

**CITATION:** Eureka 93 Inc. et. al. (Re) 2020 ONSC 2532  
**COURT FILE NO.:** 33-2618511  
**DATE:** 2020/04/23

**COURT OF ONTARIO,  
SUPERIOR COURT OF JUSTICE  
(IN BANKRUPTCY AND INSOLVENCY)**

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF  
EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

AND IN THE MATTER OF THREE RELATED INTENDED PROPOSALS (LIVEWELL  
FOODS CANADA INC., ARTIVA INC., and VITALITY CBD NATURAL HEALTH  
PRODUCTS INC.)

**BEFORE:** Mr. Justice Calum MacLeod

**COUNSEL:** E. Patrick Shea and Benoit Duchesne for the applicant debtors

Eric Golden, for the Proposal Trustee

Andrew Lenz, for the secured creditor, PR

Jason Dutrisec, for Lamarche Electric

Eduard Popov, for Tilray Inc.

Sean Zweig, for Dominion Capital LLC

**HEARD:** April 23, 2020

**DECISION AND REASONS**

**Nature of the Motion**

[1] The applicant debtor brings a motion to extend the time for making a proposal which was previously extended on terms on March 6, 2020. Today's motion was unopposed, and I have granted the order. As this took place during a "virtual hearing" – in this case by conference call – it is important to make a few observations about the method of hearing and the application of Rule 1.08 of the *Rules of Civil Procedure*<sup>1</sup> during the COVID-19 emergency and afterwards.

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<sup>1</sup> *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

### **Form of the Hearing**

[2] The appearance before the Court today took place by teleconference due to the suspension of in-court appearances during the COVID-19 health emergency although it is the type of hearing that in future might lend itself to “virtual appearance” pursuant to Rule 1.08.

[3] I would note that Mr. Zweig sent an email to Mr. Shea to indicate that he was unable to dial into the call due to technical difficulties. He indicated that his client was not objecting to the extension of time but continued to have the same concerns that were voiced at the time of the original hearing. The inability to join the call would otherwise have been problematic.

[4] In this case, I am satisfied that notice was appropriately given to all parties along with the necessary instructions for joining the call but under the circumstances nothing was done to address the general principle that evidence and argument to be presented in open court as contemplated by Rule 1.08 (5) (a).

[5] Important considerations in conducting hearings in this manner are to ensure that all parties who might have an interest in the proceeding are on notice and able to participate and the “open court principle” such that members of the public who may wish to view the proceeding have an opportunity to do so. Obviously, the latter would not apply if the hearing is one from which the public would be excluded.

### **The Open Court Principle**

[6] As a practical matter in this particular case, the lack of notice to the public is not of concern because there was no public interest shown in the matter when it was previously before the Court, because receiverships and other routine insolvency matters do not generally attract much public interest. As this is merely a motion to extend the time and because of the exigencies of the current public health orders. In addition, I previously granted a sealing order in this matter so not all aspects of the proceeding are public. Finally, these reasons will be published so there will be a public record of the proceeding. Under the circumstances, a virtual court with no public notice is acceptable.

[7] It is important however to consider the open court principle not only during the public health crises but for the future. The only nod to public access at the moment is a notice on the Ontario Courts website which invites members of the public who wish to view or hear a virtual hearing to contact courts administration at generic email addresses. In that case, assuming the request is received and processed in time, arrangements can be made for public monitoring of a virtual hearing. There have been instances where members of the public or the media have been provided with information to hear or view a conference. In this case, that could not have practically occurred because this hearing was not shown on the daily court list and in any event, it would not have been posted very long in advance.

[8] I am not criticizing counsel who organized the conference call with my approval after contacting the bankruptcy office. I am simply flagging this concern for the future. Any hearing that would normally be open to the public should be listed on the daily court list and publicized sufficiently far in advance that a request to monitor the proceeding can be granted.

[9] In the long term, more robust solutions are required. A virtual court should be striving to give at least the level of public access that would exist if the proceeding took place in open court at the courthouse. Ideally there should be a practical method for a virtual hearing to be viewed or heard by anyone who is interested while simultaneously avoiding the risks that to date have influenced restrictions on televising or streaming live court proceedings.

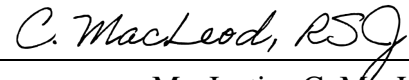
### **The Merits of the Motion**

[10] The debtors and the proposal trustee request an extension of time under s. 50.4 (9) of the *Bankruptcy Insolvency Act*<sup>2</sup> to June 12, 2020. The lack of opposition is important, but the court must still be satisfied that this further extension satisfies the criteria of good faith, diligence, lack of prejudice and the potential viability of the proposal set out in the subsection.

[11] If anything, the outlook has improved since the original motion. Despite the intervening COVID-19 closures which have included retail cannabis outlets, the construction has proceeded, not all of the contemplated funds have been required, a crop is under cultivation and a contract for sale of clones has been procured. Some positive cash flow is now anticipated, and the proponents of the motion now have more grounds to believe they can make a viable proposal. The potential prejudice to the noteholders is not materially greater – and may be less – than it was when the original order was granted.

### **Disposition**

[12] An order will issue extending the time for filing a proposal to June 12, 2020. The terms of the original order remain in force.



Mr. Justice C. MacLeod

Date: April 23, 2020

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<sup>2</sup> *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3

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**DECISION AND REASONS**

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Mr. Justice C. MacLeod

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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(IN BANKRUPTCY AND INSOLVENCY)**  
  
(PROCEEDING COMMENCED AT OTTAWA)

**ORDER**

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