Court File No.

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 CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.

Applicants

FACTUM OF THE APPLICANTS
(CCAA Application)

March 31, 2020

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6
Fax: 416-868-0673

R. Paul Steep LSO#: 21869L
Tel: 416-601-7998
E-mail: psteep@mccarthy.ca

James D. Gage LSO#: 34676I
Tel: 416-601-7539
E-mail: jgage@mccarthy.ca

Trevor Courtis LSO#: 67715A
Tel: 416-601-7643
Email: tcourtis@mccarthy.ca

Alexander Steele LSO#: 475719P
Tel: 416-601-8370
Email: asteele@mccarthy.ca

Lawyers for the Applicants

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(CCAA Application)

PART I. INTRODUCTION

1. CannTrust is seeking relief under the *Companies' Creditors Arrangement Act* (Canada)[1] due to the significant challenges that it has faced following regulatory audits of its facilities in June and July 2019 which revealed that CannTrust was growing and storing cannabis contrary to applicable laws.[2]

2. Prior to these audits, CannTrust operated a business that was experiencing operational growth and expanding into new markets and product segments.[3]

3. Following these audits, among other things, shipments of all CannTrust's cannabis products have been stopped, its cannabis licences have been partially suspended, its chief

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[1] *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [**CCAA**].
[2] For ease of reference, the Applicants will be collectively referred to herein as "**CannTrust**". Any capitalized terms used but not otherwise defined herein have the meanings given to them in the Affidavit of Greg Guyatt, sworn March 31, 2020 ("**Guyatt Affidavit**").
[3] Guyatt Affidavit, Application Record of the Applicants dated March 31, 2020 ("**Application Record**"), Tab 2.

executive officer and chair have been replaced, it has terminated or laid off over 500 employees, large customers have returned its products, it has ceased making its required disclosures under securities laws, multiple class actions and other litigation seeking at least $500 million in aggregate damages (the "**Pending Litigation**") have been commenced against it and its market capitalization declined by almost 90%.[4]

4. CannTrust has had no revenue since July 2019. Meanwhile, CannTrust has had to incur significant ongoing costs to complete remediation measures required and address its operational, financial, legal and other reporting obligations. While CannTrust has completed its remediation work and requested the reinstatement of its licence at one of its facilities, and is expected to do the same for its other facility by the end of April 2020, there is no assurance whether or when Health Canada will reinstate those licences. Health Canada's review may be further delayed by its decision to reduce onsite field inspection activities in light of the COVID-19 pandemic.[5]

5. Even if its cannabis licences are reinstated, it would take several months for CannTrust to earn revenue from cannabis plants that would need to be propagated, cultivated, processed and sold. At the same time, CannTrust would require significant working capital to restore its operations.[6]

6. The current disruption of global capital markets and the recent downturn of the Canadian cannabis industry more specifically have made CannTrust's financial situation even more precarious and the likelihood that it could attract capital is now highly doubtful.[7]

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[4] Guyatt Affidavit at para. 10, Application Record, Tab 2.
[5] Guyatt Affidavit at para. 12, Application Record, Tab 2.
[6] Guyatt Affidavit at para. 14, Application Record, Tab 2.
[7] Guyatt Affidavit at para. 16, Application Record, Tab 2.

7. In the circumstances, CannTrust is insolvent and requires CCAA protection to allow CannTrust breathing space so that it can maximize value for all affected stakeholders by, among other things:

(a) completing the remainder of its remediation plan;

(b) continuing to work with Health Canada to resolve any remaining compliance issues, with a view towards obtaining reinstatement of its licences, restoring operations and returning CannTrust to profitability;

(a) exploring a CCAA plan of compromise or arrangement as a means for addressing the multiple putative class actions and other litigation brought against CannTrust in several jurisdictions, seeking to resolve all of the claims and contingent claims against CannTrust through a single forum; and

(c) facilitating the completion of its review of strategic alternatives, including any potential sale of or other strategic transaction involving CannTrust, whether in addition to, or as an alternative to, a CCAA plan of compromise or arrangement.[8]

8. On this initial application, CannTrust seeks an order (the "**First Day Order**") granting relief that is reasonably necessary for its continued operation in the ordinary course of business during the initial 10-day stay period.

[8] Guyatt Affidavit at para. 17, Application Record, Tab 2.

PART II. THE FACTS

9. The affidavit sworn by the Chief Executive Officer of CannTrust, Greg Guyatt, on March 31, 2020 in support of this application sets out in detail the facts concerning CannTrust, its business and property and the relief requested on this application.[9]

PART III. ISSUES AND THE LAW

10. The issues before this Court and the position of CannTrust on each are as follows:

(a) Do the Applicants meet the criteria for protection under the CCAA? ***Yes. The Applicants are insolvent companies with total claims against them of more than $5 million.***

(b) Should the Court grant an initial order staying all proceedings in respect of the Applicants? ***Yes. It is appropriate to grant a stay of proceedings with respect to the Applicants to provide the necessary breathing space to complete the remediation plan and resume operations and address the Pending Litigation.***

(c) Should the Court extend the stay of proceedings to the Cross-Default Rights? ***Yes. It is fair and reasonable to extend the stay of proceedings to the Affected Parties in respect of the Cross-Default Rights.***

(d) Should the Court approve the Intercompany Advances? ***Yes, this relief will preserve the status quo between the Applicants.***

[9] Guyatt Affidavit, Application Record, Tab 2.

