

**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 a second amended and restated initial order, including recognition of the U.S. Plan Sponsor Order (as defined below) and the U.S. Second Interim DIP 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. A summary of these facts is also included at paragraphs 11 - 14 of the Second

Report of Alvarez & Marsal Canada Inc., in its capacity as Information Officer, dated February 16, 2010.

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 (the "U.S. Interim DIP Order");

(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 an application 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 an application 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; 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 12, 2010, the U.S. Court granted the following orders:

- (1) approving the Plan Sponsor Agreement, as amended, among the Debtors and Charlesbank Equity Fund VII (the "Plan Sponsor") and/or certain of its affiliates (referred to collectively as "Charlesbank") dated February 3, 2010 (the "Plan Sponsor Agreement") and break-up fee and expense reimbursement provision set forth in the Plan Sponsor Agreement (the "U.S. Plan Sponsor Order"); and
- (2) 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 the lenders from time to time party to that certain Amended and Restated Credit Agreement dated as of June 21, 2007 (the "Prepetition Credit Agreement") by and among TLC USA, the Applicant (as guarantor) and the other additional guarantors party thereto (the "Prepetition Lenders"), 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 "New DIP Credit Agreement"), by and among the Debtors, the lenders party thereto from time to time (the "New DIP Lenders"), and the Plan Sponsor, as collateral agent and administrative agent (in such capacity, the "New DIP Agent"), for and on behalf

of itself and the New DIP Lenders in the Chapter 11 Proceeding, on an interim basis and on a final basis, in an aggregate amount not to exceed \$20 million (the "DIP Facility"); (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 (the "U.S. Second Interim DIP Order").

9. The Applicant is now seeking recognition of the U.S. Plan Sponsor Order and the U.S. Second Interim DIP Order pursuant to section 49 of the CCAA.

U.S. Plan Sponsor Order

10. Since the Petition Date, in furtherance of their fiduciary duties, and in accordance with the terms of the plan support agreement among the Debtors and certain of the Prepetition Lenders (the "Prepetition Lender PSA") and the U.S. Interim DIP Order, the Debtors have continued to explore possible restructuring transactions as an alternative to the restructuring outlined in the Prepetition Lender PSA, as the Prepetition Lender PSA and paragraph 39 of the U.S. Interim DIP Order provide that the Debtors may exercise a "fiduciary out" and terminate the Prepetition Lender PSA under certain terms and conditions.

U.S. Motion of the Debtors for entry of U.S. Plan Sponsor Order ("U.S. Plan Sponsor Motion"), Affidavit of Tim Robbins sworn February 11, 2010 ("Robbins Affidavit"), para. 8 and Exhibit "A", Applicant's Motion Record, Volume 1, Tabs 2 and 2(A), pp. 24 and 32

11. The Debtors have determined to and have exercised their fiduciary out to terminate the Prepetition Lender PSA and, in consultation with their financial and legal advisors, believe that the plan of reorganization contemplated by the Plan Sponsor Agreement provides them with the best way to exit the Chapter 11 Proceeding in a prompt and expeditious manner.

U.S. Plan Sponsor Motion, Robbins Affidavit, para. 8 and Exhibit "A", Applicant's Motion Record, Volume 1, Tabs 2 and 2(A), pp. 24 and 36

12. The Debtors have entered into a Plan Sponsor Agreement with Charlesbank, that will provide for: (i) payment in cash in full of the Prepetition Lenders; (ii) a greater cash distribution to unsecured creditors than the Joint Plan of Reorganization filed by the Debtors on January 6,

2010 (the "Lender Plan"); and (iii) the emergence of the Debtors from the Chapter 11 Proceeding virtually debt free.

U.S. Plan Sponsor Motion, Robbins Affidavit, para. 8 and Exhibit "A", Applicant's Motion Record, Volume 1, Tabs 2 and 2(A), pp. 24 and 36

13. In connection with the Plan Sponsor Agreement, the Plan Sponsor has provided a written commitment to fund up to \$141,964,500 to or for the benefit of the Debtors' estates in connection with the plan of reorganization contemplated thereby (the "Sponsored Plan").

U.S. Plan Sponsor Motion, Supplemental Affidavit of Tim Robbins sworn February 12, 2010, para. 2 and Exhibit "A", Applicant's Motion Record, Volume 2, Tabs 3 and 3(A), pp. 413 and 688

14. The Debtors believe in the exercise of their sound business judgment that the Plan Sponsor Agreement constitutes the Debtors' most favourable restructuring alternative in this proceeding, and that the Sponsored Plan provides a higher and better recovery for the Debtors' secured and unsecured creditors than the recovery set forth in the Lender Plan.

