

CITATION: Eureka 93 Inc. et. al. (Re) 2020 ONSC 1482
COURT FILE NO.: 33-2618511
DATE: 2020/03/09

**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, for the debtors

Sean Zweig, for Dominion Capital LLC

Lou Brzezinski, for the Proposal Trustee

HEARD: March 6, 2020

DECISION AND REASONS

[1] The debtors (the NOI Companies) move to have four related matters consolidated, to extend the time for making proposals, and for approval of proposed interim priority financing arrangements (“DIP financing”).

[2] Four related corporations have served notice of intention to make a proposal pursuant to s. 50.4 (1) of the *Bankruptcy and Insolvency Act*¹. Three of the corporations are subsidiaries of Eureka 93, the publicly traded parent company. Only one of these corporations has any significant asset. That is Artiva Inc. which owns a 100 acre parcel of land containing a largely completed, licenced, but not yet operational, cannabis facility. The purpose of the proposed financing is to complete the facility and to generate sales so that there is cash flow.

[3] The temporary financing and extension of time to make a proposal is actively supported by the secured creditor holding the first mortgage. Other creditors are either in support of the plan or are neutral but the motion is strongly opposed by Dominion Capital on behalf of a group of three secured creditors (“the noteholders”). Dominion takes the view that “there is no business to rehabilitate, no air of reality to the NOI Companies’ business plan, no significant assets apart from

¹ RSC 1985, C. B-3 as amended

the Ottawa facility, and no hope of satisfying the claims of creditors through the Proposal Proceedings.”

[4] If an extension of time is not granted, then pursuant to s. 50.1 (8) of the *BIA* the NOI companies will be deemed to have made an assignment in bankruptcy on March 15th, 2020. If the interim financing is not granted then it is likely there will be a receivership and a liquidation of the assets. In that case there will be no recovery for the unsecured creditors. The total debt at this point in time appears to be in excess of \$28 million although that is inclusive of intercompany debt.

[5] If the plan is approved it is possible but not guaranteed that the value of the business as a going concern will be higher than the “as is” value of the land, it is possible the debtors will put forward an acceptable proposal and possible there will be full recovery for the secured creditors and something for those that are unsecured. On the other hand, the plan may fail, the proposal may be voted down but there will be another \$2.3 million in debt in priority to all other creditors.

[6] The court must decide if it is reasonable to authorize this additional debt while continuing to protect the debtors from their existing creditors in the hope that this will generate a better outcome. The noteholders urge the court not to do so.

Background

[7] Eureka 93 Inc. is the parent company of a corporate group that was intended to be a vertically integrated hemp and cannabis company. Livewell and Vitality are subsidiaries of Eureka and Artiva is a subsidiary of Livewell. Eureka is or was publicly traded until a cease trading order was issued by the Ontario Securities Commission (OSC) in September of last year when it ran into significant financial difficulty and was unable to meet its obligations as an issuer of securities.

[8] Eureka is a holding company and currently has five employees. Artiva owns a farm equipped with greenhouses and has a cannabis cultivation licence from Health Canada. This facility (the Ottawa facility) is not yet completed and it requires a further significant capital investment to begin production. None of the other corporations are operational at this time. The focus of the motion and of the intended proposal is to salvage the Ottawa facility and to generate positive cash flow through Artiva.

[9] Dominion describes the business of Artiva as more of an idea than a reality. They say that Artiva owns the land and the Ottawa facility but does not have a business. Despite the significant funds raised to date, the Ottawa facility remains incomplete and inoperable. The noteholders take the view that permitting the NOI companies to raise more funds in priority to the existing secured creditors is futile and will only result in further erosion of their collateral and any potential recovery for the existing creditors. Essentially, the moving party has no faith in Eureka’s remaining management nor in the business plan the proponents now seek to put forward.

[10] I have reviewed the First Report of the Proposal Trustee (Deloitte). The Proposal Trustee has not audited the financial statements or verified any of the representations made by management. The trustee has reviewed the proposed cash flow and is satisfied that the interim financing would provide sufficient liquidity to bring the facility to completion and to begin. The Proposal Trustee recommends the plan. It believes it is a better option than either an immediate

bankruptcy or uncontrolled efforts by secured creditors to realize on their security. The facility is largely completed to Health Canada standards. It was successful in obtaining the licence to grow and sell cannabis in September of last year. No crop could have been legally grown before that date. It requires roughly \$650,000.00 to complete the construction and \$160,000.00 to purchase inventory.

[11] The interim financing plan is expensive and would add \$2.3 million in debt to the burden already in place. A large portion of the cost is the cost of professional fees to work through the insolvency and restructuring and the cost of high risk borrowing. The plan involves at least three significant assumptions which cannot be tested and carry significant risks. There is the risk that the remaining construction will not be completed on time, to specification and within budget. There is the risk that production of cannabis will not ramp up as smoothly as predicted. There is the risk that buyers of the product will not be found in sufficient time or numbers to meet the cash flow predictions.

[12] In addition, there is always the risk that even if all of this falls into place, the proposal or proposals will prove unacceptable to the creditors and an insolvency or a receivership will still result. The debtors have reason to believe that if the facility is completed, they will be able to refinance the project or to sell it as a going concern. On the evidence before me, those are not empty hopes, but they are by no means guaranteed.

