

2007 BCSECCOM 337

June 11, 2007

Headnote

Mutual Reliance Review System for Exemptive Relief Applications

Securities Act s. 114(2) Issuer Bids - Exemption from Issuer Bid Requirements - An issuer conducting an issuer bid under a modified Dutch auction procedure requires relief from the requirement to disclose in its bid circular that it will take up and pay for shares on a pro rata basis, and the associated disclosure requirement - The issuer is making an issuer bid under a modified Dutch auction; it cannot disclose that it will take up and pay for shares deposited on a pro rata basis; the issuer is disclosing the maximum number of shares it will acquire under the bid, and the minimum and maximum amount it will pay for shares tendered; as a result, the potential for confusion is minimal

An issuer wants relief from the restriction to extend its bid if all terms and conditions of the bid have been complied with except those waived by the issuer, unless the issuer first takes up all securities deposited under the bid and not withdrawn - The issuer is subject to the rules of the issuer bid regimes in Canada and the U.S.; the operation of these rules would effectively prevent the Filer from extending the offer where all of the conditions have been satisfied or waived; but for the jurisdiction of incorporation of the Filer, it would be entitled to conduct the offer in accordance with the 1934 Act rather than the Canadian requirements by way of reliance on the exemption from the provisions of the issuer bid requirements in Canada provided by Part 12 of National Instrument 71-101 *The Multijurisdictional Disclosure System*

Securities Rules s. 162(3) - Exemption from the Valuation Requirements - An issuer wants relief from the requirement to obtain a formal valuation in connection with an issuer bid for its outstanding securities - A liquid market for the issuer's securities exists prior to the bid; after the bid, there will be a market for the issuer's securities that is not materially less liquid than before the bid; the issuer can rely on exemptions from the requirement to obtain a valuation and disclose prior valuations in OSC Rule 61-501 or Québec Policy Q-27

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 105(g), (l), 114(2)

Securities Rules, B.C. Reg. 194/97, ss. 162(2) and 162(3)

Form 62-903F, Item 2 & Item 9

In the Matter of
the Securities Legislation of

2007 BCSECCOM 337

British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, Nova
Scotia, Newfoundland and Labrador and New Brunswick
(the Jurisdictions)

and

In the Matter of
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of
TLC Vision Corporation
(the Filer)

MRRS Decision Document

Background

The local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the Legislation) that, in connection with the proposed purchase by the Filer of a portion of its outstanding common shares (Shares) pursuant to an issuer bid (the Offer), the Filer be exempt from the requirements in the Legislation:

- (a) to take up and pay for securities proportionately according to the number of securities deposited by each securityholder;
- (b) to provide disclosure in the issuer bid circular (the Circular) of such proportionate take-up and payment;
- (c) that the Offer not be extended by the Filer, where all the terms and conditions of the Offer have been complied with except those waived by the Filer, unless the Filer first takes up all Shares deposited thereunder and not withdrawn (the Take up Requirement); and
- (d) except in Ontario and Quebec to obtain a valuation of the Shares and provide disclosure in the Circular of such valuation, or a summary thereof (the Valuation Requirement) (collectively the Requested Relief).

Under the Mutual Reliance Review System for Exemptive Relief Applications

2007 BCSECCOM 337

- (a) the Nova Scotia Securities Commission is the principal regulator for this application; and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

Interpretation

Defined terms contained in National Instrument 14-101 Definitions have the same meaning in this decision unless they are defined in this decision.

1934 Act means the U.S. Securities Exchange Act of 1934.

Nasdaq means the Nasdaq Global Market.

Price Range means US\$5.75 to US\$6.25 per Share.

Shareholders means, collectively, holders of Shares.

TSX means the Toronto Stock Exchange.