(e) Should EY be appointed as Monitor? ***Yes. EY meets all of the statutory requirements and is very experienced in similar matters.***

(f) Should the engagement of the CRO be approved? ***Yes. The experience, expertise and institutional knowledge of the CRO will be beneficial to CannTrust and its stakeholders in achieving a positive outcome in these proceedings.***

(g) Should the Court grant the priority charges sought? ***Yes. The quantum and priority of the Administration Charge, Directors' Charge and Intercompany Charge is appropriate and necessary during the initial 10-day stay period.***

(h) Should the Court grant the relief related to securities reporting? ***Yes. In the circumstances it is appropriate to authorize CannTrust to incur no further expenses related to securities reporting.***

(i) Should the Court grant the other relief sought in the proposed First Day Order? ***Yes. The relief sought is reasonably necessary for the continued operation of CannTrust during the initial 10-day stay period.***

A. The Applicants Meet the Criteria for Protection Under the CCAA

11. The CCAA applies to a debtor company or affiliated debtor companies where the total of claims against the debtor or its affiliates exceeds $5 million.[10] A "debtor company" includes a company that is insolvent.[11] The Applicants each qualify as a "company" because they are incorporated pursuant to the *Business Corporations Act* (Ontario) or the *Business Corporations*

[10] CCAA, s. 3.
[11] CCAA, s. 2 "debtor company".

Act (British Columbia).[12] The Applicants are affiliated debtor companies with total claims against them of more than $5 million.[13] As outlined below, the Applicants are each insolvent.

(i) The Tests for Insolvency

12. The CCAA does not define "insolvent", so CCAA courts have taken guidance from the *Bankruptcy and Insolvency Act* (the "**BIA**").[14] The BIA defines an "insolvent person" as a person who:

(a) is for any reason unable to meet his obligations as they generally become due (the "**liquidity test**");

(b) has ceased paying his current obligations in the ordinary course of business as they generally become due; or

(c) has property that in aggregate is not, at fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due (the "**balance sheet test**").[15]

13. The tests for insolvency are disjunctive. A company satisfying any one of these tests at the time of its application for an initial order is considered insolvent for purposes of the CCAA.[16]

14. A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a "looming liquidity crisis" in the sense that it is reasonably expected to run out of liquidity

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[12] Guyatt Affidavit at paras. 19, 20, 24, and 25, Application Record, Tab 2.
[13] Guyatt Affidavit at paras. 147, 152 Application Record, Tab 2.
[14] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**"). See *Stelco Inc., Re*, 2004 CarswellOnt 1211 at para. 26 (SCJ) [***Stelco***], leave to appeal to ONCA refused, 2004 CarswellOnt 2936, leave to appeal to SCC refused, 2004 CarswellOnt 5200; *Target Canada Co., Re*, 2015 ONSC 303 at para. 26 [***Target***]; *Cinram International Inc., Re*, 2012 ONSC 3767 at para. 50 [***Cinram***].
[15] BIA, s. 2, "insolvent person".
[16] *Stelco* at para. 28; *Cinram* at para. 51.

within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.[17]

15. In applying these tests, the financial statements of the company may be used as a starting point, but they are adjusted to reflect what would then be reasonably and objectively expected based on the totality of the evidence.[18]

16. For the purposes of the balance sheet test, all obligations due and accruing due must be considered. In valuing liabilities due and accruing due, this Court held in *Stelco* that the Court should consider all obligations of "whatever nature or kind", leaving "nothing in limbo," and taking into account all liabilities, whether contingent or unliquidated.[19] Contingent liabilities in the form of litigation claims cannot be ignored "just because [the debtor] has entered defences in all of them."[20]

(ii) The Applicants are Insolvent

17. CannTrust Holdings Inc. ("**CannTrust Holdings**"), the reporting issuer parent company, is insolvent under the balance sheet test because it appears that the realizable value of its assets is not sufficient to satisfy its existing liabilities and its contingent liability for the claims asserted in the Canadian Class Actions, the Zola Action and the US Class Actions, in which estimated damages claims exceed $500 million in the aggregate, and its potential regulatory liabilities to the OSC and others.[21]

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[17] *Stelco* at paras. 26, 40; *Target* at para. 26.
[18] *4519922 Canada Inc., Re*, 2015 ONSC 124 at paras. 29-30 [***Coopers & Lybrand***]. *Lemare Holdings Ltd., Re* 2012 CarswellBC 3294 at para. 49 [***Lemare Holdings***].
[19] *Stelco* at paras. 50 & 56; *Union of Canada Life Insurance, Re*, 2012 ONSC 957 at para. 16.
[20] *Coopers & Lybrand* at paras. 31-32. See also *Lemare Holdings* at paras. 50-54; *Muscletech Research & Development Inc., Re*, 2006 CarswellOnt 264 at para. 2 [***Muscletech***].
[21] Guyatt Affidavit at para. 147, Application Record, Tab 2.

