Court File No. 19-V-

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **AGMEDICA BIOSCIENCE INC. 2472602 ONTARIO INC., 2642466 ONTARIO INC., 8895309 CANADA INC., WELLWORTH HEALTH CORP., 8050678 CANADA INC., 8326851 CANADA INC., TAVIVAT NATURALS INC., WORLDWIDE BEVERAGE INNOVATIONS INC., and UNIQUE BEVERAGES (USA) INC., and ESEELA INC.**
(each an **"Applicant"** and collectively, the **"Applicants"**)

Applicants

FACTUM OF THE APPLICANTS

December 1, 2019

Thornton Grout Finnigan LLP
100 Wellington Street West
Suite 3200
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

Rebecca L. Kennedy (LSO# 61146S)
Email: rkennedy@tgf.ca

Owen Gaffney (LSO# 75017B)
Email: ogaffney@tgf.ca

Adam Driedger (LSO# 77296F)
Email: adriedger@tgf.ca

Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for the Applicants

Court File No.:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **AGMEDICA BIOSCIENCE INC. 2472602 ONTARIO INC., 2642466 ONTARIO INC., 8895309 CANADA INC., WELLWORTH HEALTH CORP., 8050678 CANADA INC., 8326851 CANADA INC., TAVIVAT NATURALS INC., WORLD WIDE BEVERAGE INNOVATIONS INC., and UNIQUE BEVERAGES (USA) INC., and ESEELA INC.**
(each, an "**Applicant**" and collectively, the "**Applicants**")

Applicants

FACTUM OF THE APPLICANTS

PART I - OVERVIEW

1. AgMedica Bioscience Inc. ("**AgMedica**"), the primary Applicant, is a licenced producer of cannabis in accordance with the *Cannabis Act* (the "**Act**") and the *Cannabis Regulations* (the "**Regulations**") located in Chatham-Kent, Ontario. AgMedica is currently in a liquidity crisis. The Applicants require immediate interim financing and the protections afforded under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**")[1] in order to maintain the *status quo* and obtain the breathing room required to pursue and implement their restructuring strategy.

---

[1] R.S.C. 1985, c. C-36 (the "**CCAA**").

2. With the benefit of the protection afforded by the CCAA, AgMedica will be able to maintain its value, preserve jobs for its employees, and generally stabilize its business operations for the benefit of all of the Applicants' stakeholders.

3. As such, the Applicants seek creditor protection and other relief pursuant to an order (the "**Initial Order**") under the CCAA, among other things:

   (a) declaring that the Applicants are parties to which the CCAA applies;

   (b) appointing Ernst & Young Inc. (the "**Proposed Monitor**") as Monitor in these CCAA proceedings to monitor the Applicants' business and affairs;

   (c) staying all proceedings taken or that may be taken in respect of the Applicants, their directors and officers, or the Proposed Monitor until December 12, 2019, subject to further Order of the Court;

   (d) approving the Applicants' ability to borrow up to the maximum principal amount of $1,000,000 under a debtor-in-possession credit facility (the "**DIP Facility**") to finance their working capital requirements and other general corporate purposes, post-filing expenses and costs; and

   (e) granting the Administration Charge, DIP Charge, and Directors' Charge (each term as defined below and collectively, the "**Super-Priority Charges**").

PART II - FACTS

4. Capitalized terms not otherwise defined herein are defined in the affidavit of Trevor Henry sworn December 1, 2019 (the "**Henry Affidavit**"). The facts of this Application are more fully described in the Henry Affidavit.

