Court File No.: CV-19-00632052-00CL

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

September 10, 2020

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PART I - OVERVIEW

1. The Applicants bring a motion for an Order (the "**Sanction Order**"), among other things:

(a) declaring that the meeting of the Affected Creditors (the "**Meeting**") held on August 25, 2020, was duly convened and held, all in accordance with the Order of Mr. Justice Koehnen dated August 4, 2020 (the "**Meeting Order**");

(b) sanctioning and approving the Applicants' Plan of Compromise and Arrangement dated August 22, 2020 (the "**Plan**"), as approved by the required majorities of the Affected Creditors at the Meeting;

(c) authorizing the Applicants and the Monitor to take all steps and actions, and to do all things necessary or appropriate to implement the Plan in accordance with its terms and conditions; and

(d) extending the stay of proceedings from September 11, 2020 to the earlier of (i) the Effective Time, and (ii) October 9, 2020.

PART II – FACTS

2. The relevant facts in connection with this factum are set out in the Affidavit of Trevor Henry sworn September 8, 2020 (the "**Henry Affidavit**"). All of the facts referenced in the following section are pinpointed to the relevant paragraphs of same. All capitalized terms not defined herein have the meanings given to them in the Henry Affidavit.

PART III – LAW & ANALYSIS

3. The key issue on this motion is whether the Plan should be sanctioned by the Court.

A. THE PLAN SHOULD BE SANCTIONED

4. Section 6 of the CCAA provides that a plan of compromise or arrangement is binding on a debtor company and all of its creditors if the following two conditions are met: (i) a majority in number representing two-thirds in value of the creditors present and voting at the meeting of creditors approve the plan; and (ii) the plan has been sanctioned by the Court.[1]

i. Approval of the Affected Creditors

5. At the Meeting, the Plan was overwhelmingly approved by the majority in number of the Affected Creditors representing at least two-thirds in value of the Affected Claims.[2]

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[1] *Companies' Creditors Arrangement Act*, RSC, 1985, c. C-36, section 6 [***CCAA***].
[2] Affidavit of Trevor Henry sworn September 8, 2020, at para 44 [***Henry Affidavit***].

6. As described in the Ninth Report of the Monitor dated August 31, 2020, 94.8% of the total number of Affected Creditors present and voting at the Meeting in person or by proxy holding 87.9% of the total value of the Affected Claims held by such Affected Creditors voted in favour of the Plan.

7. Having satisfied the creditor approval condition, the key issue before the Court is whether the Plan should be approved and sanctioned.

ii. Plan Sanction Test

8. It is well-established that the general requirements for court approval of a CCAA plan are as follows:[3]

   (a) there must be strict compliance with all statutory requirements;

   (b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA; and

   (c) the CCAA plan must be fair and reasonable.

a. Strict Compliance with Statutory Requirements

9. Both the first and second requirements of the test refer to procedural compliance with the provisions of the CCAA and the various Orders granted during the course of the CCAA Proceeding.[4]

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[3] *SkyLink Aviation Inc. (Re)*, 2013 ONSC 2519 at para 26; *Canadian Airlines Corp. (Re)*, 2000 ABQB 442 at para 60 [***Canadian Airlines***]; *Olympia & York Developments Ltd. v. Royal Trust Co.*, 1993 CarswellOnt 182 at para 17 (Gen Div) [***Olympia & York***].
[4] *Olympia & York, supra* note 3, at para 19.

10. With respect to the first part of the test (strict compliance with all statutory requirements), the following factors may be considered by the Court:[5]

   (a) whether the applicant falls within the definition of a "debtor company" pursuant to section 2 of the CCAA;

   (b) whether the applicant has total claims against it exceeding $5 million;

   (c) whether the notice calling the meeting of the Affected Creditors was sent in accordance with the Meeting Order, and any other Orders of the Court;

   (d) whether the creditors were properly classified;

   (e) whether the Meeting was properly constituted and the voting was properly carried out; and

   (f) whether the Plan was approved by the required majorities.