U.S. Plan Sponsor Motion, Robbins Affidavit, para. 8 and Exhibit "A", Applicant's Motion Record, Volume 1, Tabs 2 and 2(A), pp. 24 and 36

15. Given the value of Charlesbank's financial commitment to the Debtors' estates and the time, expense and effort invested by Charlesbank in this process, the Plan Sponsor Agreement provides for the payment of a break-up fee and reimbursement of reasonable out-of-pocket costs and expenses in the event the Debtors consummate a superior acquisition or similar transaction.

U.S. Plan Sponsor Motion, Robbins Affidavit, para. 8 and Exhibit "A", Applicant's Motion Record, Volume 1, Tabs 2 and 2(A), pp. 24 and 40 - 41

16. The Debtors believe in the exercise of their sound business judgment that the proposed break-up fee and expense reimbursement terms are fair, reasonable and appropriate under the circumstances.

U.S. Plan Sponsor Motion, Robbins Affidavit, para. 8 and Exhibit "A", Applicant's Motion Record, Volume 1, Tabs 2 and 2(A), pp. 24 and 41

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

Second Report of the Information Officer dated February 16, 2010
("Second Report"), filed, para. 37, p. 13

U.S. Second Interim DIP Order

18. Prior to the Petition Date, the Debtors considered various sources of postpetition financing, including financing from certain of the Prepetition Lenders, and in considering those options, the Debtors recognized that the obligations owed to the Prepetition Lenders are secured by virtually all of their property.

U.S. Motion of the Debtors for entry of U.S. Second Interim DIP Order ("U.S. Second Interim DIP Motion"), Robbins Affidavit, para. 9 and Exhibit "B", Applicant's Motion Record, Volume 1, Tabs 2 and 2(B), pp. 25 and 205 - 206

19. In view of these circumstances, the Debtors concluded that entering into a senior, priming, debtor-in-possession financing facility with certain of their Prepetition Lenders was in their best interests.

U.S. Second Interim DIP Motion, Robbins Affidavit, para. 9 and Exhibit "B", Applicant's Motion Record, Volume 1, Tabs 2 and 2(B), pp. 25 and 206

20. On December 22, 2009, the U.S. Court entered the U.S. Interim DIP Order, which was subsequently recognized and given full force and effect in all provinces and territories in Canada by the Canadian Court on December 23, 2009.

U.S. Second Interim DIP Motion, Robbins Affidavit, para. 9 and Exhibit "B", Applicant's Motion Record, Volume 1, Tabs 2 and 2(B), pp. 25 and 206

21. In connection with the Plan Sponsor Agreement, the Debtors and the New DIP Agent subsequently engaged in extensive, arms'-length negotiations with respect to the terms and conditions of the New DIP Credit Agreement and the U.S. Second Interim DIP Order.

U.S. Second Interim DIP Motion, Robbins Affidavit, para. 9 and Exhibit "B", Applicant's Motion Record, Volume 1, Tabs 2 and 2(B), pp. 25 and 207

22. Approval of the New DIP Facility will provide the Debtors with immediate and ongoing access to borrowing availability to pay their current and ongoing operating expenses, including postpetition wages and salaries and utility and vendor costs.

U.S. Second Interim DIP Motion, Robbins Affidavit, para. 9 and Exhibit "B", Applicant's Motion Record, Volume 1, Tabs 2 and 2(B), pp. 25 and 215

23. Approval of the New DIP Facility also will pay off all obligations arising under the U.S. Interim DIP Order and enable the Debtors to prosecute a plan of reorganization that will pay the allowed claims of the Prepetition Lenders in full and in cash and permit the Debtors to emerge from the Chapter 11 Proceeding debt free.

U.S. Second Interim DIP Motion, Robbins Affidavit, para. 9 and Exhibit "B", Applicant's Motion Record, Volume 1, Tabs 2 and 2(B), pp. 25 and 215-216

24. The Debtors require the use of cash collateral to fund their day-to-day operations, and absent such relief, the Debtors' business will be brought to an immediate halt, with damaging consequences for the Debtors and their estates and creditors.

U.S. Second Interim DIP Motion, Robbins Affidavit, para. 9 and Exhibit "B", Applicant's Motion Record, Volume 1, Tabs 2 and 2(B), pp. 25 and 218

25. In the U.S. Interim DIP Order, the Prepetition Lenders agreed to the Debtors' use of cash collateral and the Debtors' entry into the New DIP Credit Agreement in consideration for the adequate protection set forth in that order, and such adequate protection was for claims that were primed by a senior debtor-in-possession loan.

U.S. Second Interim DIP Motion, Robbins Affidavit, para. 9 and Exhibit "B", Applicant's Motion Record, Volume 1, Tabs 2 and 2(B), pp. 25 and 219

26. Here, the Debtors are proposing the same adequate protection for claims that are not being primed, and the adequate protection contained in the U.S. Second Interim DIP Order to protect the Prepetition Lenders' interests in the prepetition collateral is fair and reasonable as a result.