18. CannTrust Inc. ("**Opco**"), the primary operating entity and holder of the Cannabis Licences, is insolvent under the balance sheet test because it appears that the realizable value of its assets is not sufficient to satisfy its existing liabilities such as employee obligations, trade debt and contract commitments, its liability to CannTrust Holdings for intercompany advances (which was approximately $209.8 million as at December 31, 2019), its contingent liability for the claims asserted in the Construction Action and its potential regulatory liabilities to Health Canada and others.[22]

19. Elmcliffe Investments Inc. ("**Elmcliffe**") and CTI Holdings (Osoyoos) Inc. ("**CTI Holdings**") hold certain real property, buildings and related equipment for the Fenwick Facility and the BC Outdoor Cultivation Lands, respectively.[23] Opco, Elmcliffe and CTI Holdings do not currently have any revenues. Accordingly, Opco, Elmcliffe and CTI Holdings are each insolvent under the liquidity test as they are unable to meet their respective obligations as they generally become due.[24]

B. The Court Should Grant an Initial Order Staying Proceedings

(i) Jurisdiction

20. A CCAA application may be made to a court in the province in which the Applicants' head office or chief place of business in Canada is situated.[25] CannTrust's head office is located in Vaughan, Ontario and its production facilities are located in Fenwick and Vaughan, Ontario.[26] CTI Holdings is a BC corporation with its registered address at a law firm in British Columbia,

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[22] Guyatt Affidavit at para. 126, Application Record, Tab 2.
[23] Guyatt Affidavit at para. 155, Application Record, Tab 2.
[24] Guyatt Affidavit at para. 155, Application Record, Tab 2; ***Target*** at paras. 19, 23 and 27.
[25] CCAA, s. 9(1).
[26] Guyatt Affidavit at para. 25, 44, 42, Application Record, Tab 2.

however its sole director and officer is located in Ontario and all operational decisions are made from the CannTrust head office in Vaughan, Ontario.[27] Accordingly, this court has jurisdiction to grant the First Day Order sought by the Applicants.

(ii) Scope of First Day Orders

21. On an initial application, the Court may stay proceedings "on any terms that it may impose."[28] Following the recent amendments to the CCAA, the initial stay period may not be more than 10 days and the other relief granted during that period must be "limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period."[29]

22. The purpose of the newly-enacted section 11.001 of the CCAA is to "limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players."[30] First day orders should allow debtor companies to stabilize their operations and maintain the *status quo* during the initial 10-day stay period.[31]

(iii) Appropriate to Stay Proceedings Against the Applicants

23. The CCAA stay of proceedings has been described as "the engine that drives a broad and flexible statutory scheme."[32] The purpose of stay orders is to maintain the *status quo* and provide

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[27] Guyatt Affidavit at para. 25, Application Record, Tab 2.
[28] CCAA, s. 11.02.
[29] CCAA, s. 11.001.
[30] *Lydian International Limited (Re)*, 2019 ONSC 7473 at para. 25 [***Lydian***]; *Clover Leaf Holdings Company, Re*, 2019 ONSC 6966 at para. 13.
[31] *Lydian* at paras. 26-30.
[32] *Nortel Networks Corp., Re*, 2010 ONSC 1304 at para. 34; citing *Stelco Inc., Re*, 2005 CarswellOnt 1188 at para. 36 (CA).

the debtor company with an essential respite from the burden of dealing with litigation and other claims against it while it attempts to carry on as a going concern, restructure its financial affairs and negotiate an acceptable restructuring arrangement.[33]

24. The stay maintains a level playing field among the creditors of a company so that no creditor will have an advantage over other creditors, and prevents aggressive creditors from taking actions that would undermine the company's financial position, prejudice other creditors and impair the prospects of a viable restructuring.[34]

25. The CCAA has been employed in numerous cases as a means of dealing with or achieving a global resolution of litigation against the debtor company.[35] For example:

(a) In *Muscletech Research & Development Inc., Re*., the debtor companies sought CCAA protection primarily to achieve a global resolution of a large number of product liability claims and other lawsuits.[36]

(b) In *Montreal, Maine & Atlantic Canada Co*., the CCAA filing was made to address litigation claims against the debtor arising out of a train disaster.[37]

(c) In *4519922 Canada Inc.*, the applicant sought to address negligence claims arising from the preparation and audit of financial statements.[38]

