Court File No. CV-20-00638930-00CL

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
(Comeback Hearing)

April 7, 2020

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PART I. INTRODUCTION

1. On March 31, 2020, CannTrust[1] was granted an initial order (the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act* (Canada)[2], including a stay of proceedings until April 9, 2020 (the "**Stay Period**"). As required by section 11.001 of the CCAA, the relief in the Initial Order was limited to what was reasonably necessary for the continued operation of CannTrust in the ordinary course of business during the initial stay period.[3]

2. At the comeback hearing, CannTrust is seeking an order (the "**Proposed Amended and Restated Initial Order**") which amends and restates the Initial Order to, among other things:

[1] 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**"), Application Record, March 31, 2020 ("**Application Record**"), Tab 2, or the Affidavit of Greg Guyatt, sworn April 6, 2020 (the "**Second Guyatt Affidavit**"), Supplementary Application Record, April 6, 2020 ("**Supplementary Application Record**"), Tab 1.

[2] *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [**CCAA**].

[3] CCAA, s. 11.001.

(a) extend the Stay Period to July 5, 2020;

(b) stay and suspend the commencement or continuation of the Pending Litigation or any Proceeding in relation thereto against or in respect of the Other Defendants during the Stay Period except with leave of this Court;

(c) approve the KERP established by CannTrust, authorize the payments to the Key Employees pursuant to the KERP, grant the KERP Charge and seal the unredacted version of the KERP Summary;

(d) approve the engagement of the Financial Advisor and grant the Transaction Fee Charge;

(e) increase the maximum amount of certain other priority Charges;

(f) authorize CannTrust to pay amounts payable pursuant to the CannTrust Capital Appreciation Plan (the "**CCAP**") (whether accrued prior to, on or after the Initial Filing Date) incurred in the ordinary course of business on terms consistent with existing arrangements or past practice;

(g) authorize CannTrust to, with the consent of the Monitor, pay pre-filing amounts owing to critical suppliers; and

(a) permit, but not require, CannTrust to pay rent to landlords at such intervals as rent is usually paid in the ordinary course of business.

3. CannTrust commenced these CCAA proceedings 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.[4] CannTrust continues to require CCAA protection to allow it breathing space so that it can maximize value for all affected stakeholders by, among other things:

(a) completing the remainder of its remediation plan for its Vaughan Facility and submitting the related evidence package to Health Canada;

(b) continuing to work with Health Canada to resolve any remaining *Cannabis Act* compliance issues and obtain reinstatement of its Cannabis Licences;

(c) 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

(d) facilitating the completion of the Board of Directors' 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.[5]

4. The relief sought in the Proposed Amended and Restated Initial Order is necessary and appropriate to allow CannTrust to carry out these remedial activities with a view towards

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[4] Guyatt Affidavit at para. 9, Application Record, Tab 2.
[5] Guyatt Affidavit at para. 17, Application Record, Tab 2.

restructuring its business and returning CannTrust to functional and compliant operations and, ultimately, to profitability.[6]

PART II. THE FACTS

5. The affidavits sworn by the Chief Executive Officer of CannTrust, Greg Guyatt, on March 31, 2020 and April 6, 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.[7]

PART III. ISSUES AND THE LAW

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

(a) Should the Court grant the requested extension to the Stay Period? ***Yes. CannTrust has acted in good faith and with due diligence and the length of the requested extension is appropriate in the circumstances.***

(b) Should the Court extend the stay of proceedings to the Other Defendants in the Pending Litigation? ***Yes. It is fair and reasonable to extend the stay of proceedings to the Other Defendants in the Pending Litigation.***

(c) Should the Court approve the KERP, grant the KERP Charge and seal the KERP Summary? ***Yes. The KERP and the KERP Charge are appropriate and necessary to incentivize certain key employees to remain in their employment during these CCAA proceedings. The KERP Summary should be sealed.***

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[6] Guyatt Affidavit at paras. 198-199, Application Record, Tab 2; Second Guyatt Affidavit at para. 15, Supplementary Application Record, Tab 1.

[7] Guyatt Affidavit, Application Record, Tab 2; Second Guyatt Affidavit, Supplementary Application Record, Tab 1.