Analysis

[13] All parties agree to administrative consolidation of the four intended proposals. This makes sense. It is necessary for each corporation to make a proposal because of the ownership structure. All shares of the subsidiaries are owned by Eureka. There is no benefit to having four separate court files.²

[14] All parties are in agreement with the proposed sealing. It is not in the public interest to have sensitive financial information such as appraisals of the land or the identity of potential purchasers in the public domain at this time. The documents contained in the “confidential document brief” will be sealed until further order.³

[15] This is not a plan of rearrangement under the *Companies' Creditors Arrangement Act*⁴ nor is it even a proposal at this point. It is a notice of intention to make a proposal under s. 50.4 (1) of the *BIA*. This procedure permits the debtor to gain the statutory protection of a stay of proceedings without initial court approval while, subject to compliance with the terms of the Act, it attempts to put itself in the position to make a proposal. But the Act only permits this for 30 days within which time it is necessary to either put together a proposal or to obtain further approval and protection from the court.⁵

² See *Electro Sonic Inc. (Re)*, 2014 ONSC 942 (Commercial List)

³ See *Canwest Publishing Inc. (Re)*, 2010 ONSC 222 (Commercial List) @ paras 63 - 65

⁴ *Companies' Creditors Arrangement Act*, R.S.C. , 1985, c. C-36

⁵ See *Cumberland Trading Inc. (Re)*, (1994) 23 CBR (3d) 225 (Ont. Ct., Gen Div., Commercial List)

[16] The court may extend the time to make a proposal and during that time the court may approve interim financing pursuant to s. 50.6 (1) of the Act. In making that decision and in exercising its discretion, the court is mandated to consider all relevant factors including those set out in subsection (5). That subsection reads as follows:

Factors to be considered

(5) In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the debtor is expected to be subject to proceedings under this Act;
- (b) how the debtor's business and financial affairs are to be managed during the proceedings;
- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

[17] It is the position of the noteholders that the proposed interim financing would materially prejudice the noteholders by placing another \$2.3 million in debt in priority to its security. This of course is inherent in approving DIP financing and is not the only consideration.⁶ Still it is part of the analysis. \$2.3 million in additional debt over the next month is significant. It is also the position of the noteholders that they have no confidence in management or the ability of that management to successfully bring the project to fruition and generate positive cash flow.

[18] I appreciate the concerns of the noteholders. I share the concern that there is a significant risk inherent in cultivating a first crop of cannabis and finding buyers. This is an industry in its infancy and the struggles of some of the established companies in this area are public knowledge. In fact, on the day of the hearing Canopy Growth Corp. announced it was closing two greenhouse facilities in British Columbia and cancelling a project planned for Ontario.⁷

[19] Counsel for the debtor submitted that this was not an appropriate area for judicial notice particularly in light of the specific evidence before me. The affidavit evidence filed on behalf of the debtors indicated a different business strategy focused on seedlings or "clones" and painted an optimistic picture of quickly generating positive cash flow. I agree that a news report should not be taken as evidence, but it is useful background. There is no doubt that there is significant risk for any new business particularly in an evolving and volatile sector such as legal cannabis production.

⁶ See *OVG Inc., (Re)*, 2013 ONSC 1794

⁷ See: <https://business.financialpost.com/cannabis/canopy-growth-lays-off-500-workers-shuts-massive-b-c-greenhouse-facilities>

[20] The question is whether this is a risk worth taking despite the misgivings of the noteholders and the potential prejudice to their position. I am encouraged by the First Report of the Proposal Trustee and the support for the plan set out therein. I am also impressed by the support for the plan voiced by the representative of the first mortgagee and the interim lenders.

[21] I appreciate that both the interim lender and the first mortgagee are fully secured against the value of the land but the willingness to lend the additional funds is supported by their analysis of the plan as viable. Mr. Martin deposes that he has been working with Mr. Poli since September of 2019 and has full confidence in the plan. It is his position that the interim financing plan and proposal proceedings based on a completed and operational facility is likely to generate greater value for all stakeholders than would be the case in a liquidation.

[22] There are other stakeholders, not the least of which are two lien claimants and the unsecured creditors. There is at least \$15 million in secured debt and over \$9 million in unsecured debt. As noted, the other secured creditors support the motion and neither the lien holders nor the unsecured creditors appeared to oppose it.

[23] There are five current employees but perhaps 20 other employees who were laid off from the various companies. The completion of the project and the start of cannabis production would involve calling some of those employees back to work.

[24] I am persuaded that immediate liquidation would have dire effects whereas the brief extension of time and the interim financing hold at least the prospect of increased value and a successful proposal.⁸

Conclusion & Order

[25] I am granting the proposed order substantially in the form proposed although I have simplified the title of the proceedings in paragraph 2 of the draft order as shown at the top of these reasons. I am also imposing an additional term.

[26] During the extension period, the court will require a bi-weekly status report confirming the interim funding is in place, verifying progress of construction, the continued validity of the cultivation licence and progress towards production of a first crop.

[27] In the event that there is a significant deviation from the plan as proposed or if any of the assumptions built into the interim financing plan fail to materialize or require significant readjustment, the noteholders or any other creditor may move to lift the stay or for amendment of the order.

[28] I may be spoken to for further direction if required or if there is any dispute as to the form of the order.

⁸ See *Mustang GP Ltd (Re)*, 2015 ONSC 6562

[29] The parties may also arrange to speak to the matter if any party seeks costs.

A handwritten signature in cursive script, appearing to read "C. MacLeod J.", is written above a horizontal line.

Mr. Justice C. MacLeod

Date: March 9, 2020

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Mr. Justice C. MacLeod

Released: March 9, 2020