5. Unless otherwise stated herein, monetary amounts are stated in Canadian dollars.

The Applicants' Business, Operations, and Corporate Structure

6. AgMedica is a private company that was federally incorporated on November 22, 2013, under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended, (the "**CBCA**") and maintains its registered head office at Suite 200, 111 Heritage Road, Chatham-Kent, Ontario (the "**Head Office**").[2]

7. The other Applicants are either wholly-owned subsidiaries of AgMedica or entities whose voting shares AgMedica controls and through which AgMedica, among other things, beneficially owns various real and intellectual property (each, a "**Subsidiary**" and collectively, the "**Subsidiaries**").[3]

8. AgMedica is a licensed producer of cannabis in accordance with the Act and the Regulations. The principal activities of AgMedica are the production, distribution, and sale of dried cannabis flower, pre-rolled cannabis joints, cannabis softgel capsules, and cannabis oil (collectively, the "**Cannabis Products**").[4]

9. AgMedica obtained a cannabis license (the "**License**") from Health Canada in accordance with the Act and Regulations on June 15, 2018, in respect of Zone 1 of its indoor production and distribution facility located at 566 Riverview Drive, Chatham-Kent, Ontario (the "**Riverview Facility**"). The License was amended on August 3, 2018, to permit AgMedica

---

[2] Affidavit of Trevor Henry, sworn December 1, 2019 [Henry Affidavit] at para. 7.
[3] Henry Affidavit at para. 8.
[4] Henry Affidavit at para. 11.

to produce, distribute, and sell cannabis oil products. In addition, on August 30, 2019, the License was extended to an additional twelve (12) growing rooms within Zone 2 of the Riverview Facility (the "**Additional Growing Rooms**").[5]

10. AgMedica is not yet producing Cannabis Products in the Additional Growing Rooms. However, once the Additional Growing Rooms become fully operational, AgMedica's production capacity will increase to approximately 24,000 kilograms of Cannabis Products per year, which represents approximately $120,000,000 in forecasted annual revenue.[6]

11. The License is critically important to the Applicants and their stakeholders. Without the License, AgMedica could not carry on its business.[7]

12. At present, approximately 99% of the Cannabis Products sold by AgMedica are for domestic recreational consumption, with the remaining 1% of its Cannabis Products sold for domestic and international medicinal use.[8]

13. AgMedica currently employs approximately 160 full-time employees. Most of AgMedica's employees are located in Chatham-Kent, Ontario. As such, AgMedica is a significant employer in the Chatham-Kent region. None of AgMedica's employees are unionized or otherwise party to a collective agreement in connection with their employment with AgMedica.[9]

---

[5] Henry Affidavit at paras. 14, 16.
[6] Henry Affidavit at para. 16.
[7] Henry Affidavit at para. 21.
[8] Henry Affidavit at para. 22.
[9] Henry Affidavit at para. 25.

14. AgMedica is party to numerous licensing and joint venture agreements with various domestic and international partners in respect of the production, distribution, and sale of Cannabis Products. These arrangements, which are integral to AgMedica's continued operations, are more fully described in the Henry Affidavit.[10]

The Applicants' Secured Creditors

15. The majority of the Applicants' securable assets are various real property assets located in Ontario (the "**Real Property**"). Stone Quest Capital Corp., Kathleen Glynn Philipp, and SF V Bridge III, LP, the Applicants' three secured creditors (each, a "**Secured Creditor**" and collectively, the "**Secured Creditors**"), are primarily secured as against the Real Property.[11]

16. As at November 29, 2019, the Secured Creditors have collectively registered mortgages against the Real Property in the amount of $27,200,000.[12]

The Applicants' Liquidity Crisis

17. While AgMedica has significant business operations, assets, and potential for future growth, a combination of external factors has created issues with respect to AgMedica's liquidity.