(d) Should the Court approve the engagement of the Financial Advisor and grant the Transaction Fee Charge? ***Yes. The experience, expertise and institutional knowledge of the Financial Advisor will be beneficial to CannTrust and its stakeholders in achieving a positive outcome in these proceedings.***

(e) Should the Court approve the amendments to the Initial Order related to the other priority Charges? ***Yes. The quantum and priority of the Charges is appropriate.***

(f) Should the Court grant the other relief sought in the Proposed Amended and Restated Initial Order? ***Yes. The other relief sought with respect to the CCAP, payments to critical suppliers and rent payments is appropriate in the circumstances.***

A. Stay Extension is Appropriate

(i) Legal Principles

7. Section 11.02(2) of the CCAA gives the court discretion to grant or extend a stay of proceedings, "for any period that the court considers necessary."[8] Pursuant to section 11.02(3) of the CCAA, to exercise its discretion to extend the stay of proceedings, the court must be satisfied that: (i) circumstances exist that make the order appropriate, and (ii) the applicant has acted, and is acting, in good faith and with due diligence during the CCAA proceedings.[9]

8. When considering whether to grant an order extending the stay of proceedings, the court must satisfy itself that the extension will further the purposes of the CCAA[10] – namely, "the

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[8] CCAA, s. 11.02(2).
[9] CCAA, s. 11.02(3); *U.S. Steel Canada Inc., Re*, 2016 ONSC 3106 at para. 2.
[10] *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758 at paras. 12-15.

making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business."[11]

(ii) Circumstances Exist That Make the Stay Extension Appropriate

9. In this case, the requested extension of the Stay Period is appropriate and will further the remedial purpose of the CCAA in that it will allow CannTrust breathing room to (i) stabilize its business, (ii) continue its remediation work and seek the reinstatement of its Cannabis Licences, (iii) engage with the plaintiffs in the Pending Litigation in order to explore a potential resolution of those claims, and (iv) continue its review of strategic alternatives with the assistance of the Monitor, the CRO and the Financial Advisor, including, among other things, exploring a potential sale and investment solicitation process and a potential CCAA plan of compromise or arrangement.[12]

10. The length of the proposed stay extension takes into account that:

(a) while CannTrust's remediation work at its Vaughan Facility is nearing completion and a remediation package is being assembled which is expected to be sent to Health Canada before the end of April 2020, the timing of Health Canada's decisions on the reinstatement of the Cannabis Licences is uncertain as a result of (i) resource constraints and restrictions on field visits as a result of the current COVID-19 pandemic, and (ii) the fact that there will likely be further dialogue

[11] *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, 1990 CarswellBC 394 at para. 10 (CA).
[12] Second Guyatt Affidavit at para. 12, Supplementary Application Record, Tab 1.

between CannTrust and Health Canada regarding the remediation packages relating to the Fenwick Facility and the Vaughan Facility;[13] and

(b) given the number of securities class actions and other litigation commenced against CannTrust in various jurisdictions in Canada and the United States, the negotiations regarding a potential resolution of those claims will be complex and time-intensive.

11. A shorter stay extension would only serve to distract CannTrust and its stakeholders from these crucial efforts.[14]

12. CannTrust is projected to have sufficient cash over the proposed extension of the Stay Period to enable CannTrust to meet its day-to-day obligations.[15] The Monitor supports the requested extension of the Stay Period.[16]

(iii) CannTrust Acting in Good Faith and With Due Diligence

13. CannTrust has acted and continues to act in good faith and with due diligence. In the limited time since the Initial Order was issued, CannTrust and its representatives (i) continued to engage with Health Canada regarding the reinstatement of the Cannabis Licences and other regulatory matters, (ii) continued to carry out remediation activities at the Vaughan Facility and

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[13] Second Guyatt Affidavit at para. 11, Supplementary Application Record, Tab 1.
[14] *Rothmans, Benson & Hedges Inc., Re*, Court File No. CV-19-616779-00CL, endorsement of Justice McEwen released October 18, 2019 at p. 2.
[15] Second Guyatt Affidavit at para. 13, Supplementary Application Record, Tab 1; First Report of the Monitor dated April 7, 2020 at para. 30 ("**First Report**").
[16] Second Guyatt Affidavit at para. 13, Supplementary Application Record, Tab 1; First Report at para. 31.

otherwise maintained operations as they existed prior to commencing these proceedings, and (iii) prepared and executed a communications plan.[17]

14. Accordingly, this Court has jurisdiction to extend the Stay Period up to and including July 5, 2020 and it is appropriate to do so.

B. The Court Should Extend the Stay of Proceedings to the Other Defendants

(i) Legal Principles

15. 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."[18]

16. 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";[19] where not extending the stay to a third party "could potentially jeopardize the success of the plan and thereby the continuance of the company";[20] 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";[21] 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.[22]

[17] Second Guyatt Affidavit at para. 10, Supplementary Application Record, Tab 1.
[18] *Pacific Exploration & Production Corp., Re*, 2016 ONSC 5429 at para. 26 [***Pacific Exploration***].
[19] *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 at para. 21.
[20] *Lehndorff General Partner Ltd.*, Re, 1993 CarswellOnt 183 (Gen. Div.) at para. 10.
[21] *Canwest Publishing Inc., Re*, 2010 ONSC 222 at para. 33 [***Canwest Publishing***].
[22] *Cinram International Inc., Re*, 2012 ONSC 3767 at para. 61 [***Cinram***].