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[33] *Lehndorff General Partner Ltd.*, Re, 1993 CarswellOnt 183 at para. 5 (Gen. Div.) [***Lehndroff***]; *Campeau v. Olympia & York Developments Ltd.*, 1992 CarswellOnt 185 at para. 17 (Gen Div); *Re Doman Industries Ltd.*, 2003 BCSC 376 at para. 22.
[34] *Woodward's Ltd., Re*, 1993 CarswellBC 530 at para. 12 (SC); *Lehndorff* at para. 6.
[35] See e.g. *Coopers & Lybrand* at paras. 53-54; *Muscletech* at para. 3; *Montréal, Maine & Atlantique Canada Co., Re*, 2013 QCCS 4039 at paras. 38-40 [***Montreal, Maine***]; *Grace Canada Inc., Re*, 2005 CarswellOnt 6648 at para. 11 (SCJ).
[36] *Muscletech* at para. 3.
[37] *Montreal, Maine* at paras. 38-40.
[38] *Coopers & Lybrand* at para. 10.

(d) Three separate tobacco companies each recently commenced CCAA proceedings to resolve class action litigation and other litigation that had been commenced against each of them.[39]

26. The CCAA is a valuable tool in such situations since it brings various creditors together into one forum, avoiding chaos and inefficiency.[40] It provides the applicant and stakeholders with a means of arriving at a global resolution of litigation claims and provides a structure to attempt to resolve outstanding litigation.[41]

27. CannTrust needs the single forum structure of the CCAA to address the numerous litigation claims against it effectively and in an orderly manner while maintaining its focus squarely on completing its remediation work, obtaining the reinstatement of its licences and resuming operations. Accordingly, it is appropriate to grant a stay of proceedings with respect to the Applicants.

C. The Court Should Extend the Stay of Proceedings to the Cross-Default Rights

(i) Third Party Stays in CCAA Proceedings

28. This Court has the discretion under section 11 of the CCAA to impose a stay of proceedings with respect to non-applicant third parties where it is "satisfied that it is fair and reasonable in the circumstances.[42]

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[39] *JTI-Macdonald Corp., Re*, 2019 ONSC 1625 at paras. 12-13; *Imperial Tobacco Canada Limited, Re*, 2019 ONSC 1684 at paras. 3-5; *Rothmans, Benson and Hedges Inc., Re*, Court File No. CV-19-616779-00CL, endorsement of Pattillo J. issued March 22, 2019.

[40] *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para. 22.

[41] *Coopers & Lybrand* at paras. 53 and 67.

[42] *Pacific Exploration & Production Corp., Re*, 2016 ONSC 5429 at para. 26 [***Pacific Exploration***].

29. Generally, Canadian Courts have extended the stay of proceedings to non-applicant third parties where "it is important to the reorganization and restructuring process, and where it is just and reasonable to do so";[43] where not extending the stay to a third party "could potentially jeopardize the success of the plan and thereby the continuance of the company";[44] where operations of the third party "are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted";[45] and where the third party has crossclaimed against the debtor companies on the basis of a guarantee, contribution or indemnity that the debtor may owe to the third party.[46]

30. In *Lydian International Limited (Re)*, the Honourable Chief Justice Morawetz recently extended the stay of proceedings to several non-applicant affiliates, including those in foreign jurisdictions, during the initial 10-day stay period to stabilize the operations of the group of companies.[47]

31. In the proposed First Day Order, CannTrust is seeking a stay of all rights and remedies against or in respect of certain third parties in which CannTrust has a material equity interest (the "**Affected Parties**"), arising out of, relating to, or triggered by the insolvency of CannTrust or the commencement of these proceedings (the "**Cross-Default Rights**").[48] If counterparties were able to rely on Cross-Default Rights in their contracts with the Affected Parties, it may have a material impact on the financial position of CannTrust.[49]

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[43] *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 at para. 21.
[44] *Lehndorff* at para. 10.
[45] *Canwest Publishing Inc., Re*, 2010 ONSC 222 at para. 33 [***Canwest Publishing***].
[46] *Cinram at* para. 61.
[47] *Lydian* at para. 39.
[48] First Day Order at para. 14, Application Record, Tab 4.
[49] Guyatt Affidavit at para. 164, Application Record, Tab 2.

32. Accordingly, it is fair and reasonable to extend the stay of proceedings to the non-Applicant members of the CannTrust Group in respect of the Cross-Default Rights.[50]

D. Intercompany Advances Should be Approved

33. Where the operations and expenses of debtor companies are funded in the ordinary course through intercompany advances, it is appropriate for the CCAA court to approve the continuation of those arrangements during the CCAA proceedings and to grant an intercompany charge over the assets of the borrowers.[51]

34. Substantially all of the cash and short term investments of CannTrust are owned by CannTrust Holdings. The operations and expenses of Opco, Elmcliffe and CTI Holdings are funded in the ordinary course through non-interest-bearing advances from CannTrust Holdings.[52] The First Day Order will facilitate the continuation of this practice by authorizing CannTrust Holdings to make Intercompany Advances to each of Opco, Elmcliffe and CTI Holdings (each, an "**Intercompany Borrower**") to fund their ongoing expenditures and other amounts permitted by the Initial Orders. Any Intercompany Advances will be subject to Monitor review and approval.[53] The Intercompany Advances will be secured by an Intercompany Charge, as set out further below.

