



District of	British Columbia
Division	No. 03 - Vancouver
Estate No.	11-2729070
Court No.	B-210210

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**IN THE MATTER OF THE BANKRUPTCY OF**

**FIREWEED BREWING CORP.**

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**TRUSTEE'S PRELIMINARY REPORT**

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**April 29, 2021**

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## INTRODUCTION

- 1) Fireweed Brewing Corp. ("**Fireweed**" or the "**Company**") previously operated a craft brewery located at 1083 Richter Street, Kelowna, British Columbia ("**BC**"). Fireweed's brands include Tree Brewing, Kelowna Pilsner, Dukes Cider, Thirsty Beaver Amber Ale, and Shaftebury, among others. The Company was incorporated in Alberta ("**AB**") in July 2003, and was continued into British Columbia in February 2015.
- 2) Fireweed is wholly owned by Jayca Holding Inc. ("**Jayca**"), a holding company. Jayca's share capital is owned 99% by Mr. Todd Melnyk ("**Mr. Melnyk**") and 1% by Mrs. Carolyn Melnyk. Mr. Melnyk is the sole director of Fireweed.
- 3) Jayca has a second wholly owned subsidiary, Tree Beer Institute Ltd. ("**TBI**") which owns certain intellectual property related to the Tree Beer Institute.
- 4) On April 14, 2021 (the "**Date of Bankruptcy**"), Fireweed made an assignment into bankruptcy for the general benefit of creditors pursuant to the provisions of the *Bankruptcy and Insolvency Act* ("**BIA**") and Deloitte Restructuring Inc. was appointed as Licensed Insolvency Trustee of the estate ("**Trustee**"), subject to affirmation by the creditors at the first meeting of creditors. Jayca and TBI are not subject to these bankruptcy proceedings.
- 5) The purpose of the Trustee's Preliminary Report ("**Report**") is to:
  - a) Provide background information concerning the Company's affairs and the causes of its financial difficulties;
  - b) Provide the Trustee's preliminary evaluation of the assets and liabilities of the Company; and
  - c) Outline the key activities of the Trustee since its appointment.

## Terms of Reference

- 6) In preparing this Report, the Trustee has relied upon unaudited financial and other information prepared by the Company's former director, the books and records of the Company, and discussions with the former director.
- 7) The Trustee has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the information in a manner that would wholly or partially comply with Generally Accepted Assurance Standards pursuant to the Chartered Professional Accountants Canada Handbook and, accordingly, the Trustee expresses no opinion or other form of assurance in respect of this information.
- 8) The Trustee assumes no responsibility or liability for any loss or damage occasioned by any party as a result of the circulation, publication, reproduction, or use of this Report. Any use which any party makes of this report, or any reliance or decision to be made based on this Report, is the sole responsibility of such party.
- 9) All dollar amounts in this Report are expressed in Canadian dollars, unless otherwise indicated.

## **BACKGROUND TO THE COMPANY'S FINANCIAL DIFFICULTIES**

- 10) The Company sold its various craft beers and ciders in BC and AB. Mr. Melnyk joined the Company in 2008, becoming the President and CEO with primary responsibility for running the operations of the Company. In 2015, Mr. Melnyk bought out the founding partners, becoming the majority beneficial owner of Fireweed.
- 11) Through 2008 to 2016, the Company increased its product offering and revenues as the craft beer industry experienced significant growth. In August 2016, the Government of AB changed the way it marked up beer, moving from graduated fees for small brewers to a higher flat price of \$1.25 per litre. While it was possible for some of this additional mark-up to be passed onto consumers through higher prices, the extra mark-up put pressure on the Company's profit margins and impacted sales volumes. Fireweed attempted to cut costs, and grow the business in BC to offset this issue. However, the Company continued to experience cash flow pressures as a result of high debt service costs and funding of working capital.
- 12) In 2018, owing to continued financial challenges, Mr. Melnyk began exploring options for licensing contracts for the Company's beer and cider brands.
- 13) On October 17, 2018, Fireweed entered into a license agreement (the "**License Agreement**") with Big Rock Brewery Inc. ("**Big Rock**") granting Big Rock an exclusive license to the use of Fireweed's trademarks and other associated intellectual property (the "**Fireweed IP**"). Fireweed also entered into various ancillary agreements with Big Rock, including a Contract Manufacturing Agreements for AB and BC (the "**Manufacturing Agreements**") and a purchase and sale agreement in respect of various brewing equipment and inventory. Pursuant to the License Agreement and Manufacturing Agreements, Big Rock is required to pay Fireweed monthly license and manufacturing fees (together, "**License Fees**") based on the volume of beer and cider produced and sold by Big Rock through the term of the agreements (to December 31, 2024).
- 14) License Fees payable under the agreements with Big Rock were not sufficient to service Fireweed and Jayca's debts owing to Bank of Montreal. As a result, the Company could not continue to pay its obligations as they fell due, and Mr. Melnyk assigned the Company into bankruptcy on April 14, 2021.
- 15) Fireweed operated its Kelowna brewery between March 2003 and June 2018 and had a maximum of 10 employees prior to the implementation of the License Agreement with Big Rock. Fireweed had no employees during the 12 months prior to the Date of Bankruptcy.
- 16) A summary of the audited and unaudited financial results of the Company is shown below.