(ii) Appropriate to Extend Stay to Other Defendants

17. Also named as defendants in the Pending Litigation are various current and former directors, officers and employees of CannTrust, its auditors, certain underwriters and certain selling shareholders. It is appropriate to stay the Pending Litigation against the Other Defendants as allowing the Pending Litigation to proceed could:

(a) adversely affect the rights of CannTrust in those proceedings;

(b) result in a finding of liability and/or award of damages against the Other Defendants that could have legal and financial consequences for CannTrust, including claims for indemnification or contribution;

(c) require CannTrust and its management to devote time and effort to monitoring and participating in the proceedings to ensure that the rights and interests of CannTrust are not prejudiced;

(d) require CannTrust to incur legal and other expenses in connection with these proceedings; and/or

(e) result in different inquiries at different times into the same underlying facts, creating the possibility for conflicting or inconsistent judgments and wasted judicial resources.[23]

18. A similar stay of proceedings was granted in the CCAA proceedings recently commenced by three separate tobacco companies which similarly faced numerous class actions and other proceedings that named other defendants.[24]

[23] Guyatt Affidavit at paras. 161-163.

19. Accordingly, it is fair and reasonable to extend the stay of proceedings to the Other Defendants to the Pending Litigation.[25]

C. KERP and KERP Charge Should be Approved

(i) Legal Principles

20. The jurisdiction to approve a KERP and grant a KERP charge is grounded in the court's general power under section 11 of the CCAA to make any order it sees fit in a CCAA proceeding.[26] The discretion of the court to approve a KERP will be exercised on a case-by-case basis.[27]

21. Courts have frequently recognized the importance and utility of KERPs in restructuring proceedings.[28] A debtor company that is able to retain the critical skills and knowledge of its employees and executives has a greater chance of successfully restructuring its business for the benefit of all stakeholders.[29]

22. The courts have developed the following list of factors to be considered when deciding whether to approve a KERP and grant a KERP charge:

(a) whether the Monitor and/or Chief Restructuring Officer support the KERP (to which great weight is attributed);

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[24] *Rothmans, Benson & Hedges Inc., Re*, Court File No. CV-19-616779-00CL, Second Amended and Restated Initial Order dated April 26, 2019 at paras. 19-20 [***RBH Initial Order***]; *JTI-Macdonald Corp., Re*, Court File No. CV-19-615862-00CL, Second Amended and Restated Initial Order dated March 8, 2019 at paras. 19-20; *Imperial Tobacco Canada Limited*, Re, Court File No. CV-19-616077-00CL, Second Amended and Restated Initial Order dated March 12, 2019 at paras. 19-20.
[25] *Pacific Exploration* at para. 26; Guyatt Affidavit at para. 164, Application Record, Tab 2.
[26] CCAA, s. 11; *Cinram* at para. 91.
[27] *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (SCJ) at para. 49 [***Canwest Global***].
[28] *Cinram* at paras. 90-93; *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 (SCJ) at paras. 8-10 [***Grant Forest***]; *Timminco Ltd., Re*, 2012 ONSC 506 at paras 71-75 [***Timminco***]; *Target Canada Co., Re*, 2015 ONSC 303 at paras. 56-59.
[29] *Timminco* at para. 72; *Canwest Global* at paras. 49-50.

(b) whether the employees to which the KERP applies would consider other employment options if the KERP were not secured by the KERP charge;

(c) whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;

(d) the employees' history with the debtor and any special knowledge and skills they possess;

(e) the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;

(f) whether the KERP was approved by the board of directors, including the independent directors;

(g) whether the KERP is supported or consented to by secured creditors of the debtor; and

(h) whether the payments under the KERP are payable upon the completion of the restructuring process.[30]

23. With respect to the final factor, KERP arrangements that contain staged bonuses and do not defer all retention payments to the completion of the restructuring have been recognized as fair and reasonable in other CCAA proceedings.[31]

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[30] *Cinram* at para. 91, citing *Grant Forest* at paras. 8-24; *Canwest Global* at para. 50; *Aralez Pharmaceuticals Inc., Re*, 2018 ONSC 6980 at para. 29.
[31] *Cinram* at para. 92; *Grant Forest* at paras. 22-23.