18. On October 17, 2018, Canada became the first major economy to legalize and regulate the recreational use of cannabis (the "**Legalization**"). Following the Legalization, AgMedica,

---

[10] Henry Affidavit at paras. 27-49.
[11] Henry Affidavit at para. 70.
[12] *Ibid*.

like many other Canadian licensed producers, was in the process of preparing for an initial public offering ("**IPO**") in order to raise significant amounts of capital from public investors.[13]

19. AgMedica and its proposed underwriters planned to complete the IPO in the second quarter of 2019. However, the proposed underwriters ultimately did not proceed with the IPO on the basis that the market did not support such a transaction due to insufficient public investment in licensed producers of cannabis.[14]

20. As a result, AgMedica was forced to consider alternative long-term financing options.[15]

21. In September 2019, AgMedica appeared to resolve its liquidity issues by executing an exclusive term sheet with respect to a $60,000,000 debt financing package; however, in late October 2019, the prospective lender advised that it was no longer willing to lend into the cannabis space due to prevailing market conditions.[16]

22. Since early November 2019, AgMedica has continued its efforts to generate sufficient cash flow to fund its operations and deleverage the business; however, it has become clear that such financing will not materialize prior to the Applicants exhausting their liquidity.[17]

---

[13] Henry Affidavit at para. 96.
[14] Henry Affidavit at para. 98.
[15] Henry Affidavit at para. 99.
[16] Henry Affidavit at para. 100.
[17] Henry Affidavit at para. 101.

23. As the Cash Flow Projection indicates, the Applicants will run out of cash by the week beginning December 2, 2019. The next payroll of AgMedica is payable on December 4, 2019. AgMedica requires emergency financing to remain in business.[18]

DIP Financing

24. In light of the foregoing, AgMedica sought interim debtor-in-possession financing ("**DIP Financing**") from various lenders. Ultimately, AgMedica was able to secure DIP Financing from Hillmount Capital Inc. (the "**DIP Lender**") pursuant to a Term Sheet executed by the parties on November 29, 2019 (the "**DIP Facility Agreement**"), wherein the DIP Lender agreed to loan a maximum principal amount of $7,500,000 to AgMedica (the "**DIP Facility**"), subject to the terms and conditions prescribed therein.[19]

25. The DIP Facility is required in order for AgMedica to: (i) maintain operating cash; (ii) fund the costs of its operations and these proceedings; and (iii) pursue and implement its restructuring strategy.[20]

26. The projected 13 week cash flow forecast (the "**Cash Flow Forecast**") prepared by the Applicants with the assistance of the Proposed Monitor demonstrates that if the relief requested is granted, including approval of the DIP Facility Agreement and the DIP Charge, the Applicants will have sufficient liquidity to meet their obligations during the initial 13 week period of the CCAA filing.[21]

---

[18] Henry Affidavit at para. 103.
[19] Henry Affidavit at para. 104.
[20] Henry Affidavit at para. 105.
[21] Henry Affidavit at paras. 93-94.

Objective of CCAA Filing

27. As described above, AgMedica is currently in a liquidity crisis. AgMedica immediately requires DIP Financing and the protections afforded under the CCAA in order to maintain the *status quo* and obtain the breathing room required to pursue and implement its restructuring strategy.[22]

28. As part of its restructuring strategy, AgMedica intends to:

(a) restructure its balance sheet and deleverage the business;

(b) restructure AgMedica's operations by focusing efforts on expanding production capacity and reducing input costs with respect to the production of Cannabis Products at the Riverview Facility;

(c) investigate other cost savings measures in order to increase AgMedica's efficiency and profitability;

(d) sell the Real Property, with the exception of the Riverview Facility, in order to generate liquidity and deleverage the business; and

(e) pursue all investment alternatives with the support of the proposed Monitor in conducting a court supervised sales process.[23]

29. With the benefit of the protection afforded by the CCAA, AgMedica will be able to maintain its value, preserve jobs for its employees, and generally stabilize its business operations for the benefit of the Applicants' stakeholders.[24]

---

[22] Henry Affidavit at para. 106.
[23] Henry Affidavit at para. 107.
[24] Henry Affidavit at para. 108.