11. The Applicants have complied with the procedural requirements of the CCAA and all of the Orders of the Court granted in this CCAA proceeding. In particular:

   (a) in granting the Initial Order, this Court determined that each Applicant constituted a "debtor company" under the CCAA and that the Applicants' liabilities exceeded the $5 million threshold under the CCAA;[6]

   (b) the notices required under the Meeting Order were delivered within the timeframes and in the manner required by such Orders;[7]

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[5] *Canadian Airlines, supra* note 3, at para 62.
[6] Initial Order of Mr Justice Hainey dated December 2, 2019, at para 2.
[7] Henry Affidavit at paras 40-41.

(c) the classification of Affected Creditors into a single class was approved by this Court pursuant to the Meeting Order and this classification was not opposed;[8]

(d) the Meeting was properly constituted and the vote on the Plan was properly carried out in accordance with the Meeting Order;[9] and

(e) the Plan was overwhelmingly supported by the Affected Creditors, far in excess of the double majority threshold set out in section 6(1) of the CCAA.[10]

12. In addition, the Plan complies with the statutory requirements set out in sections 6(3), 6(5) and 6(6) of the CCAA, which collectively provide that the Court may not sanction a plan unless it contains certain provisions concerning Crown claims, employee claims, and pension claims.

13. The Plan does not affect provincial and federal government claims of the type described in section 6(3) or employee-related payments of the kind described in section 6(5). Such claims will not be compromised under the Plan.[11] Further, in accordance with section 6(8) of the CCAA, the Plan does not provide for the payment of equity claims.[12]

14. As such, the Applicants submit that the statutory requirements in order for the Plan to be sanctioned under section 6 of the CCAA have been satisfied.

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[8] Meeting Order of Mr. Justice Koehnen dated August 4, 2020, at para 7.
[9] Ninth Report of the Monitor dated August 31, 2020, at paras 22-30.
[10] *Henry Affidavit* at para 44.
[11] *Henry Affidavit* at para 19.
[12] Applicants' Plan of Compromise or Arrangement dated August 22, 2020, at section 2.4.

b. No Matters Unauthorized

15. In considering whether any unauthorized steps have been taken by the debtor company, the Court must rely on the reports of the Monitor as well as the various parties involved.[13]

16. Throughout the course of this CCAA proceeding, the Applicants have acted in good faith and with due diligence. The Applicants have complied with the requirements of the CCAA and the Orders of this Court. The Applicants have regularly filed affidavits addressing key developments of this restructuring and the Monitor has provided regular reports in respect of same, none of which have identified any conduct or action by the Applicants that is not authorized by the CCAA.[14]

17. The Applicants are not aware of any basis for asserting that they have proceeded in a manner that is not authorized by the CCAA.

c. The Plan is Fair and Reasonable

18. The final element of the test requires the Court to consider whether the Plan represents a fair and reasonable balancing of interests, in light of: (i) the relative degrees of prejudice that would flow from sanctioning or refusing to sanction the Plan; (ii) the other commercial alternatives available; and (iii) the context of the CCAA proceedings.[15]

19. In reviewing the fairness and reasonableness of the Plan, the Court does not and should not require perfection.[16] As the Court held in *Canadian Airlines*:[17]

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[13] *Canadian Airlines, supra* note 3, at para 64.
[14] *Henry Affidavit* at para 48.
[15] *Olympia & York, supra* note 3, at paras 28-31.
[16] *AbitibiBowater Inc., (Re),* 2010 QCCS 4450 at para 33 [***Abitibi***].
[17] *Canadian Airlines, supra* note 3, at para 3.

> The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.

20. The Court's discretion should be informed by the objectives of the CCAA, namely to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, employees and in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation.[18]

21. An important measure of whether a plan is fair and reasonable is the degree to which it is supported by the creditors and the relevant stakeholders of the debtor company. This support, which reflects the business judgment of the participants that their interests are treated equitably under the Plan, creates an inference that the arrangement is fair and reasonable to those that may be affected by it. The court should be reluctant to interfere with the business decisions of creditors reached as a body.[19]

22. Additional factors to be considered by courts in considering whether a plan is fair and reasonable include:[20]

    (a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;

[18] *Canadian Airlines*, *supra* note 3, at paras 95 & 97.
[19] *Canadian Airlines*, *supra* note 3, at para 97; *Olympia & York*, *supra* note 3, at para 37.
[20] *Canwest Global Communications Corp. (Re)*, 2010 ONSC 4209 at para 21.