(ii) KERP Should be Approved

24. CannTrust established the KERP to incentivize certain key employees to remain in their employment during these CCAA proceedings.[32] Under the KERP, the 23 Key Employees will be entitled to aggregate payments amounting to a certain percentage of their annual salary upon the occurrence of two specific milestones. The first milestone payment will be made, with respect to all Key Employees, 60 days after the expiry of the appeal period for the Proposed Amended and Restated Initial Order (which milestone is expected to be occur on or around July 1, 2020). The second milestone payment will be made:

(a) for non-executive Key Employees, on the earlier of (i) January 15, 2021, or (ii) the completion date of a going concern reorganization or transaction; and

(b) for executive Key Employees, on the completion date of a going concern reorganization or transaction.[33]

25. The KERP also includes a discretionary fund of $200,000 to be allocated to employees whose retention becomes essential, for similar reasons as the Key Employees, which decision will be made in consultation with and subject to the approval of the Monitor. The total amount payable under the KERP is approximately $2.2 million.[34]

26. The factors to be considered by the Court militate in favour of approving the KERP:

(a) the Monitor and the CRO each support the KERP;[35]

[32] Second Guyatt Affidavit at para. 14, Supplementary Application Record, Tab 1.
[33] Second Guyatt Affidavit at para. 19, Supplementary Application Record, Tab 1.
[34] Second Guyatt Affidavit at para. 21, Supplementary Application Record, Tab 1.
[35] Second Guyatt Affidavit at para. 25, Supplementary Application Record, Tab 1; First Report at para. 57.

(b) the Key Employees would consider other employment options without the KERP, and if the KERP was not secured by the KERP Charge;[36]

(c) the continued employment of the Key Employees is integral to the ability of CannTrust to complete its remediation plan at the Vaughan Facility, obtain the reinstatement of its Cannabis Licences, return to functional and compliant operations, pursue a strategic transaction and/or otherwise successfully restructure its business;[37]

(d) the Key Employees possess specialized knowledge and skills as they occupy key roles in the areas of production, operations, finance, product development, marketing, human resources and regulatory compliance, and they have valuable experience in navigating the nascent cannabis industry and its complex regulatory regime;[38]

(e) the Key Employees could not be readily or easily replaced in the near term and any process to find appropriately qualified replacements would be lengthy, difficult and costly due to the Key Employees' (i) security clearances with Health Canada (for certain of the Key Employees), (ii) institutional knowledge of the operations and processes of CannTrust and the content and status of its remediation plan, and/or (iii) key relationships with customers, suppliers and regulatory authorities;[39]

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[36] Second Guyatt Affidavit at para. 16, Supplementary Application Record, Tab 1.
[37] Second Guyatt Affidavit at para. 15, Supplementary Application Record, Tab 1.
[38] Second Guyatt Affidavit at paras. 17,18, Supplementary Application Record, Tab 1.
[39] Second Guyatt Affidavit at para. 17, Supplementary Application Record, Tab 1.

(f) the KERP was approved by the Board of Directors of CannTrust Holdings;[40]

(g) CannTrust does not have any secured debt;[41] and

(h) the KERP contains two milestones (described above) that are designed to incentivize Key Employees to both (i) remain in their roles in the short term, which is a crucial period during which CannTrust expects to complete its remediation activities with respect to the Vaughan Facility and apply for reinstatement of its licence there, and (ii) remain in their roles over the long term in order to achieve a successful restructuring (to which approximately two-third of the payments to be made under the KERP have been allocated).[42]

27. KERPs that have included a discretionary fund to be disbursed in the future if necessary to ensure the retention of other critical employees have also been approved in other CCAA proceedings.[43]

28. The terms of the KERP are fair and reasonable in the circumstances and will provide an incentive for the Key Employees to continue to perform their critical roles throughout the restructuring process.[44] Accordingly, it is appropriate for the Court to approve the KERP and the payments to the Key Employees contemplated thereby.

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[40] Second Guyatt Affidavit at para. 14, Supplementary Application Record, Tab 1.
[41] Guyatt Affidavit at para. 124, Application Record, Tab 2.
[42] Second Guyatt Affidavit at para. 20, Supplementary Application Record, Tab 1.
[43] Affidavit of Rajat Marwah at paras. 7-8, Motion Record of the Applicants (Re: KERP Approval) in *Essar Steel Algoma Inc., Re*, Court File No. CV-15-000011169-00CL, Tab 2.
[44] Second Guyatt Affidavit at para. 20, Supplementary Application Record, Tab 1.

