recognize the U.S. Plan Confirmation Order and for certain other relief should be granted.

46. The Information Officer recommends that this Honourable Court recognize and give full force and effect to the U.S. Plan Confirmation Order.

47. Granting the relief sought by the Applicant is consistent with the purpose of the CCAA, and in particular Part IV, the principles of comity and the harmonization of a cross-border insolvencies, and this Honourable Court has the jurisdiction to grant that relief.

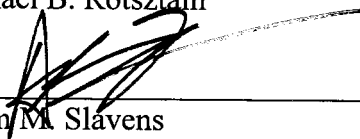
PART III - ORDER REQUESTED

48. The Applicant, therefore, requests that an order be made by the Honourable Court substantially in the form of the draft order included in the Motion Record of the Applicant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Michael Rotsztein per AMS

Michael B. Rotsztein



Adam M. Slavens

Lawyers for TLC Vision Corporation

SCHEDULE “A”
COMPANIES’ CREDITORS ARRANGEMENT ACT

PART IV

CROSS-BORDER INSOLVENCIES

PURPOSE

Purpose

44. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
- (d) the protection and the maximization of the value of debtor company’s property; and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.

2005, c. 47, s. 131.

INTERPRETATION

Definitions

45. (1) The following definitions apply in this Part.

“foreign court”
« *tribunal étranger* »

“foreign court” means a judicial or other authority competent to control or supervise a foreign proceeding.

“foreign main proceeding”
« *principale* »

“foreign main proceeding” means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests.

“foreign non-main proceeding”

« secondaire »

“foreign non-main proceeding” means a foreign proceeding, other than a foreign main proceeding.

“foreign proceeding”

« instance étrangère »

“foreign proceeding” means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors’ collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company’s business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

“foreign representative”

« représentant étranger »

“foreign representative” means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to (a) monitor the debtor company’s business and financial affairs for the purpose of reorganization; or

(b) act as a representative in respect of the foreign proceeding.

Centre of debtor company’s main interests

(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company’s registered office is deemed to be the centre of its main interests.

2005, c. 47, s. 131.

RECOGNITION OF FOREIGN PROCEEDING

Application for recognition of a foreign proceeding

46. (1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

Documents that must accompany application

(2) Subject to subsection (3), the application must be accompanied by (a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;

(b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative’s authority to act in that capacity; and

(c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

Documents may be considered as proof

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

Other evidence

(4) In the absence of the documents referred to in paragraphs (2)(a) and (b), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

Translation

(5) The court may require a translation of any document accompanying the application.

2005, c. 47, s. 131.

Order recognizing foreign proceeding

47. (1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

Nature of foreign proceeding to be specified

(2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

2005, c. 47, s. 131.

Order relating to recognition of a foreign main proceeding

48. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and

(d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

Scope of order

(2) The order made under subsection (1) must be consistent with any order that may be made under this Act.

When subsection (1) does not apply

(3) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.

Application of this and other Acts

(4) Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

2005, c. 47, s. 131.

Other orders

49. (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and

(c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

Restriction

(2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

Application of this and other Acts

(3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

2005, c. 47, s. 131.

Terms and conditions of orders

50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

2005, c. 47, s. 131.

Commencement or continuation of proceedings

51. If an order is made recognizing a foreign proceeding, the foreign representative may commence and continue proceedings under this Act in respect of a debtor company as if the foreign representative were a creditor of the debtor company, or the debtor company, as the case may be.

2005, c. 47, s. 131.

OBLIGATIONS

Cooperation — court

52. (1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Cooperation — other authorities in Canada

(2) If any proceedings under this Act have been commenced in respect of a debtor company and an order recognizing a foreign proceeding is made in respect of the debtor company, every person who exercises powers or performs duties and functions under the proceedings under this Act shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Forms of cooperation

(3) For the purpose of this section, cooperation may be provided by any appropriate means, including

(a) the appointment of a person to act at the direction of the court;

(b) the communication of information by any means considered appropriate by the court;

(c) the coordination of the administration and supervision of the debtor company's assets and affairs;

(d) the approval or implementation by courts of agreements concerning the coordination of proceedings; and

(e) the coordination of concurrent proceedings regarding the same debtor company.