(b) what creditors would receive on a liquidation or bankruptcy compared to the plan;

(c) available alternatives to the plan and bankruptcy;

(d) oppression of the rights of creditors;

(e) unfairness to shareholders; and

(f) the public interest.

23. Each of these factors supports the approval of the Plan by this Court:

(a) **Classification of Claims:** Placing the Affected Creditors into a single class for the purposes of considering and voting on the Plan was appropriate in the circumstances given the similar nature and interest of the Affected Claims as general unsecured claims. This classification was approved by this Court pursuant to the Meeting Order.

(b) **Creditor Approval:** As described above, the Plan received overwhelming support at the Meeting from the Affected Creditors (94.8% in number representing 87.9% in value).

(c) **Liquidation Comparison:** In its Eighth Report, the Monitor conducted an analysis of the estimated recoveries for the Affected Creditors in a liquidation. The liquidation analysis indicates that the Plan will produce a more favourable result for the Affected Creditors than they would receive in connection with a going concern sale or forced liquidation of the assets of the Applicants. Whereas the Plan provides for a distribution to the

Affected Creditors, the Monitor does not anticipate that there would be any funds available or Affected Creditors in the event of a sale or liquidation. In addition, the Plan provides for the continuation of the Applicants' business and operations as a going concern, which will benefit many stakeholders beyond the Affected Creditors, including suppliers, customers, and approximately 100 jobs in the Chatham-Kent community.

(d) **Alternatives to the Plan:** The Applicants, with the assistance of the Monitor, conducted an extensive SISP during the course of this CCAA Proceeding. Following a robust canvassing of the market, the Applicants and the Monitor determined that the sole qualified bid received as a result of the SISP was not viable for a successful restructuring, and would not have been acceptable to the Applicants' creditors. The Recapitalization Transaction and the Plan represents a superior outcome for the Applicants and their stakeholders relative to the sole qualified bid received in connection with the SISP.

(e) **No Oppression of Creditors:** It is clear that the Plan does not oppress creditors given the relative recoveries for Affected Creditors under the Plan in comparison to the liquidation context. The Recapitalization Transaction and the Plan are expected to result in the greatest possible recoveries for Affected Creditors in the circumstances given the available alternatives.

(f) **Public Interest:** The Plan will result in the Applicants emerging from CCAA protection as a competitive, going-concern licensed producer of cannabis with a healthy balance sheet, which will preserve employment and economic activity for suppliers. Approval of the Plan thus serves the public interest and achieves the broader purposes of the CCAA.

24. In light of the foregoing, the Applicants submit that the Plan is fair, equitable, and reasonable in the circumstances and that the Sanction Order should be granted.

PART IV – RELIEF REQUESTED

25. For all of the foregoing reasons, the Applicants request that this Honourable Court grant the Sanction Order, substantially in the form of the draft Sanction Order located at Tab 3 of its Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of September, 2020.

September 10, 2020

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *SkyLink Aviation Inc. (Re)*, 2013 ONSC 2519.

2. *Canadian Airlines Corp. (Re)*, 2000 ABQB 442.

3. *Olympia & York Developments Ltd. v. Royal Trust Co.*, 1993 CarswellOnt 182.

4. *AbitibiBowater Inc., (Re),* 2010 QCCS 4450.

5. *Canwest Global Communications Corp. (Re)*, 2010 ONSC 4209.

SCHEDULE "B"
RELEVANT STATUTES

***Companies' Creditors Arrangement Act*, R.S.C., 1985 c. C-36**

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

> (a) subsection 224(1.2) of the Income Tax Act;
>
> (b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or

employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a provincial pension plan as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

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