(iii) KERP Charge Should be Granted

29. The amount of the KERP Charge is reasonable having regard to the importance of the ongoing employment of the Key Employees and the scope and complexity of these CCAA proceedings.[45]

30. KERP charges in excess of the $1.4 million being sought in this case have been granted in other CCAA proceedings.[46] For example, in *Essar Steel Algoma*, a KERP for 23 employees and a discretionary fund of $250,000 was secured by a charge of approximately $3.4 million.[47]

31. Accordingly, it is appropriate for the Court to grant the KERP Charge sought.

(iv) KERP Summary Should be Sealed

32. A sealing order may be granted where (i) the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and (ii) the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.[48]

33. The KERP Summary contains commercially sensitive and personal information regarding the identity and compensation of the Key Employees, the disclosure of which could adversely affect CannTrust and the Key Employees.[49] The terms of the KERP, the aggregate amount of the

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[45] Second Guyatt Affidavit at para. 25, Supplementary Application Record, Tab 1.
[46] *Cinram* at para. 93 ($3 million); *Essar Steel Algoma Inc., Re*, Court File No. CV-15-000011169-00CL, Order re KERP Approval issued December 7, 2015 at paras. 1-2 ($3.4 million); *Target Canada Co., Re*, Court File No. CV-15-10832-00CL, Initial Order issued January 15, 2015 at paras. 24-25 ($6.5 million) [***Target Initial Order***].
[47] Affidavit of Rajat Marwah at paras. 7-8, Motion Record of the Applicants (Re: KERP Approval) in *Essar Steel Algoma Inc., Re*, Court File No. CV-15-000011169-00CL, Tab 2.
[48] *Canwest Global* at para. 51, citing *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 53.
[49] Second Guyatt Affidavit at para. 26, Supplementary Application Record, Tab 1.

KERP, the payment milestones and the aggregate amount payable upon each of those milestones being achieved have been disclosed and disclosure of the personal information of the KERP Employees would add nothing.[50] Accordingly, it is appropriate to seal the KERP Summary.

D. Financial Advisor Engagement and Transaction Fee Charge Should be Approved

(i) Engagement of Financial Advisor

34. Greenhill & Co. Canada Ltd. (the "**Financial Advisor**") has been providing financial advisory services to CannTrust since July 2019. The Financial Advisor has initiated a confidential strategic alternatives market canvas which is currently at an early stage.[51]

35. CannTrust intends to continue utilizing the services of the Financial Advisor during the CCAA proceedings and entered into the Financial Advisor Engagement Letter which governs the services to be provided by the Financial Advisor to CannTrust during the course of these proceedings.[52]

36. CannTrust is seeking approval of the Financial Advisor Engagement Letter and the appointment of the Financial Advisor pursuant thereto.[53] Similar relief has been granted in initial orders in other CCAA proceedings.[54] This relief is appropriate in the circumstances as:

(a) it will facilitate the Financial Advisor continuing its confidential market canvas and CannTrust transitioning seamlessly into a court-approved sale and investment solicitation process if it decides to implement one in the future;

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[50] *Canwest Global* at para. 52.
[51] Second Guyatt Affidavit at para. 36, Supplementary Application Record, Tab 1.
[52] Second Guyatt Affidavit at para. 40, Supplementary Application Record, Tab 1.
[53] Second Guyatt Affidavit at para. 40, Supplementary Application Record, Tab 1.
[54] *Target Initial Order* at paras. 42-45; *8440522 Canada Inc. [Mobilicity]*, Court File No. CV-13-00274-00CL, initial order issued September 30, 2013 at paras. 33-36 [***Mobilicity Initial Order***]; *U. S. Steel Canada Inc., Re*, Court File No. CV-14-10695-00CL, second amended and restated initial order issued November 26, 2014 at para. 27 [***USSC Initial Order***].

(b) the expertise and institutional knowledge of the Financial Advisor will be beneficial to CannTrust and its stakeholders in achieving a positive outcome in these proceedings; and

(c) CannTrust and the Monitor have reviewed the proposed fees and disbursements set out in the Financial Advisor Engagement Letter and believe them to be fair and reasonable in the circumstances.[55]

(ii) Transaction Fee Charge

37. The Financial Advisor Engagement Letter contemplates a Transaction Fee in an amount equal to the sum of (a) $1,000,000 plus (b) 4.0% of the value the consideration payable to CannTrust Holdings, its shareholders or creditors pursuant to any Transaction (as that term is defined in the Financial Advisor Engagement Letter) to the extent that the value exceeds $45,000,000 (the "**Transaction Fee**").[56]

38. In the Proposed Amended and Restated Initial Order, it is contemplated that the Transaction Fee will be secured by a charge (the "**Transaction Fee Charge**") on the Property of the Applicants.[57] Charges to secure success and transaction fees of CROs and financial advisors have been approved in other CCAA proceedings. For example, (i) in *Target Canada*, the transaction fee potentially payable to the financial advisor was secured by a charge in the amount of $3 million,[58] (ii) in *U. S. Steel Canada*, a restructuring completion fee potentially payable to