2005, c. 47, s. 131; 2007, c. 36, s. 80.

Obligations of foreign representative

53. If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall

(a) without delay, inform the court of

(i) any substantial change in the status of the recognized foreign proceeding,

(ii) any substantial change in the status of the foreign representative's authority to act in that capacity, and

(iii) any other foreign proceeding in respect of the same debtor company that becomes known to the foreign representative; and

(b) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.

2005, c. 47, s. 131.

MULTIPLE PROCEEDINGS

Concurrent proceedings

54. If any proceedings under this Act in respect of a debtor company are commenced at any time after an order recognizing the foreign proceeding is made, the court shall review any order made under section 49 and, if it determines that the order is inconsistent with any orders made in the proceedings under this Act, the court shall amend or revoke the order.

2005, c. 47, s. 131.

Multiple foreign proceedings

55. (1) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of a debtor company, an order recognizing a foreign main proceeding is made in respect of the debtor company, the court shall review any order made under section 49 in respect of the foreign non-main proceeding and, if it determines that the order is inconsistent with any orders made under that section in respect of the foreign main proceedings, the court shall amend or revoke the order.

Multiple foreign proceedings

(2) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of the debtor company, an order recognizing another foreign non-main proceeding is made in respect of the debtor company, the court shall, for the purpose of facilitating the coordination of the foreign non-main proceedings, review any order made under section 49 in respect of the first recognized proceeding and amend or revoke the order if it considers it appropriate.

2005, c. 47, s. 131.

MISCELLANEOUS PROVISIONS

Authorization to act as representative of proceeding under this Act

56. The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

2005, c. 47, s. 131.

Foreign representative status

57. An application by a foreign representative for any order under this Part does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this Part conditional on the compliance by the foreign representative with any other order of the court.

2005, c. 47, s. 131.

Foreign proceeding appeal

58. A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.

2005, c. 47, s. 131.

Presumption of insolvency

59. For the purposes of this Part, if an insolvency or a reorganization or a similar order has been made in respect of a debtor company in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, proof that the debtor

company is insolvent and proof of the appointment of the foreign representative made by the order.

2005, c. 47, s. 131.

Credit for recovery in other jurisdictions

60. (1) In making a compromise or an arrangement of a debtor company, the following shall be taken into account in the distribution of dividends to the company's creditors in Canada as if they were a part of that distribution:

(a) the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the company; and

(b) the value of any property of the company that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires outside Canada by way of a transfer that, if it were subject to this Act, would be a preference over other creditors or a transfer at undervalue.

Restriction

(2) Despite subsection (1), the creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank in the order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph (1)(a) and the value referred to in paragraph (1)(b) is of that creditor's claim.

2005, c. 47, s. 131.

Court not prevented from applying certain rules

61. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

Public policy exception

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

2005, c. 47, s. 131; 2007, c. 36, s. 81.

SCHEDULE “B” - LIST OF AUTHORITIES

1. *Stelco Inc. (Bankruptcy), Re*, 2005 CanLII 10641 (C.A.)
2. *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.)
3. *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J.)
4. *Lear Canada (Re)*, 2009 CanLII 37931 (ON S.C.)
5. *Re Matlack Inc.* (2001), 26 C.B.R. (4th) 45 (Ont. S.C.J.)
6. *Re Laidlaw* (2003), 39 C.B.R. (4th) 239 (Ont. S.C.J.)
7. *Re Loewen Group Inc.* (2001), 32 C.B.R. (4th) 54 (Ont. S.C.J.)
8. *Re Ivaco Inc.* (2006), 25 C.B.R. (5th) 176 (Ont. C.A.)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
APPLICATION OF TLC VISION CORPORATION UNDER SECTION 47 OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Court File No. 09-8515-00CL

ONTARIO
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(Commercial List)

Proceeding commenced at Toronto

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