PART III - THE LAW AND ANALYSIS

30. The issues on this Application are as follows:

(a) whether this Court should grant CCAA protection to the Applicants;

(b) whether this Court should make an Order staying all proceedings in respect of the Applicants;

(c) whether this Court should approve the Proposed Monitor as Monitor of the Applicants in these CCAA proceedings;

(d) whether this Court should approve the Administration Charge;

(e) whether this Court should approve the DIP Facility Agreement and the DIP Charge;

(f) whether this Court should approve the Directors' Charge; and

(g) whether the relief sought on this Application is reasonably necessary.

A. This Court should grant protection to the Applicants under the CCAA.

31. The CCAA applies to a "debtor company" whose liabilities exceed $5 million. A "debtor company" is defined, *inter alia¸* as a "company" that is "insolvent" or that has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.[25] A company incorporated by or under an Act of Parliament falls under the definition of "company" in the CCAA.[26]

32. The insolvency of a debtor is assessed at the time of the filing of the CCAA application. While the CCAA does not define "insolvent", the definition of "insolvent person" under

---

[25] CCAA, s. 2(1), and s. 3(1); R.S.C. 1985, c. B-3, s. 2 ("**BIA**").
[26] CCAA, s. 2(1).

the BIA is commonly referenced by the Court in assessing whether an applicant is a debtor company in the context of the CCAA. [27] The BIA defines "insolvent person" as follows:[28]

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (i) who is for any reason unable to meet his obligations as they generally become due,
>
> (ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

33. The tests for "insolvent person" under the BIA are disjunctive. A company satisfying either (i), (ii) or (iii) of the test is considered insolvent for the purposes of the CCAA.[29]

34. In addition to the foregoing tests, in *Stelco*, Justice Farley held that a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring.[30] In other words, a corporation is insolvent if there is a reasonably foreseeable expectation at the time of filing that there is a looming liquidity crisis that will result in the debtor company not being able to pay its debts as they become due without the benefit of a stay of proceedings. [31]

---

[27] *Stelco Inc. (Re)*, 2004 CarswellOnt 1211 (S.C. [Commercial List]) at paras. 21-22 ("***Stelco***"), Applicants' Book of Authorities ("**Applicants' BOA**") at Tab 1.
[28] BIA, s. 2.
[29] *Stelco, supra* note 27 at para. 28, Applicants' BOA at Tab 1.
[30] *Stelco*, *supra* note 27 at para. 26, Applicants' BOA at Tab 1.
[31] *Stelco*, *supra* note 27 at para. 26, Applicants' BOA at Tab 1. The *Stelco* test has been consistently applied in subsequent CCAA proceedings, including recently by this Court in *Target Canada Co.*, 2015 ONSC 303, at paras. 26-27, Applicants' BOA at Tab 2.

35. The Applicant entities are all corporations incorporated under the laws of Ontario or Canada, with the sole exception of Unique Beverage (USA) Inc., a dormant corporation incorporated under U.S law, which has assets located in Canada. Each Applicant is a "company" within the meaning of the CCAA. The Applicants' liabilities together exceed $5 million.

36. The Applicants are in a liquidity crisis and are unable to meet their obligations as they generally become due. Accordingly, the Applicants are insolvent and are "debtor companies" to which the CCAA applies.

B. It is appropriate to grant the requested stay of proceedings.

37. Pursuant to section 11.02 of the CCAA, a Court may make an order staying all proceedings in respect of a debtor company for a period of ten (10) days, provided that the Court is satisfied that circumstances exist that make the order appropriate.[32] As a result of the new amendments to the CCAA in section 11.001 (as described below), the relief granted pursuant to section 11.02 must be only what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.[33]

38. Exercising discretionary authority to grant a stay pursuant to the CCAA must be informed by the purpose behind the CCAA, which should be construed broadly.[34] The purpose of the CCAA is, among other things, to maintain the *status quo* for the debtor company for a