35. In the First Day Order, Intercompany Advances will be limited to $4.2 million, which is the amount that is reasonably necessary for the continued operations of the Intercompany

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[50] *Pacific Exploration* at para. 26; Guyatt Affidavit at para. 164, Application Record, Tab 2.
[51] *Performance Sports Group Ltd., Re*, 2016 ONSC 6800 at paras. 33-35 [***Performance Sports Group***]; *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107 at paras. 62-67; *Arrangement Relatif a BioAmber Canada Inc.*, 2018 QCCS 3170 at paras. 20-22.
[52] Guyatt Affidavit at para. 174, Application Record, Tab 2.
[53] Guyatt Affidavit at para. 174, Application Record, Tab 2.

Borrowers in the ordinary course of business during the initial 10-day stay period.[54] This relief is necessary and appropriate in the circumstances.

E. EY Should be Appointed as Monitor

36. Upon the granting of an initial order, section 11.7 of the CCAA requires that a trustee be appointed to monitor the debtor company's business and financial affairs.[55] Ernst & Young Inc. ("**EYI**") has consented to act as monitor in these CCAA proceedings and is a trustee within the meaning of subsection 2(1) of the BIA.[56] EYI is very experienced in similar matters, having acted as CCAA monitor for other licenced producers of cannabis in Ontario, and is not subject to any of the restrictions as to who may be appointed as monitor set out in section 11.7(2) of the CCAA. Accordingly, EYI should be appointed as monitor of the Applicants (in such capacity, the "**Monitor**").

F. The Engagement of the CRO Should be Approved

37. Prior to the commencement of these proceedings, CannTrust engaged FTI Consulting Canada Inc. ("**FTI**") to act as chief restructuring officer ("**CRO**") and provide financial, advisory and consulting services to CannTrust.[57] Paul Bishop of FTI is the person primarily responsible for performing the services of the CRO.[58]

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[54] Guyatt Affidavit at para. 175, Application Record, Tab 2.
[55] CCAA, s. 11.7.
[56] Consent of Ernst & Young Inc. dated March 30, 2020, Application Record, Tab 3.
[57] Guyatt Affidavit at para. 176, Application Record, Tab 2.
[58] Guyatt Affidavit at para. 178, Application Record, Tab 2.

38. CannTrust intends to continue utilizing the services of the CRO during the CCAA proceedings and entered into the CRO Engagement Letter which governs the services to be provided by the CRO to CannTrust during the course of these proceedings.[59]

39. CannTrust is not seeking the appointment of the CRO as a court officer, only for the Court to approve the CRO Engagement Letter and the appointment of FTI as CRO pursuant thereto.[60] Similar relief has been granted in initial orders in other CCAA proceedings, including during the initial 10-day stay period.[61] This relief is appropriate in the circumstances as:

(a) the CRO is very experienced in restructuring proceedings of this nature;

(b) the experience and expertise of the CRO will be beneficial to CannTrust and its stakeholders in achieving a positive outcome in these proceedings; and

(c) CannTrust and the proposed Monitor have reviewed the proposed fees and disbursements set out in the CRO Engagement Letter and believe them to be fair and reasonable in the circumstances.[62]

G. The Priority Charges Should be Approved

40. CannTrust is seeking approval of certain first-ranking court-ordered charges on its assets, property and undertaking in connection with the administrative costs of the CCAA proceedings, the indemnification of its directors and officers and to secure the Intercompany Advances.

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[59] Guyatt Affidavit at para. 176, Application Record, Tab 2.
[60] Guyatt Affidavit at para. 177, Application Record, Tab 2.
[61] *SFP Canada Ltd., Re*, Court File No. CV-20-634980-00CL, initial order issued January 23, 2020 at para. 29 [***SFP Canada Initial Order***]. See also *U. S. Steel Canada Inc., Re*, Court File No. CV-14-10695-00CL, initial order issued September 16, 2014 at para. 28, and *Payless Shoesource Canada Inc., Re*, Court File No. CV-19-00614629-00CL, initial order issued February 19, 2019 at paras. 29-35.
[62] Guyatt Affidavit at para. 179, Application Record, Tab 2.

Granting the Charges with the priority sought is appropriate and important to the restructuring. CCAA Courts have acknowledged the importance of priority charges to ensure the willingness of professionals and directors and officers to participate in the CCAA proceedings.[63]

(i) Administration Charge

41. CannTrust is seeking an Administration Charge of $700,000 to secure the professional fees and disbursements of the Monitor, counsel to the Monitor, counsel to the Applicant, the CRO and the Financial Advisor. The Administration Charge is to rank in priority to the D&O Charge and the Intercompany Charge.[64] CannTrust will request that the maximum amount of the Administration Charge be increased to $1.5 million in the Amended and Restated Initial Order.