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer is a reporting issuer in each of the Jurisdictions. It is not in default of any requirement of the Legislation and is not on the list of defaulting reporting issuers maintained pursuant to such Legislation, where applicable.
2. The Filer's head and United States corporate office is located at 16305 Swingley Ridge Road, Suite 300, Chesterfield, Missouri. The Filer's International corporate office is located at 5280 Solar Drive, Suite 300, Mississauga, Ontario.
3. The Filer was continued under the *Business Corporations Act* (New Brunswick) by articles of continuance dated May 13, 2002.
4. The authorized capital of the Filer consists of an unlimited number of Shares, of which approximately 69.1 million were issued and outstanding as at April 9, 2007.
5. The Shares are listed and posted for trading on Nasdaq and the TSX under the symbols "TLCV" and "TLC" respectively.

2007 BCSECCOM 337

6. To the best of the Filer's knowledge, no person or company holds more than 10% of the Shares, other than Glenhill Advisors, LLC which, based on its filings with the U.S. Securities and Exchange Commission as of April 4, 2007, owned approximately 13.9% of the outstanding Shares. Glenhill Advisors, LLC has advised the Filer that it is still considering whether to tender Shares to the Offer.
7. On April 9, 2007, the closing price of the Shares on the Nasdaq was US\$5.39 and on such date the Shares had an aggregate market value of approximately US\$372 million, based on such closing price.
8. The Offer is subject to section 13(e) of the 1934 Act and is not exempt from the 1934 Act.
9. More than 50% of the Shares are beneficially owned by persons or companies in the United States. A majority of the Filer's senior officers and directors are citizens or residents of the United States, more than 50% of the Filer's assets, on a consolidated basis, are located in the United States and the Filer's business is administered principally in the United States.
10. The Filer intends to conduct the Offer pursuant to a modified Dutch auction procedure (the Dutch Auction), as follows:
 - (a) the maximum number of Shares that the Filer will purchase under the Offer is 20 million Shares;
 - (b) the range of prices within which the Filer is prepared to purchase such Shares is the Price Range;
 - (c) each Shareholder wishing to tender to the Offer will have the right either to:
 - (i) specify the lowest price within the Price Range at which such Shareholder is willing to sell its tendered Shares (an Auction Tender), or
 - (ii) not specify a price but elect to be deemed to have tendered the Shares purchased at the Purchase Price (determined according to subparagraph 10(g) below) (a Purchase Price Tender);
 - (d) all Shares tendered by Shareholders who fail to specify any tender price for the tendered Shares and fail to indicate that they have tendered their

2007 BCSECCOM 337

Shares under a Purchase Price Tender will be deemed to have been tendered under a Purchase Price Tender;

- (e) tendering Shareholders who make either an Auction Tender or a Purchase Price Tender but fail to specify the number of Shares that they wish to tender will be considered to have tendered all Shares held by the Shareholder;
 - (f) the aggregate dollar amount the Filer will expend pursuant to the Offer will remain variable until the Purchase Price is determined and the prorating is calculated in accordance with the procedures outlined on subparagraph 10(j) below;
 - (g) the price per Share (the Purchase Price) for the Shares tendered to the Offer and not withdrawn will be the lowest price that will enable the Filer to purchase 20 million Shares, and it will be determined based upon the number of Shares tendered and not withdrawn pursuant to an Auction Tender at each price within the Price Range and tendered and not withdrawn pursuant to a Purchase Price Tender, with each Purchase Price Tender being considered a tender at the lowest price within the Price Range for the purpose of calculating the Purchase Price;
 - (h) all Shares tendered at prices above the Purchase Price will be returned to the appropriate Shareholders;
 - (i) all Shares tendered at or below the Purchase Price will be taken up and paid for at the Purchase Price; and
 - (j) if the number of Shares validly tendered to the Offer and not withdrawn exceeds 20 million Shares, the Filer will purchase the tendered Shares on a pro rata basis.
11. If the Shares validly tendered to the Offer and not withdrawn is below 20 million Shares by the initial expiration date but all the terms and conditions thereof have been complied with except those waived by the Filer, the Filer may extend the Offer for at least 10 days, but the Legislation would require the Filer to first take up and pay for all Shares deposited and not withdrawn. Pursuant to the 1934 Act, if the Offer was extended in such circumstances, the Filer would be prohibited from taking up Shares deposited and not withdrawn until the Offer, as extended, expires.
12. Prior to the expiry of the Offer, all information regarding the prices at which such Shares are tendered will be kept confidential by the depositary under the

2007 BCSECCOM 337

Offer, and the depositary will be directed by the Filer to maintain such confidentiality until the expiry of the Offer.