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[55] Second Guyatt Affidavit at para. 40, Supplementary Application Record, Tab 1.
[56] Second Guyatt Affidavit at para. 38, Supplementary Application Record, Tab 1.
[57] Second Guyatt Affidavit at para. 39, Supplementary Application Record, Tab 1.
[58] *Target Initial Order* at para. 55.

the financial advisor and a success fee potentially payable to the CRO were secured by a charge in the amount of USD $5.5 million plus $1 million.[59]

39. The Transaction Fee Charge in the Proposed Amended and Restated Initial Order is not capped at a specific amount. This is appropriate in the circumstances as the variable portion of the Transaction Fee (4%) is only payable upon the completion of a Transaction involving consideration over the specified threshold ($45 million) and consideration received over that threshold would benefit CannTrust's creditors and other stakeholders more generally.[60]

40. The Monitor supports the amount and priority of the Transaction Fee Charge.[61] CannTrust does not have any secured debt.[62] Accordingly, it is appropriate for the Court to grant the Transaction Fee Charge sought.

E. The Priority Charges Should be Approved

(i) Administration Charge

41. 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.[63] The list of factors to consider in approving an administration charge include:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

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[59] *USSC Initial Order* at para. 37.
[60] Second Guyatt Affidavit at para. 40, Supplementary Application Record, Tab 1.
[61] First Report at paras. 64-65.
[62] Guyatt Affidavit at para. 124, Application Record, Tab 2.
[63] *CCAA*, s. 11.52(1).

(c) whether there is unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.[64]

42. In the Initial Order, an Administration Charge was granted over the Property of the Applicants in the maximum amount of $500,000, being only the amount that was reasonably necessary for the initial stay period.[65]

43. The Proposed Amended and Restated Initial Order provides for an Administration Charge of $1.4 million. The proposed Administration Charge is based on a forecast of professional fees for a period of four weeks.[66]

44. The amount of the proposed Administration Charge appropriately reflects the potential length and complexity of the CCAA proceedings and is necessary in order to ensure the active involvement and assistance of professionals during these proceedings.[67] Courts have recognized that "the protection of the Administration Charge should cover several weeks [of forecasted professional fees] because of the delays inherent in the billing and payment process."[68]

45. Administration charges of at least $1.4 million have been granted in other CCAA proceedings. For example, (i) in *Payless ShoeSource Canada*, an administration charge of USD $2 million was granted to secure the fees of the monitor, its counsel, counsel to the applicants

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[64] *Cinram* at para. 84; *Canwest Publishing* at para. 54; *Timminco* at paras. 26-29.
[65] Second Guyatt Affidavit at para. 27, Supplementary Application Record, Tab 1.
[66] Second Guyatt Affidavit at para. 28, Supplementary Application Record, Tab 1.
[67] Second Guyatt Affidavit at para. 29, Supplementary Application Record, Tab 1.
[68] *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 2955 at para. 18 [***Bloom Lake***].

and the CRO,[69] and (ii) in *Prizm Income Fund*, an administration charge of $1.5 million was granted to secure the fees of the monitor, its counsel, counsel to the applicants and the CRO.[70]

46. It is appropriate to grant the Administration Charge sought 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; and the proposed Monitor is supportive of the Administration Charge.[71]

(ii) Directors' Charge

47. Jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis is provided in section 11.51 of the CCAA.[72] 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.[73]

48. The list of factors to consider in approving a directors' charge include:

(a) whether the charge is limited to obligations and liabilities the directors and officers may incur after the commencement of proceedings;

(b) ensuring that the charge does not extend to coverage of wilful misconduct or gross negligence;

(c) whether adequate insurance at a reasonable cost could be obtained;

[69] *Payless ShoeSource Canada Inc., Re*, 2019 ONSC 1215 at para. 33 [***Payless***].
[70] *Priszm Income Fund, Re*, 2011 ONSC 2061 at paras. 41-44.
[71] Guyatt Affidavit at para. 182, Application Record, Tab 2; Second Guyatt Affidavit at para. 30, Supplementary Application Record, Tab 1; First Report at paras. 41-42.
[72] *CCAA*, s. 11.51.
[73] *Canwest Publishing* at para. 56.