42. Section 11.52 of the CCAA expressly provides this Court with the jurisdiction to grant an administration charge in respect of the fees and expenses of the monitor and any financial, legal or other experts engaged by the company for the CCAA proceeding.[65] It is appropriate for the Administration Charge to encompass the fees and expenses of the CRO.[66]

43. The requested Administration Charge in the First Day Order is limited to what is reasonably necessary to cover the fees and disbursements of the professionals for the initial stay period, as reflected in the cash flow forecast filed in support of the application.[67] Administration Charges of CAD $1.25 million[68] and CAD $400,000[69] have been granted during the initial 10-day stay period in other CCAA proceedings.

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[63] *Timminco Ltd., Re,* 2012 ONSC 506 at para. 66.
[64] Guyatt Affidavit at para. 182, Application Record, Tab 2; First Day Order at paras. 34-36, Application Record, Tab 4.
[65] *CCAA*, s. 11.52(1).
[66] *SFP Canada Initial Order* at para. 28.
[67] Cash Flow Forecast, Exhibit "F" to the Guyatt Affidavit, Application Record, Tab 2F.
[68] *Clover Leaf* at para. 32.

44. CannTrust submits that the Administration Charge is warranted and necessary[70] and that it is appropriate to grant the Administration Charge in the amount of $700,000 given that the CCAA will require the extensive involvement of the professional advisors from the very outset; there is no unwarranted duplication of roles; CannTrust has no secured debt; the First Day Order gives priority to enumerated secured claims that would otherwise be affected by the Charges; and the proposed Monitor is supportive of the Administration Charge.[71]

(ii) Directors' Charge

45. CannTrust is seeking a Directors' Charge in an amount of $1.4 million to indemnify its directors and officers for liabilities they may incur in their capacity as directors and officers of CannTrust after the commencement of these CCAA proceedings. The Directors' Charge is to rank subordinate to the Administration Charge.[72] CannTrust will request that the maximum amount of the Directors' Charge be increased to $3.75 million in the Amended and Restated Initial Order.

46. Jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis is provided in section 11.51 of the CCAA.[73] An insolvency creates new risks and potential liabilities for directors and officers. A directors' charge is intended to keep them in place during a restructuring to avoid disruption and to retain experienced management at a critical time.[74]

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[69] *SFP Canada Initial Order* at para. 28.
[70] See the non-exhaustive list of factors in *Canwest Publishing* at para. 54. See also *Lydian* at paras. 46-48.
[71] Guyatt Affidavit at para. 182, Application Record, Tab 2.
[72] Guyatt Affidavit at para. 191, Application Record, Tab 2; First Day Order at paras. 20 and 40, Application Record, Tab 4.
[73] *CCAA*, s. 11.51; *Lydian* at para. 52.
[74] *Canwest Publishing* at para. 56.

47. The directors and officers of CannTrust are beneficiaries of directors and officers insurance policies (the "**D&O Insurance Policies**"), however: (i) CannTrust's insurers have not committed to renewing CannTrust's insurance coverage, including for its directors and officers, past August 25, 2020; and (ii) there is the potential for insufficient coverage as there are exclusions and limitations to the coverage provided.[75]

48. To partially close this gap, CannTrust established a trust (the "**D&O Trust**") and committed $6 million to it, which is intended to cover any claims that current and future directors and officers may become personally liable for in such capacity. Notwithstanding the existence of the D&O Insurance Policies and the D&O Trust, there is the potential that gaps may remain in the coverage of the directors and officers.[76] The directors and officers of CannTrust have expressed their desire for certainty with respect to potential personal liabilities if they continue in their personal capacity.[77]

49. In *Clover Leaf* and *SFP Canada*, Directors' Charges of CAD $2.3 million and CAD $1 million, respectively, were granted during the initial 10-day stay period notwithstanding the existence of a D&O insurance policy as further protection for the directors was necessary for the continued operation of the debtor companies.[78]

50. The amount of the Directors' Charge has been calculated based on the estimated potential exposure of the directors and officers during the initial 10-day stay period for obligations and liabilities that they may incur after the commencement of these CCAA proceedings and does not cover wilful misconduct or gross negligence. The Initial Order gives priority to enumerated

[75] Guyatt Affidavit at para. 186, Application Record, Tab 2.
[76] Guyatt Affidavit at para. 188, Application Record, Tab 2.
[77] Guyatt Affidavit at para. 188, Application Record, Tab 2.
[78] *Clover Leaf* at para. 33; *SFP Canada Initial Order* at para. 19.

secured claims that would otherwise be affected by the Charges.[79] The proposed Monitor is supportive of the Directors' Charge.[80]

(iii) Intercompany Charge

51. CannTrust is seeking an Intercompany Charge on all of the Property of each of the Intercompany Borrowers as security for the intercompany advances made by CannTrust Holdings to such Intercompany Borrower.[81] Intercompany charges to protect intercompany advances have been approved before in CCAA proceedings under the general power in section 11 of the CCAA to make such orders as the court considers appropriate.[82]