---

[32] CCAA, s. 11.02.
[33] CCAA, s. 11.001.
[34] *Re Stelco Inc.*, 2005 CarswellOnt 1188 (C.A.) at para. 44, Applicants' BOA at Tab 3; *Nortel Networks Corporation (Re)*, 2009 CarswellOnt 4467 (S.C. [Commercial List]) at paras. 31 and 47, Applicants' BOA at Tab 4.

period while it consults with its stakeholders with a view to continuing operations for the benefit of both the debtor company and its creditors.[35]

39. As described, the Applicants are experiencing a liquidity crisis and are unable to meet their obligations generally as they become due. The Applicants intend to continue operations and consult with their stakeholders in good faith if they are granted protection. Therefore, it is appropriate for this Court to grant the requested stay of proceedings in favour of the Applicants.

C. The Proposed Monitor should be appointed as Monitor as requested.

40. Upon the granting of an Initial Order, section 11.7 of the CCAA requires that a trustee be appointed to monitor the debtor company's business and financial affairs. The Proposed Monitor has consented to act as monitor in these CCAA proceedings and is a trustee within the meaning of subsection 2(1) of the BIA.[36] The Proposed Monitor is not subject to any of the restrictions as to who may be appointed as monitor set out in section 11.7(2) of the CCAA.

D. The Administration Charge should be Approved

41. The Applicants request that this Court grant a super-priority Administration Charge on the Property (as defined in the proposed form of the Initial Order) in favour of the Applicants' counsel, the Proposed Monitor, and the Proposed Monitor's independent legal counsel in

---

[35] *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 ("***Century Services***") at para. 60, Applicants' BOA at Tab 5.
[36] CCAA, s. 11.7.

the amount of $250,000. The Applicants will seek to amend the Administration Charge to $500,000 under the proposed Amended and Restated Initial Order. Section 11.52 of the CCAA provides the Court statutory jurisdiction to grant the Administration Charge:

> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> 11.52 (2) Priority – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.[37]

42. In *Canwest Publishing*, Justice Pepall considered section 11.52 of the CCAA and identified the following non-exhaustive list of factors the Court may consider when granting an administration charge:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.[38]

---

[37] CCAA, s.11.52.

[38] *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 at para. 54, Applicants' BOA at Tab 6.

43. The Administration Charge is warranted, necessary, and appropriate in the circumstances, given that:[39]

(a) the proposed restructuring will require the extensive involvement of the professional advisors subject to the Administration Charge;

(b) the professionals subject to the Administration Charge have contributed, and will continue to contribute, to the restructuring of the Applicants;

(c) there is no unwarranted duplication of roles so the professional fees associated with these proceedings will be minimized;

(d) the Administration Charge will rank in priority to the DIP Charge, the Directors' Charge, and any existing security granted by the Applicants in favour of the Secured Creditors, all of whom were provided with notice that the Applicants were commencing this Application for creditor protection pursuant to the CCAA; and

(e) the Proposed Monitor believes that the proposed quantum of the Administration Charge is reasonable.

E. The DIP Facility Agreement and DIP Charge should be Approved

i. *Overview of DIP Facility Agreement*

44. As the Cash Flow Forecast indicates, AgMedica will run out of cash by the week beginning December 2, 2019. The next payroll of AgMedica is payable on December 4, 2019. AgMedica requires emergency debtor-in-possession financing to remain in business and implement its restructuring strategy for the benefit of all of the Applicants' stakeholders.

---

[39] Henry Affidavit at paras. 111-113.

45. As discussed above, AgMedica was able to secure the DIP Facility from the DIP Lender pursuant to the DIP Facility Agreement, wherein the DIP Lender agreed to loan a maximum principal amount of $7,500,000 to AgMedica, subject to the terms and conditions prescribed therein.

46. The Applicants' access to the DIP Facility is conditional upon the provision of an order of this Court, among other things, approving the DIP Facility Agreement and granting a super-priority charge on the Property in the amount of $1,000,000 subject to the terms of the DIP Facility Agreement (the "**DIP Charge**"). The Applicants will seek to amend the DIP Charge to $7,500,000 under the proposed Amended and Restated Initial Order.

