

CITATION: Trees Corporation, 2023 ONSC 7265
COURT FILE NO.: 23-00711935-00CL
DATE: 2023-12-29

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TREES CORPORATION, ONTARIO CANNABIS HOLDINGS CORP., MIRACULO INC., 2707461 ONTARIO LTD., OCH ONTARIO CONSULTING CORP., AND 11819496 CANADA INC.

Applicants

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Robert Thornton, Derek Harland and Rushi Chakrabarti* for the Applicants

Maya Poliak, for CJ Marketing and Arthur Minh Tri Nguyen-Cao

William Skelly, for 606093 Saskatchewan Ltd., Minerva Investments Ltd., Echo Capital Growth Corporation, and PMH Investco Ltd.

Natalie Levine, for Tweed Franchise Inc.

David Bish and Mike Noel, for Ernst & Young Inc., the Proposed Monitor

Daniel Richer and Dylan Chochla, for One Plant Retail Corp., Proposed DIP Lender

HEARD and DETERMINED: December 22, 2023

REASONS: December 29, 2023

ENDORSEMENT

[1] At the conclusion of the hearing, the Applicants were granted protection from their creditors pursuant to the *Companies' Creditors Arrangement Act* ("CCAA"), with a comeback hearing scheduled for January 2, 2024. These are the reasons for such relief.

[2] Trees Corporation ("Trees"), and its subsidiaries Ontario Cannabis Holdings Corp. ("OCH"), Miraculo Inc. ("Miraculo"), 2707461 Ontario Ltd., operating as Camp Cannabis ("Camp Cannabis"), OCH Ontario Consulting Corp. ("Ontario Consulting"), and 11819496 Canada Inc.,

doing business as Trees Cannabis (“118”) (collectively, the “Applicants”) seek protection from their creditors and certain other ancillary relief pursuant to an initial order (the “Initial Order”).

[3] The Applicants are in the business of selling cannabis through retail channels and operate 13 cannabis retail stores operating in Ontario and British Columbia. Over the last three years, the Applicants have suffered significant losses in the tens of millions of dollars.

[4] The Applicants received demand letters and Notices of Intention to Enforce Security on December 15, 2023 and December 21, 2023, from several secured creditors. The Applicants contend that without the protection offered by a stay of proceedings, secured creditors would be in a position to enforce upon their security and possibly disrupt business operations as early as December 27, 2023.

[5] The Applicants submit that they require debtor-in-possession financing to fund operations in the next ten days. The Applicants entered into a debtor-in-possession term sheet with the DIP Lender (as defined below) which would provide the Applicants with an initial advance of \$350,000 if the Initial Order is granted.

[6] Without the stay of proceedings and the approval of the debtor-in-possession financing, the Applicants contend that they are unable to meet their obligations as they become due. Further, the most likely alternative to a CCAA proceeding is the cessation of operations and a piecemeal liquidation of the Applicants’ assets, to the detriment of the Applicants’ landlords, lenders, customers, and 102 employees. The Applicants acknowledge that they are insolvent.

[7] The Applicants request the protection of the CCAA to, among other things: (a) maintain operations for the benefit of its employees and other stakeholders; (b) disclaim unprofitable leases; (c) streamline their remaining operations with a view to generating a profit; (d) commence a court-approved sale and investment solicitation process with the assistance of the Monitor to identify bids that will maintain the Applicants as a going concern and maximize value for the creditors and stakeholders; and (e) address the current capital structure of the Applicants.

[8] The facts are set out in the Affidavit of Jeffrey Holmgren, sworn December 21, 2023.

Corporate Structure

[9] Trees is a public corporation with its registered office located in Toronto, Ontario. Trees is the direct or indirect parent company of each of the Subsidiaries. In addition, Trees operates four licensed cannabis stores in British Columbia.

[10] Miraculo is a wholly owned subsidiary of Trees with a registered head office in Toronto, Ontario. Historically, Miraculo operated an online consumer education platform ancillary to the Applicants’ retail stores. Currently, Miraculo has no business operations.

[11] OCH is the direct subsidiary of Trees and is a holding company with no active operations.