52. The Intercompany Charge will not secure any Intercompany Advances made by CannTrust Holdings to the Intercompany Borrowers before the Initial Filing Date. In the First Day Order, Intercompany Advances (and thus the Intercompany Charge) will be limited to $4.2 million, which is the amount that is reasonably necessary for the continued operations of the Intercompany Borrowers in the ordinary course of business during the initial 10-day stay period.[83]

H. Securities Reporting Relief Should be Granted

53. The TSX, NYSE and OSC, as applicable, have indicated that the securities of CannTrust Holdings will likely be delisted and cease traded as a result of CannTrust commencing these

[79] Guyatt Affidavit at para. 192, Application Record, Tab 2.
[80] Guyatt Affidavit at para. 182, Application Record, Tab 2.
[81] Guyatt Affidavit at para. 274, Application Record, Tab 2; First Day Order at paras. 38 and 40, Application Record, Tab 4.
[82] *Performance Sports Group* at para. 34.
[83] Guyatt Affidavit at para. 175, Application Record, Tab 2.

CCAA proceedings, regardless of whether CannTrust Holdings cures its disclosure defaults.[84] In the circumstances, the Board has determined that incurring further expenses to cure its disclosure defaults and maintain the currency of its securities reporting going forward is not appropriate at this juncture. The resources and time of CannTrust are better directed towards completing its remediation efforts, attempting to resolve the Pending Litigation and completing its review of strategic alternatives.[85]

54. In the First Day Order, CannTrust is seeking the authorization of this Court to proceed in this manner and incur no further expenses in relation to any Securities Filings that may be required by the Securities Provisions (as each term is defined in the First Day Order). CannTrust is also seeking protection for certain individuals against any personal liability that may arise as a result of such decision.[86] Similar relief has been granted in other CCAA proceedings, including during the initial 10-day stay period.[87]

55. CannTrust is not asking the Court to exempt it from its continuous disclosure obligations, or bar any securities regulators or stock exchanges from taking steps within their discretion as a result of the continued non-reporting by CannTrust. Accordingly, this relief is appropriate in the circumstances.

I. The Other Relief Sought Should be Granted

56. The other relief sought in the proposed First Day Order is appropriate and is reasonably necessary for the continued operations of the Applicants in the ordinary course of business

[84] Guyatt Affidavit at para. 170, Application Record, Tab 2.
[85] Guyatt Affidavit at para. 170, Application Record, Tab 2.
[86] Guyatt Affidavit at para. 171, Application Record, Tab 2; First Day Order at paras. 46-47, Application Record, Tab 4.
[87] *Pure Global Cannabis, Inc., Re*, initial order issued March 19, 2020 at para. 49 [***Pure Global Initial Order***]; *Old PSG Wind-down Ltd., Re*, Court File No. CV-16-11582-00CL, order issued December 20, 2017 at para. 12.

during the initial 10-day stay period, including relief related to (i) cash management, (ii) continued payment of employee, professional and operating expenses in the ordinary course of business, (iii) certain restructuring steps such as terminating employees and pursuing refinancing and asset sale opportunities, subject to the approval of the Court, and (iv) service and notice. Similar relief has been granted during the initial 10-day stay period in other CCAA proceedings.[88]

57. Given the limitations imposed on the ability of CannTrust and the Monitor to process and send notices to creditors by physical mail as a result of the COVID-19 pandemic, and the fact that many businesses may not have staff on site to open such mailings, the Applicants are seeking the Court's authorization to deliver the notices to known creditors by e-mail instead of physical mail. In the current circumstances, the Applicants believe that the notices are more likely to come to the prompt attention of known creditors if they are sent by e-mail.[89] Similar relief was recently granted in another CCAA proceeding and is appropriate in the circumstances.[90]

PART IV. ORDER REQUESTED

58. For the reasons set out above, the Applicants request that this Court grant the proposed First Day Order. The Applicants meet all of the qualifications required to obtain the requested relief under the CCAA, and the relief is appropriate and reasonably necessary for the continued

[88] See e.g. *SFP Canada Initial Order*, *Lydian International Limited, Re*, Court File No. CV-19-00633392-00CL, initial order issued December 23, 2019; *AgMedica Bioscience Inc., Re*, Court File No. CV-19-00632052-00CL, initial order issued December 2, 2019; *Quest University Canada, Re*, Supreme Court of British Columbia File No. S-200586, initial order issued January 16, 2020.

[89] Guyatt Affidavit at para. 194, Application Record, Tab 2; First Day Order at para. 48, Application Record, Tab 4.

[90] *Pure Global Initial Order* at para. 50.

operations of the Applicants in the ordinary course of business during the initial 10-day stay period.

59. The balance of the relief sought by the Applicants in the Notice of Application should be reserved to be heard by the Court at the comeback hearing. The Applicants intend to file a separate factum with respect to that relief prior to the comeback hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of March, 2020.