47. The DIP Charge is proposed to rank behind the Administration Charge, but ahead of the Directors' Charge and any existing security granted by the Applicants in favour of the Secured Creditors.

ii. *Jurisdiction to Approve the DIP Facility Agreement and DIP Charge*

48. Section 11.2 of the CCAA provides the Court with the express statutory authority to approve the DIP Facility Agreement and the DIP Charge:

> 11.2(1) Interim Financing — On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.[40]

---

[40] CCAA, s. 11.2(1).

49. Section 11.2(2) further provides the Court with the express statutory authority to order that the DIP Charge rank in priority over the claim of any secured creditor of the company:

> 11.2(2) Priority — Secured Creditors — The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.[41]

50. Section 11.2(4) sets out the following factors to be considered by the Court in deciding whether to grant a DIP charge:

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report.[42]

51. In addition, on November 1, 2019, subsection 11.2(5) was added to the CCAA regarding DIP financing sought on an initial application:

> When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made

---

[41] CCAA, s. 11.2(2).
[42] CCAA, section 11.2(4).

> under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.[43]

52. This amendment is consistent with the existing jurisprudence on DIP financing. Courts have consistently held that DIP financing should be granted in order to "keep the lights on", and be limited to terms that are "reasonably necessary" for the continued operation of the debtor company.[44] For example, a recent decision in British Columbia considering s. 11.2(5) approved DIP financing on the basis that it was "necessary to permit the [applicant] to maintain the value of the enterprise while they pursue a restructuring."[45]

iii. *The Criteria in Subsections 11.2(1), 11.2(4), and 11.2(5) are Satisfied*

53. Based on following factors, the DIP Facility and the DIP Charge should be approved:

    (a) the notice requirements under 11.2(1) have been met;

    (b) the Applicants, in consultation with the Proposed Monitor, have established a business plan to ensure that costs can be reduced to the greatest extent reasonably possible during these CCAA proceedings;

    (c) given its current financial circumstances, the Applicants cannot obtain alternative financing outside of these CCAA proceedings prior to exhausting their liquidity;

    (d) the Applicants' liquidity as of the week beginning December 2, 2019, is dependent on the DIP Facility;

---

[43] CCAA, s. 11.2(5).
[44] *Royal Oak Mines*, 1999 CarswellOnt 625 (S.C. [Commercial List]) [*Royal Oak*] at paras 21-24, Applicants' BOA at Tab 7.
[45] *Miniso International Hong Kong Ltd v. Migu Investments Inc.*, 2019 BCSC 1234, Applicants' BOA at Tab 8.

(e) the DIP Facility is necessary in order for AgMedica to implement its restructuring plan, which will preserve the value of AgMedica's business for the benefit of all of the Applicants' stakeholders;

(f) without the DIP Facility, AgMedica will not be able to remain in business and make payroll, jeopardizing the jobs of approximately 160 full-time employees in the Chatham-Kent region;

(g) the quantum of the DIP Facility is reasonable and appropriate having regard to the Cash Flow Forecast;

(h) the Proposed Monitor is of the view that the DIP Facility and DIP Charge are appropriate and limited to what is reasonably necessary in the circumstances.