13. Since the Offer is for less than all the Shares, if the number of Shares tendered to the Offer exceeds 20 million Shares, the Legislation would require the Filer to:

- (a) take up and pay for deposited Shares proportionately, according to the number of Shares deposited by each Shareholder; and
- (b) disclose in the Circular that the Filer would, if Shares tendered to the Offer and not withdrawn exceeded 20 million Shares, take up such Shares proportionately according to the number of Shares tendered by each Shareholder.

14. There is a “liquid market” in the Shares, as defined in Ontario Securities Commission Rule 61-501 (“OSC Rule 61-501”), because:

- (a) there is a published market for the Shares, namely the Nasdaq and the TSX;
- (b) during the 12-month period before April 10, 2007:
 - (i) the number of issued and outstanding Shares was at all times at least 5,000,000, excluding Shares beneficially owned, directly or indirectly, or over which control or direction was exercised, by related parties and Shares that were not freely tradeable;
 - (ii) the aggregate trading volume of the Shares on the Nasdaq, being the published market on which the Shares are principally traded, was at least 1,000,000 Shares;
 - (iii) there were at least 1,000 trades in Shares on the Nasdaq; and
 - (iv) the aggregate trading value based on the price of the trades referred to in clause (iii) was at least \$15,000,000.

15. The market value of the Shares on the Nasdaq, as determined in accordance with applicable rules, was at least \$75,000,000 for March 2007.

16. There are over 69 million Shares issued and outstanding, more than 70 million Shares traded on Nasdaq during the twelve months ended April 5, 2007 and in

2007 BCSECCOM 337

the six month period ended April 9, 2007, there were over 100,000 individual trades on Nasdaq.

17. The Filer has determined it is reasonable to conclude that, following completion of the Offer, there will be a market for the beneficial owners of Shares who do not tender to the Offer that is not materially less liquid than the market that exists at the time the Offer is made and the Filer intends to rely upon the exemptions from the Valuation Requirement in Ontario Securities Commission Rule 61-501 and Quebec Local Policy Statement Q-27 (the Presumption of Liquid Market Exemptions).
18. The Circular will:
 - (a) disclose the mechanics for the take-up of and payment for, or the return of, Shares as described in paragraph 10 above;
 - (b) explain that, by tendering Shares at the lowest price in the Price Range or under a Purchase Price Tender, a Shareholder can reasonably expect that the Shares so tendered will be purchased at the Purchase Price, subject to proration as described in paragraph 10 above;
 - (c) disclose the fact that the Filer has applied for an exemption from the Take Up Requirement;
 - (d) disclose the facts supporting the Filer's reliance on the Presumption of Liquid Market Exemptions; and
 - (e) except to the extent exemptive relief is granted by this decision, contain the disclosure prescribed by the Legislation for issuer bids.

Decision

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the Decision has been met.

The decision of the Decision Makers under the Legislation is that the Requested Relief, other than the relief from the Valuation Requirement, is granted provided that:

- (a) Shares deposited under the Offer and not withdrawn are taken up and paid for, or returned to Shareholders, in the manner described in paragraph 10 above; and

2007 BCSECCOM 337

- (b) the Filer complies with the requirements of sections 13(e) and 14(e) of the 1934 Act and Regulations 13E and 14E under the 1934 Act with respect to the conduct of the Offer.

The decision of the Decision Makers under the Legislation, other than in Ontario and Québec, is that the relief from the Valuation Requirement is granted provided that the Filer can rely on the Presumption of Liquid Market Exemptions.

Paul Radford
Nova Scotia Securities Commission

H. Leslie O'Brien
Nova Scotia Securities Commission