McCarthy Tétrault LLP

Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

Jurisprudence

1. *Stelco Inc., Re*, 2004 CarswellOnt 1211 (SCJ), leave to appeal to ONCA refused, 2004 CarswellOnt 2936, leave to appeal to SCC refused, 2004 CarswellOnt 5200
2. *Target Canada Co., Re*, 2015 ONSC 303
3. *Cinram International Inc., Re*, 2012 ONSC 3767
4. *4519922 Canada Inc., Re*, 2015 ONSC 124
5. *Lemare Holdings Ltd., Re*, 2012 BCSC 1591
6. *Union of Canada Life Insurance, Re*, 2012 ONSC 957
7. *Muscletech Research & Development Inc., Re*, 2006 CarswellOnt 264 (SCJ)
8. *Lydian International Limited (Re)*, 2019 ONSC 7473
9. *Clover Leaf Holdings Company, Re*, 2019 ONSC 6966
10. *Stelco Inc., Re*, 2005 CarswellOnt 1188 (CA)
11. *Nortel Networks Corp., Re*, 2010 ONSC 1304
12. *Lehndorff General Partner Ltd.*, Re, 1993 CarswellOnt 183 (Gen. Div.)
13. *Campeau v. Olympia & York Developments Ltd.*, 1992 CarswellOnt 185 (Gen Div)
14. *Re Doman Industries Ltd.*, 2003 BCSC 376
15. *Montréal, Maine & Atlantique Canada Co., Re*, 2013 QCCS 4039
16. *Grace Canada Inc., Re*, 2005 CarswellOnt 6648 (SCJ)
17. *JTI-Macdonald Corp., Re*, 2019 ONSC 1625
18. *Imperial Tobacco Canada Limited, Re*, 2019 ONSC 1684
19. *Rothmans, Benson and Hedges Inc., Re*, Court File No. CV-19-616779-00CL, endorsement of Pattillo J. issued March 22, 2019.
20. *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60
21. *Pacific Exploration & Production Corp., Re*, 2016 ONSC 5429

22. *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461

23. *Canwest Publishing Inc., Re*, 2010 ONSC 222

24. *Performance Sports Group Ltd., Re*, 2016 ONSC 6800

25. *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107

26. *Arrangement Relatif a BioAmber Canada Inc.*, 2018 QCCS 3170

27. *SFP Canada Ltd., Re*, Court File No. CV-20-634980-00CL, initial order issued January 23, 2020

28. *U. S. Steel Canada Inc., Re*, Court File No. CV-14-10695-00CL, initial order issued September 16, 2014

29. *Payless Shoesource Canada Inc., Re*, Court File No. CV-19-00614629-00CL, initial order issued February 19, 2019

30. *Timminco Ltd., Re*, 2012 ONSC 506

31. *Pure Global Cannabis, Inc., Re*, initial order issued March 19, 2020

32. *Old PSG Wind-down Ltd., Re*, Court File No. CV-16-11582-00CL, order issued December 20, 2017

33. *Lydian International Limited, Re*, Court File No. CV-19-00633392-00CL, initial order issued December 23, 2019

34. *AgMedica Bioscience Inc., Re*, Court File No. CV-19-00632052-00CL, initial order issued December 2, 2019

35. *Quest University Canada, Re*, Supreme Court of British Columbia File No. S-200586, initial order issued January 16, 2020

SCHEDULE "B"
RELEVANT STATUTES

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

s. 2 ("**company**")

"**company**" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies.

s. 2 ("**debtor company**")

"**debtor company**" means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or

(d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent.
s. 3(1)

s. 3(1)

Application. – This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

s. 9(1)

Jurisdiction of court to receive applications – Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

s. 11

General power of court – Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

s. 11.001

Relief reasonably necessary – 11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

s. 11.51(1)

Security or charge relating to director's indemnification. – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all of part of the property of the company is subject to a security or charge -- in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

s. 11.51(2)

Priority. – The court may order that the security or charge rank in priority over the claim of any secured creditors of the company

s. 11.51(3)

Restriction. – indemnification insurance – The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

s. 11.51(4)

Negligence, misconduct or fault. – The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

s. 11.52(1)

Court may order security or charge to cover certain costs. – On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceeding under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

s. 11.52(2)

Priority. **–** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3, as amended**

s. 2 ("**insolvent person**")

"**insolvent person**" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

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 CANNTRUST HOLDINGS INC. ET AL.

Court File No:

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

FACTUM
(CCAA Application)

McCarthy Tétrault LLP
Suite 5300, TD Bank Tower
Toronto ON M5K 1E6
Fax: 416-868-0673

James Gage LSO#: 34676I
Tel: 416-601-7539
Email: jgage@mccarthy.ca

Paul Steep LSO#: 21869L
Tel: 416-601-7998
Email: psteep@mccarthy.ca

Trevor Courtis LSO#: 67715A
Tel: 416-601-7643
Email: tcourtis@mccarthy.ca

Alexander Steele LSO#: 475719P
Tel: 416-601-8370
Email: asteele@mccarthy.ca
Lawyers for the Applicants