F. The Directors' Charge should be Approved

54. To ensure the ongoing stability of the Applicants' business during the CCAA proceedings, the Applicants require the continued participation of the directors and officers who manage their business and commercial activities. The directors and officers of the Applicants have considerable institutional knowledge and valuable experience.[46]

55. The Applicants request this Court grant a super-priority charge in favour of the Applicants' directors and officers in the amount of $500,000 (the "**Directors' Charge**"). The Applicants will seek to increase the Directors' Charge at the comeback hearing to $900,000. The Directors' Charge protects the directors and officers against obligations and liabilities they may incur as directors and officers of the Applicants after the

---

[46] Henry Affidavit at para. 117.

commencement of the CCAA proceedings, except to the extent that the obligation or liability is incurred as a result of the director's or officer's gross negligence or wilful misconduct. The Directors' Charge will only be available to the extent liability is not covered by the Applicants' D&O Insurance (as defined in the Henry Affidavit).[47]

56. Section 11.51 of the CCAA provides the Court with the express statutory jurisdiction to grant the Directors' Charge in an amount the Court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it.[48]

57. In approving a similar charge in *Canwest*, Justice Pepall applied section 11.51 of the CCAA and noted the Court must be satisfied with the amount of the charge and that it is limited to obligations the directors and officers may incur after the commencement of the proceedings, so long as adequate insurance cannot be obtained at a reasonable cost.[49]

58. In *Jaguar Mining Inc., Re,* R.S.J. Morawetz (as he then was) stated that, in order to grant a Directors' Charge, the Court must be satisfied of the following factors:[50]

(a) notice has been given to the secured creditors likely to be affected by the charge;

(b) the amount is appropriate;

(c) the applicant could not obtain adequate indemnification insurance for the director at a reasonable cost; and

---

[47] Henry Affidavit at para. 119.
[48] CCAA, section 11.51.
[49] *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 at paras. 46 and 48 [*Canwest*] Applicants' BOA at Tab 9.
[50] *Jaguar Mining Inc., Re*, 2014 ONSC 494 at para. 45, Applicants' BOA at Tab 10.

(d) the charge does not apply in respect of any obligation incurred by a director as a result of the director’s gross negligence or wilful misconduct.

59. With respect to the Applicants, the Directors’ Charge is reasonable in the circumstances because: (i) the Applicants have given notice to the secured creditors likely to be affected by the Directors’ Charge; (ii) the Proposed Monitor is of the view that the Directors’ Charge is reasonable and appropriate in the circumstances; (iii) the Applicants cannot be certain whether the insurance providers will deny coverage for various reasons, and the Applicants may not have sufficient funds available to satisfy any contractual indemnity should its directors and officers need to call upon such indemnities; (iv) the Applicants will require the active and committed involvement of the directors and officers, whose continued participation is necessary for an effective restructuring; and (iv) the Directors’ Charge does not secure obligations incurred by a director as a result of the directors’ gross negligence or wilful misconduct.

G. The Relief Sought is Reasonably Necessary

60. On November 1, 2019, the CCAA was amended to include section 11.001:[51]

> An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

61. The stated purpose of this amendment is to “[enhance] retirement security by making the insolvency process fairer, more transparent and more accessible” by, among other things,

---

[51] CCAA, s. 11.001.

limiting “the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players”. [52]

62. This amendment is consistent with existing jurisprudence, which states that the terms of Initial Orders should be limited to terms that are “reasonably necessary for the continued operation of the debtor company during a brief but realistic period of time.”[53]

63. The Applicants submit that the relief sought on this Application is in accordance with the limitation in section 11.001 and is consistent with the spirit of the CCAA as remedial legislation intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy.[54]

64. The Applicants have limited the relief sought on this initial application to that which is reasonably necessary in the circumstances for the continued operations of their business. Accordingly, the Applicants submit that the relief sought on this initial application is in accordance with section 11.001 and should be granted.

[52] Canada, Innovation, Science and Economic Development Canada, *Insolvency reforms to come into force*, News Release (Ottawa: Media Relations) 2019 at 2; Canada, Marketplace Framework Policy Branch, *Order Fixing November 1, 2019 as the Day on Which Certain Provisions of the two Acts Come into Force: SI/2019-90*, Canada Gazette, Part II, Volume 153, Number 18.
[53] *Royal Oak*, *supra* note 44 at paras 21-24, Applicants’ BOA at Tab 7.
[54] *Re Lehndorff General Partners Ltd*, (1993), 17 C.B.R. (3d) 24 at para 5 (S.C. [Commercial List]), Applicants' BOA at Tab 11; *Cinram International Inc, Re,* 2012 ONSC 3767 at para 58 [Cinram], Applicants’ BOA at Tab 12.