U.S. Second Interim DIP Motion, Robbins Affidavit, para. 9 and Exhibit "B", Applicant's Motion Record, Volume 1, Tabs 2 and 2(B), pp. 25 and 219 - 220

27. Stay modifications of the kind contemplated by the U.S. Second Interim DIP Order are ordinary and standard features of postpetition debtor-in-possession financing facilities and, in the Debtors' business judgment, are reasonable and fair under the present circumstances.

U.S. Second Interim DIP Motion, Robbins Affidavit, para. 9 and Exhibit "B", Applicant's Motion Record, Volume 1, Tabs 2 and 2(B), pp. 25 and 220

28. The U.S. Second Interim DIP Order is critical to preserving and maintaining the going concern value of the Debtors and facilitating their reorganization efforts, as the Debtors have an urgent and immediate need for cash to continue to operate, and do not currently have sufficient unencumbered funds with which to operate their business on an ongoing basis.

U.S. Second Interim DIP Motion, Robbins Affidavit, para. 9 and Exhibit "B", Applicant's Motion Record, Volume 1, Tabs 2 and 2(B), pp. 25 and 221

29. Recognition of the U.S. Second Interim DIP Order by the Canadian Court is a condition of the New DIP Credit Agreement.

U.S. Second Interim DIP Motion, Robbins Affidavit, para. 9 and Exhibit "B", Applicant's Motion Record, Volume 1, Tabs 2 and 2(B), pp. 25 and 304

30. The Information Officer recommends that the Canadian Court recognize and give full force and effect to the U.S. Second Interim DIP Order.

Second Report, filed, para. 37, p. 13

PART II - THE LAW

Purpose and Interpretation of the CCAA

31. 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

32. 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.

33. 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.

34. 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.

35. 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 "B"

36. 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 "B"

37. 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

38. 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

39. 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

40. 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

41. 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 "B"

Recognition of the U.S. Plan Sponsor Order

42. 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 "B"

43. 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 "B"

44. 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 "B"

Recognition of the U.S. Second Interim DIP Order

45. Prior to approving DIP financing, it is necessary for the Court to consider a number of factors, which include the benefit the Applicants will receive from the relevant DIP facility and the collateral that is charged to secure that DIP facility.

Re Indalex Ltd. (2009), 52 C.B.R. (5th) 61 at para. 6 (Ont. S.C.J.),
Brief of Authorities of the Applicant, Tab 6

46. A court has the inherent jurisdiction to grant priority charges on the debtor company's property to secure obligations that are essential to the restructuring.

United Used Auto & Truck Parts Ltd. (2000), 16 C.B.R. (4th) 141
at para. 31 (B.C.C.A.); leave to appeal to S.C.C. granted (2001),
261 N.R. 196 (S.C.C.) but appeal discontinued on March 21, 2001,
Brief of Authorities of the Applicant, Tab 7

47. In a cross-border case under the CCAA and Chapter 11, the Court held that a where the successful restructuring of Canadian and U.S.-based entities appears to be inextricably intertwined, and where securing alternate financing on a stand-alone basis is impractical, it is preferable for the Court to approve a DIP in order to continue day-to-day operations and to facilitate the company's restructuring

Re Smurfit-Stone Container Inc. (2009), 50 C.B.R. (5th) 71 at para.
18 (Ont. S.C.J.), Brief of Authorities of the Applicant, Tab 8

48. In approving a DIP, it is also appropriate for a Court to consider the benefits of a going concern operation, such as continued employment of a restructuring company's employees and the continued benefits for other third party stakeholders, as opposed to a liquidation.

Re InterTAN Canada Ltd. (2008), 49 C.B.R. (5th) 248 at para. 69
(Ont. S.C.J.), Brief of Authorities of the Applicant, Tab 9

Conclusion

49. 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 Sponsor Order and the U.S. Second Interim DIP Order, which are necessary for the protection of the Debtors' property and the interests of a creditor or creditors and are not contrary to public policy.

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

51. The Information Officer recommends that this Honourable Court recognize and give full force and effect to the U.S. Plan Sponsor Order and the U.S. Second Interim DIP Order.

52. 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 the Court has the jurisdiction to grant that relief.


PART III - ORDER REQUESTED

53. 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 B. Rotsztain



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 Indalex Ltd.* (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J.)
7. *United Used Auto & Truck Parts Ltd.* (2000), 16 C.B.R. (4th) 141 (B.C.C.A.)
8. *Re Smurfit-Stone Container Inc.* (2009), 50 C.B.R. (5th) 71 (Ont. S.C.J.)
9. *Re InterTAN Canada Ltd.* (2008), 49 C.B.R. (5th) 248 (Ont. S.C.J.)

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

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