[12] Ontario Consulting, Camp Cannabis and 118 operate the 9 Ontario retail stores. Each of their registered head offices are located in Toronto, Ontario.

The Applicants' Business and Operations

[13] Each of the Applicants' retail stores are leased. Collectively, there are 14 lease agreements (the "Leases") to which the Applicants are tenants. One of the leases is at a location that the Applicants have ceased operations, but the lease is still in effect. The Applicants intend to disclaim this lease. The Leases represent the Applicants' largest liabilities.

[14] The Applicants hold a variety of licenses and permits issued by the applicable regulatory authority in each province that the Applicants operate in. These permits and licenses provide the Applicants with the necessary authority to possess and sell cannabis to the public at their retail locations.

[15] The Applicants have an aggregate of 102 total employees located in Ontario, British Columbia and Alberta as well as four full-time contractors. The Applicants do not maintain any pension plans, defined contribution plans, or any deferred compensation plans.

The Applicants' Financial Position

[16] The Applicants have been operating at a loss for several years. Pursuant to the 2022-23 Annual Statements, the Applicants reported a net loss of approximately \$12.4 million. Further, in the Applicants 2023 Q2 Statements, the Applicants reported a net loss of approximately \$1.2 million.

[17] In the 2022-23 Annual Statements, the Applicants reported total liabilities of approximately \$11.6 million and total assets of approximately \$11.4 million. In the 2023 Q2 Statements, the Applicants reported total liabilities of approximately \$13.4 million and total assets of approximately \$12.3 million. A significant component of the Applicants' assets include intangibles and the Applicants' right to use leases.

Liabilities of the Applicants

[18] The Applicants have numerous secured creditors. The total secured debt obligations of the Applicants as at December 21, 2023 are summarized below:

- (a) Trees: Total secured debt of approximately \$1,657,500, inclusive of interest;
- (b) OCH: Total secured debt of approximately \$2,210,000, inclusive of interest;
and
- (c) Ontario Consulting: Total secured debt of approximately \$9,500,000, inclusive of interest.

[19] In addition, the Applicants have significant unsecured liabilities.

The DIP Term Sheet

[20] In order to fund the operations of the Applicants during these CCAA proceedings, the Applicants seek to gain access to debtor-in-possession financing.

[21] On December 21, 2023, the DIP Term Sheet was entered into between the Applicants and One Plant Retail Corp. (the “DIP Lender”).

[22] Among other things, the DIP Term Sheet includes the following material terms:

- (a) DIP Facility: non-revolving loan up to the maximum amount of \$800,000;
- (b) Advances: the initial advance under the DIP Facility shall be \$350,000 during the Initial Stay Period. Subsequent advances shall be made by the DIP Lender to the Borrowers as needed in installments of not less than \$100,000, as approved by the Monitor;
- (c) Interest Rate: Accrues at fifteen percent (15%) per annum on the outstanding indebtedness. Interest shall be calculated on the daily outstanding balance owing under the DIP Facility, not in advance, and shall accrue and be paid as described further below; and
- (d) Fees: The Applicants shall pay a commitment fee of \$50,000 and all reasonable costs and expenses of the DIP Lender associated with the negotiation and preparation of the DIP Term Sheet and the CCAA proceedings.

[23] Pursuant to the DIP Term Sheet, the DIP Facility must be repaid in full by the date that is the earliest of: (a) the Maturity Date of February 29, 2024; (b) the closing of a transaction; (c) any Order made by the Court replacing Ernst & Young Inc. (“E&Y”) as Monitor; (d) the date on which the CCAA proceedings are terminated for any reason, including if one or more of the Applicants become bankrupt, whether voluntarily or involuntarily; and (e) the occurrence of an Event of Default (as defined in the DIP Term Sheet).

[24] The secured creditors, who were informed of this Application with very little notice, objected to the DIP Term Sheet. After negotiations with secured creditors, which took place during breaks in the hearing, modifications were made to the proposed DIP Facility and the proposed DIP Lender’s Charge. These modifications were reflected in a revised Initial Order.

ISSUES

[25] The issues in respect of the relief being sought under the Initial Order are as follows:

- (a) Are the Applicants entitled to seek protection under the CCAA?
- (b) Should a stay of proceedings be granted in respect of the Applicants?