PART IV - RELIEF REQUESTED

65. For all of the foregoing reasons, the Applicants request an Order substantially in the form of the draft Initial Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this day of December, 2019.

THORNTON GROUT FINNIGAN LLP
Barristers and Solicitors
100 Wellington Street West
Suite 3200
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

Rebecca L. Kennedy (LSO# 61146S)
Email: rkennedy@tgf.ca

Owen Gaffney (LSO# 75017B)
Email: ogaffney@tgf.ca

Adam Driedger (LSO# 77296F)
Email: adriedger@tgf.ca

Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for the Applicants

SCHEDULE "A" – LIST OF AUTHORITIES

Cases Cited

1. *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184.
2. *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222.
3. *Cinram International Inc., Re*, 2012 ONSC 3767.
4. *Jaguar Mining Inc., Re*, 2014 ONSC 494.
5. *Miniso International Hong Kong Ltd v. Migu Investments Inc.*, 2019 BCSC 1234.
6. *Nortel Networks Corporation (Re)*, 2009 CarswellOnt 4467 (S.C. [Commercial List]).
7. *Re Lehndorff General Partners Ltd*, (1993), 17 C.B.R. (3d) 24 (Ont. S.C. [Commercial List]).
8. *Re Stelco Inc.*, 2005 CarswellOnt 1188 (C.A.).
9. *Royal Oak Mines*, 1999 CarswellOnt 625 (S.C. [Commercial List]).
10. *Stelco Inc. (Re)*, 2004 CarswellOnt 1211 (S.C. [Commercial List]).
11. *Target Canada Co.*, 2015 ONSC 303.
12. *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60.

Secondary Sources

1. Canada, Innovation, Science and Economic Development Canada, *Insolvency reforms to come into force,* News Release, (Ottawa: Media Relations) 2019.
2. Canada, Marketplace Framework Policy Branch, *Order Fixing November 1, 2019 as the Day on Which Certain Provisions of the two Acts Come into Force: SI/2019-90*, Canada Gazette, Part II, Volume 153, Number 18.

SCHEDULE "B" – RELEVANT STATUTES

***Companies' Creditors Arrangement Act*, RSC 1985, c C-36**

Section 2

Definitions
debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent.

Section 3

Application
(1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

Section 11

General power of court
Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Section 11.001

Relief reasonably necessary
An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Section 11.02

Stays, etc. – initial application

(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the 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 company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application
(3) The court shall not make the order unless

> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction
(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Section 11.2

Interim financing
(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors
(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders
(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered
(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application
(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Section 11.51

Security or charge relating to director's indemnification
(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority
(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance
(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault
(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Section 11.52

Court may order security or charge to cover certain costs
(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act. Priority (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **AGMEDICA BIOSCIENCE INC., 2472602 ONTARIO INC., 2642466 ONTARIO INC., 8895309 CANADA INC., WELLWORTH HEALTH CORP., 8050678 CANADA INC., 8326851 CANADA INC., TAVIVAT NATURALS INC., WORLDWIDE BEVERAGE INNOVATIONS INC., UNIQUE BEVERAGES (USA) INC., and ESEELA INC.**

Court File No. 19-V-

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

FACTUM OF THE APPLICANTS

Thornton Grout Finnigan LLP
100 Wellington Street West
Suite 3200
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

Rebecca L. Kennedy (LSO# 61146S)
Email: rkennedy@tgf.ca
Owen Gaffney (LSO# 75017B)
Email: ogaffney@tgf.ca
Adam Driedger (LSO# 77296F)
Email: adriedger@tgf.ca

Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for the Applicants