(\$)	Unaudited 3 months ended 31-Mar-18	Audited Year ended 31-Dec-17	Audited Year ended 31-Dec-16
Sales	1,641,318	5,428,213	5,968,351
Cost of sales	830,158	2,626,531	3,211,026
<b>Gross profit</b>	<b>811,160</b>	<b>2,801,682</b>	<b>2,757,325</b>
Expenses	500,577	2,486,692	2,910,671
Income taxes (Recovered)	NA	(22,267)	(25,827)
<b>Net income / (loss)</b>	<b>310,583</b>	<b>337,257</b>	<b>(127,519)</b>
<b>Retained earnings</b>	<b>NA</b>	<b>683,531</b>	<b>346,274</b>

- 17) We understand from Mr. Melnyk that no financial statements have been produced for the Company since March 31, 2018 and that any License Fees payable under the Big Rock agreements have not been paid to Fireweed due to various offsetting counter claims by Big Rock (refer to paragraphs 42 to 44 of this Report).

## ASSETS

- 18) The Trustee assisted Mr. Melnyk with producing a statement of affairs of the Company as of the Date of Bankruptcy (the "**Statement of Affairs**"). The significant assets of the Company are outlined below.

### Machinery, Plant and Equipment

- 19) The Company owns certain brewing equipment, including a bottling line and storage tanks with an estimated realizable value of approximately \$15,000. Mr. Melnyk has advised the Trustee that the equipment is in storage in a warehouse in Kelowna.

### Fireweed IP

- 20) Subject to the provisions of the License Agreement, Big Rock has the option to purchase the Fireweed IP prior to the end of the term of the agreement. Big Rock has made an initial offer to purchase the Fireweed IP for \$500,000 plus taxes. This offer is based on the various agreements and certain adjustments between the parties since they entered into the License Agreement and Manufacturing Agreements. The Statement of Affairs shows a net realizable value of \$530,000 as this was the original offer price submitted by Big Rock, payable in monthly installments over the remaining term of the License Agreement. The Trustee is in the process of reviewing the Big Rock agreements and is in discussions with Big Rock regarding its offer.

### Advances to shareholders

- 21) As of December 31, 2017, the Company's financial statements showed a balance owing by Jayca to Fireweed of \$3,076,140. Mr. Melnyk has informed the Trustee that Jayca has no realizable assets, and that this receivable is uncollectable.
- 22) The Trustee has reviewed the financial statements of Jayca dated December 31, 2017. The statements include an amount owing from shareholders of \$1,009,006 and long term investments of \$6,114,673. Mr. Melnyk has advised that he is not in a position personally to repay the shareholder loan owing to Jayca, and that the long term investments relate to investments in the share capital of Fireweed and TBI for the purchase of various equipment, inventory and to fund the businesses.

## **Due from related party**

- 23) As of December 31, 2017, the Company's financial statements showed a balance owing by TBI to Fireweed of \$975,220. Mr. Melnyk has informed the Trustee that TBI has no realizable assets, and that this receivable is uncollectable.
- 24) The Trustee has reviewed the financial statements of TBI dated December 31, 2017. The statements include an amount owing from related parties of \$618,669, and a liability owing to Fireweed of \$975,220. There are no other material assets on the balance sheet.