(d) the position of the secured creditors likely to be affected by the charge; and

(e) the position of the Monitor.[74]

49. In the Initial Order, a Directors' Charge was granted over the Property of the Applicants in the maximum amount of $550,000, being only the amount that was reasonably necessary for the initial stay period.[75]

50. The Proposed Amended and Restated Initial Order provides for a Directors' Charge of $3.55 million. The proposed Directors' Charge is based on (i) two weeks and four days of estimated future payroll following the forecasted ramp-up of operations upon the Cannabis Licences for the Fenwick Facility and Vaughan Facility being reinstated, (ii) the anticipated payments under the CCAP in October 2020, (iii) anticipated accrued vacation and (iv) anticipated unremitted source deductions.[76] Accordingly, the amount of the proposed Directors' Charge corresponds with obligations and liabilities the directors may incur after the commencement of proceedings.

51. The indemnity in the Proposed Amended and Restated Initial Order that is secured by the Directors' Charge provides that it does not extend to coverage of wilful misconduct or gross negligence.[77]

52. The directors and officers of CannTrust are beneficiaries of directors and officers 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;

[74] *Cinram* at paras 88-89, *Canwest Global* at paras. 46-48; *Canwest Publishing* at paras. 56-57; *Timminco* at paras. 30-36.
[75] Second Guyatt Affidavit at para. 31, Supplementary Application Record, Tab 1.
[76] Second Guyatt Affidavit at para. 32, Supplementary Application Record, Tab 1.
[77] Amended and Restated Initial Order at para. 27, Supplementary Application Record, Tab 2.

and (ii) there is the potential for insufficient coverage as there are exclusions and limitations to the coverage provided.[78]

53. CannTrust has no secured debt.[79] The proposed Monitor is supportive of the Directors' Charge.[80]

54. Directors charges in similar amounts have been granted in other CCAA proceedings. For example, (i) in *Payless ShoeSource Canada*, a directors' charge of USD $4 million was granted,[81] and (ii) in *Bloom Lake*, a directors' charge of $3.5 million was granted.[82]

55. For these reasons, the amount of the proposed Directors' Charge appropriately reflects the potential personal liabilities of the directors and officers of CannTrust during these CCAA proceedings and is necessary in order to ensure the active and committed involvement of its directors and senior officers to operate the Business during these proceedings.[83]

F. The Other Relief Sought Should be Granted

(i) CCAP Payments

56. The CCAP is an existing compensation program that was established in October 2019 in place of existing incentive programs which were not meeting compensation expectations. Currently, there are 59 employees that have been chosen to participate in the CCAP. Participants accrue salary each month until paid out in accordance with the CCAP. The percentage each

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[78] Guyatt Affidavit at para. 186, Application Record, Tab 2.
[79] Guyatt Affidavit at para. 192, Application Record, Tab 2.
[80] Guyatt Affidavit at para. 182, Application Record, Tab 2; First Report at paras. 43-46.
[81] *Payless* at para. 33.
[82] *Bloom Lake* at para. 1.
[83] Second Guyatt Affidavit at para. 33, Supplementary Application Record, Tab 1.

employee accrues is set by management, taking into account the employee's title, base compensation and job complexity.[84]

57. The amount accumulated in the CCAP will vest in and be paid to each participant in October 2020 and, if the program is extended for a second year, October 2021. The total estimated payments to be made at the end of the first year of the CCAP are approximately $1.7 million.[85]

58. The Proposed Amended and Restated Initial Order authorizes CannTrust to pay all amounts payable pursuant to the CCAP (whether accrued prior to, on or after the Initial Filing Date).[86] While CannTrust believes that payments under the CCAP, as an existing compensation arrangement, would fall within the scope of the payments already authorized by the Initial Order, CannTrust is seeking express approval to make these payments for greater certainty.[87]

59. In tandem with the KERP, the CCAP is important to CannTrust's ability to retain key employees and ensure compensation expectations are being met. Accordingly, it is appropriate to expressly authorize CannTrust to pay amounts payable pursuant to the CCAP.

(ii) Critical Suppliers

60. The Proposed Amended and Restated Initial Order provides CannTrust with the authority to pay certain suppliers for amounts owing for goods or services actually supplied to CannTrust prior to the date of the Initial Order.[88] Payment of these pre-filing amounts are subject to the approval of the Monitor and will be based on a determination of whether the supplier is critical

[84] Guyatt Affidavit at paras. 49-51, Application Record, Tab 2.
[85] Guyatt Affidavit at paras. 49-51, Application Record, Tab 2.
[86] Amended and Restated Initial Order at para. 10(a), Supplementary Application Record, Tab 2.
[87] Guyatt Affidavit at para. 168, Application Record, Tab 2.
[88] Amended and Restated Initial Order at para. 10(c), Supplementary Application Record, Tab 2.

to the Business, the ongoing operations of CannTrust, or the preservation of the Property and the payment is required to ensure ongoing supply.[89]

61. The ability to pay certain critical suppliers for pre-filing amounts, subject to obtaining the approval of the Monitor, has been recognized as "facilitative and practical in nature."[90] The Monitor is supportive of the relief sought.[91] Accordingly, it is appropriate to authorize the payment of pre-filing amounts to critical suppliers.