(c) Should the Court appoint E&Y as Monitor?

(d) Should the Court grant the CCAA Charges?

LAW & ARGUMENT

[26] The CCAA applies to a “debtor company” or “affiliated debtor companies” where the total amount of claims against either the debtor or its affiliates exceed \$5 million.

[27] The Applicants are affiliated debtor companies with total claims that exceed \$5 million.

[28] A “debtor company” is defined in the CCAA to include any company that is bankrupt or insolvent.

[29] The Applicants are insolvent.

[30] I find that each of the Applicants is an “insolvent person” and a “debtor company” to which the CCAA applies.

[31] Each of the Applicants have a registered head office that is located in Ontario. Further, a majority of the Applicants’ operations are based in Ontario (9 of 13 operating retail stores). I am satisfied that this court is the appropriate venue for the CCAA proceedings.

[32] Further to section 11.001 of the CCAA, the relief sought on an initial application is to be limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during the initial stay period.

[33] The Applicants submit that they have limited the relief sought on this initial application to only the relief that is reasonably necessary in the circumstances for the continued operation of its businesses. In each case, the Applicants considered whether the requested relief is necessary for the immediate stabilization of their businesses to protect them and the interests of its various stakeholders.

[34] The Applicants intend to start disclaiming the leases associated with its unprofitable stores during the initial 10-day stay period.

[35] Although the landlords are not receiving notice of the initial application, section 32 of the CCAA provides a counterparty to a disclaimed contract with an opportunity to object to the disclaimer. Accordingly, the landlords may afford themselves the usual procedure under the CCAA.

[36] The Applicants are seeking the appointment of E&Y as the Proposed Monitor in these CCAA proceedings. While E&Y meets the requirements of subsection 11.7(1) of the CCAA, it is subject to one of the restrictions set out in section 11.7(2) of the CCAA, in that E&Y, an affiliate of E&Y, previously acted as Trees’ auditor in the two-year period prior to this CCAA application.

The last period audit by E&Y was December 31, 2021. E&Y resigned in its capacity as auditor effective May 10, 2022, and a new auditor was subsequently appointed.

[37] In view of the restriction set out in section 11.7(2) of the CCAA, the appointment of E&Y as Monitor notwithstanding the prior audit relationship between E&Y and Trees must be specifically authorized by the court.

[38] Section 11.7(1) of the CCAA provides that when an initial order is made, a Monitor shall be appointed. The Application was commenced on December 22, 2023, the final business day prior to the holiday break. This left no practical alternative to the appointment of E&Y as Monitor, notwithstanding the restrictions set out in section 11.7(2).

[39] During the hearing, I expressed concerns as to appropriateness of this appointment and indicated that the appointment of E&Y as Monitor would be reviewed at the comeback hearing. In addition, reference is made in [23] above to certain repayment terms of the DIP Facility. For greater certainty, “(c) any Order made by the Court replacing Ernst & Young Inc. (“E&Y”) as Monitor” is not approved and is to be considered inoperative.

[40] The proposed Initial Order provides for the following three charges (collectively, the “Charges”), in order of their requested priority:

- (a) First – an administration charge (the “Administration Charge”) to the maximum initial amount of \$350,000 to secure payment of professional fees;
- (b) Second – a DIP lender’s charge (the “DIP Lender’s Charge”) against the Property in the amount of the Initial Advance as security for the DIP Borrowers’ obligations under the DIP Term Sheet; and
- (c) Third - a directors’ and officers’ charge (the “D&O Charge”) to the maximum amount of \$251,000 to secure the indemnity given by the Applicants to their directors and officers pursuant to the Proposed Initial Order.

[41] The secured creditors raised objections to the Charges. After considerable negotiation, a consensus was reached on a form of order, that included the Charges with revised terms.

[42] The status of the Charges will be reviewed at a comeback hearing. The revised form of order is acceptable to the court.

[43] CCAA protection is granted to the Applicants and a revised Initial Order, negotiated by the parties has been signed. The comeback hearing will be held on January 2, 2024.



Chief Justice Geoffrey B. Morawetz

Date: December 29, 2023