## **CONSERVATORY AND PROTECTIVE MEASURES**

- 25) The Company's books and records are in storage in a rented area of a warehouse in Kelowna. The Trustee has attended at the warehouse and will make arrangements to either collect the necessary records or have access to them through Mr. Melnyk.
- 26) The warehouse also contains various expired inventory and raw materials, along with some TBI glass wear, which is likely to have negligible value. The Trustee has requested Mr. Melnyk to provide details of where the Company's brewing equipment is located.

## **CREDITORS**

### **Deemed Trust Claims and Secured Creditors**

#### Bank of Montreal

- 27) The Company's first ranking secured creditor is Bank of Montreal ("**BMO**"). BMO is owed \$736,318 including accrued interest as of the Date of Bankruptcy. BMO's debt is secured by way of a General Security Agreement dated November 12, 2014 (the "**Security**") granting security in all of the present and after-acquired real and personal property of Fireweed.
- 28) Fireweed provided a joint and several guarantee of the indebtedness of Jayca to BMO dated November 12, 2014. Jayca is indebted to BMO in the amount of \$959,645 as of the Date of Bankruptcy. Accordingly, BMO has a total secured claim as against Fireweed of \$1,695,963. Note that BMO has confirmed that the amount shown on the Statement of Affairs (\$2,432,164) was incorrect, and the actual amount owing is \$1,695,963.
- 29) The Trustee has retained independent legal counsel, Owen Bird Law Corporation, to perform an independent review of BMO's Security. The Trustee's legal counsel has advised that BMO's Security is valid and enforceable as against the estate and ranks in priority to the unsecured creditors of the estate.

#### CRA Claims

- 30) On January 19, 2021, Canada Revenue Agency ("**CRA**") wrote to the Company to confirm the current balances owing to CRA. The balances owing include:
  - a) Employee payroll source deductions of \$46,517;
  - b) Goods and services tax ("**GST**") of \$109,006;

- c) Corporation tax of \$49,547; and
  - d) Excise duty of \$265,621.
- 31) As of the date of this Report, the Trustee has not yet received a proof of claim from CRA. Any claim in respect of the employee portion of payroll source deductions is expected to rank as a deemed trust claim against the estate, which would give CRA priority over all assets of the estate, ahead of any other security interests or creditor claims.
- 32) The GST arrears have been certified and the debt registered with the Personal Property Registry of BC on January 2, 2020.

#### Provincial Government

- 33) On February 7, 2017, the BC Provincial Government registered a tax lien on the Company's present and after-acquired personal property in respect of outstanding Provincial Sales Tax ("**PST**"). As shown in the Statement of Affairs, the Company's records indicate PST outstanding in the amount of \$8,534 as of the Date of Bankruptcy.

#### Vendor Take-Back Financing

- 34) The Trustee understands that approximately \$3.4 million is owing to Raw Energy Ltd., Robert Maitland, and Ronald Kistic (the "**VTB Creditors**") in respect of deferred consideration owing pursuant to a vendor take-back note for the sale of the equity of the Company to Mr. Melnyk in 2015.
- 35) On November 5, 2014, the VTB Creditors registered a security interest in the Personal Property Registry BC in respect of all of the present and after acquired personal property (other than consumer goods) of Fireweed.

#### Western Craft Alliance and 49th Parallel Group Inc.

- 36) Mr Melnyk has advised that Western Craft Alliance and 49th Parallel Group Inc. are owed approximately \$5,000, however, these creditors registered a writ of enforcement against the Company in the Personal Property Registry AB in the amount of \$35,209 on November 14, 2019.

#### Dams Lease Ltd. and Canadian Western Bank

- 37) Dams Lease Ltd. and Canadian Western Bank have registered a purchase money security interest in a 2019 Ford Ranger truck. Mr. Melnyk has advised the Trustee that he has recently transferred the lease liability and truck to himself personally. The Trustee has requested that Mr. Melnyk provide documentation confirming this transfer and details of the lease and amount remaining to be paid so it can be determined if there is any equity in the vehicle to the benefit of the estate. Mr. Melnyk has not provided any documentation to date.