(iii) Rent Timing

62. The Initial Order provides, consistent with the model initial order, that until a real property lease is disclaimed in accordance with the CCAA, CannTrust will pay rent twice monthly on the first and fifteenth day of each month, in advance.[92] In the Proposed Amended and Restated Initial Order, CannTrust would be permitted, but not required, to pay rent at such intervals as rent is usually paid under the applicable lease if CannTrust determines, in consultation with the Monitor, that it would be preferable to do so.[93]

63. Debtor companies have been granted the authority to pay rent at the ordinary intervals in other CCAA proceedings.[94]

64. For the leases that CannTrust does not intend to disclaim, CannTrust will have the optionality to pay rent monthly consistent with past practice which will reduce the administrative expense associated with twice-monthly rent payments. CannTrust may still pay rent twice monthly if it determines that it would be preferable to do so. Landlords would not be prejudiced

[89] Second Guyatt Affidavit at para. 42, Supplementary Application Record, Tab 1.
[90] *Canwest Global* at paras. 41-43.
[91] First Report at paras. 34-35.
[92] Second Guyatt Affidavit at para. 45, Supplementary Application Record, Tab 1.
[93] Amended and Restated Initial Order at para. 13, Supplementary Application Record, Tab 2.
[94] *RBH Initial Order* at para. 13; *Mobilicity Initial Order* at para. 10.

by this proposed amendment to the Initial Order as the only ones that are affected will be better off; they will receive rent monthly in advance.[95] Accordingly, it is appropriate for the Court to grant this relief.

PART IV. ORDER REQUESTED

65. For the reasons set out above, the Applicants request that this Court grant the Proposed Amended and Restated Initial Order. The requested relief is appropriate in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of April, 2020.

McCarthy Tétrault LLP

Lawyers for the Applicants

[95] Second Guyatt Affidavit at para. 47, Supplementary Application Record, Tab 1.

SCHEDULE "A"
LIST OF AUTHORITIES

Jurisprudence

1. *U.S. Steel Canada Inc., Re*, 2016 ONSC 3106
2. *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758
3. *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, 1990 CarswellBC 394
4. *Rothmans, Benson & Hedges Inc., Re*, Court File No. CV-19-616779-00CL, endorsement of Justice McEwen released October 18, 2019
5. *Pacific Exploration & Production Corp., Re*, 2016 ONSC 5429
6. *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461
7. *Lehndorff General Partner Ltd.*, Re, 1993 CarswellOnt 183 (Gen. Div.)
8. *Canwest Publishing Inc., Re*, 2010 ONSC 222
9. *Cinram International Inc., Re*, 2012 ONSC 3767
10. *Rothmans, Benson & Hedges Inc., Re*, Court File No. CV-19-616779-00CL, Second Amended and Restated Initial Order dated April 26, 2019
11. *JTI-Macdonald Corp., Re*, Court File No. CV-19-615862-00CL, Second Amended and Restated Initial Order dated March 8, 2019
12. *Imperial Tobacco Canada Limited*, Re, Court File No. CV-19-616077-00CL, Second Amended and Restated Initial Order dated March 12, 2019
13. *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (SCJ)
14. *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 (SCJ)
15. *Timminco Ltd., Re*, 2012 ONSC 506
16. *Target Canada Co., Re*, 2015 ONSC 303
17. *Aralez Pharmaceuticals Inc., Re*, 2018 ONSC 6980
18. *Essar Steel Algoma Inc., Re*, Court File No. CV-15-000011169-00CL, Order re KERP Approval issued December 7, 2015
19. *Target Canada Co., Re*, Court File No. CV-15-10832-00CL, Initial Order issued January 15, 2015

20. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41

21. *8440522 Canada Inc. [Mobilicity]*, Court File No. CV-13-00274-00CL, initial order issued September 30, 2013

22. *Target Canada Co., Re*, Court File No. CV-15-10832-00CL, initial order issued January 15, 2015

23. *U. S. Steel Canada Inc., Re*, Court File No. CV-14-10695-00CL, second amended and restated initial order issued November 26, 2014

24. *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 2955

25. *Payless ShoeSource Canada Inc., Re*, 2019 ONSC 1215

26. *Priszm Income Fund, Re*, 2011 ONSC 2061

SCHEDULE "B"
RELEVANT STATUTES

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

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 – 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. 11.02(2)

Stays, etc. — other than initial application – A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

s. 11.02(3)

Burden of proof on application – The court shall not make the order unless

> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

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.

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: CV-20-00638930-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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