#### **Unsecured Creditors**

- 38) Other than the unsecured portions of any secured indebtedness owing to the secured creditors notes above, the Statement of Affairs indicates additional unsecured creditors with claims totaling approximately \$82,449.

- 39) The amounts owing to unsecured creditors will be determined based on proofs of claim filed and admitted by the Trustee.

### **Provable Claims**

- 40) At the time of finalizing this Report, proofs of claim have been filed by one unsecured creditor totaling approximately \$697,053. This claim relates to the unsecured portion of BMO's debt, and assumes that BMO holds assets of the Company with an estimated value of \$1,000,000 as security.
- 41) Mr. Melnyk has advised that the Company's former employees were paid all amounts owing in respect of wages and vacation pay and believes that there are no amounts of termination/severance pay owing.

### **LEGAL PROCEEDINGS, REVIEWABLE TRANSACTIONS AND PREFERENCE PAYMENTS**

- 42) Based on documents provided by Big Rock, the Trustee notes that certain sales revenues were paid by BC Liquor Distribution Board to Fireweed directly, when the amounts were in fact supposed to be paid to Big Rock, pursuant to the terms of the License Agreement.
- 43) In total, approximately \$595,509 was paid in error to Fireweed during the period August 23, 2018 to May 30, 2019, and approximately \$520,017 remains outstanding and owing to Big Rock, plus accrued interest. Big Rock has set-off these amounts plus accrued interest against License Fees owing by Big Rock to Fireweed pursuant to the License Agreement and Manufacturing Agreements.
- 44) The Trustee has requested an accounting from Mr. Melnyk for the proceeds received by Fireweed from BC Liquor Distribution Board. Mr. Melnyk has advised that the proceeds were used to fund debt payments to BMO and Business Development Bank of Canada, in addition to making vendor payments.
- 45) The Trustee understands that Mr. Melnyk sold a 2006 Mini Cooper around one year ago for approximately \$1,000. Mr Melnyk has advised that the funds were used to pay accounting fees.
- 46) At the time of this Report, the Trustee is not aware of any legal proceedings against the Company other than enforcement action taken by certain of the secured creditors already noted in this Report.

### **AGENCY AGREEMENT WITH BMO**

- 47) The Trustee has entered into an Agency Agreement with BMO pursuant to which BMO has appointed Deloitte Restructuring Inc. to act as its agent to attend to the realization of BMO's secured collateral.
- 48) Pursuant to section 13.4(1.1) of the BIA, the Trustee advises that:
- a) The Trustee is acting for the secured creditor, BMO;
  - b) The Trustee will be remunerated based on the amount of professional time required and its discounted hourly billing rates, which vary depending upon the



experience level of the professionals involved, plus applicable taxes. Out-of-pocket expenses (travel, meals and accommodation) will be billed at cost, as incurred; and

- c) The Trustee's independent legal counsel has advised that the Security held by BMO is valid and enforceable as against the estate.

### **THIRD PARTY DEPOSITS AND GUARANTEES**

- 49) Pursuant to the Agency Agreement, BMO has provided a limited guarantee of the fees of the Trustee.
- 50) The Trustee has not obtained any third party deposits to support its fees.

### **ANTICIPATED REALIZATION AND PROJECTED DISTRIBUTION**

- 51) In summary, the Statement of Affairs shows assets with a total net realizable value of approximately \$545,000 before costs of realization.
- 52) The Trustee is not aware of any unencumbered assets of the Company available to the unsecured creditors.
- 53) Due to the quantum of priority claims and debts owing to secured creditors, there does not appear to be sufficient value in the Company's assets to provide for any recovery to the unsecured creditors.


### **OTHER MATTERS**

- 54) Further information and materials regarding these proceedings may be obtained from the Trustee's website at:  
<http://www.insolvencies.deloitte.ca/en-ca/Pages/Fireweed-Brewing-Corp.aspx>.
- 55) This Report will also be posted to the Trustee's website after it has been filed with the Court.

Dated at Vancouver, this 29<sup>th</sup> day of April, 2021.

### **DELOITTE RESTRUCTURING INC.**

In its capacity as Trustee in Bankruptcy of  
Fireweed Brewing Corp. and not in its personal capacity

Per:   
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Paul Chambers, FCA(UK), CIRP, LIT  
Senior Vice President