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
(AGM Deadline Extension)

September 15, 2020

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(AGM Deadline Extension)

PART I - INTRODUCTION

1. The Applicants ("**CannTrust**") seek an order extending the time for CannTrust Holdings Inc. ("**CannTrust Holdings**") to call its next annual general meeting of its shareholders ("**AGM**") to a date no more than 120 days following the expiry of the Stay Period.[1]

2. CannTrust is insolvent and has been under *Companies Creditors Arrangement Act* (the "**CCAA**") protection since March 31, 2020 (the "**CCAA Proceedings**").[2] CannTrust commenced the CCAA Proceedings to explore a CCAA plan of compromise or arrangement as a means for addressing the multiple putative class actions and other litigation brought against CannTrust in a single forum (the "**Pending Litigation**"), complete its remediation plan, obtain the reinstatement of its production licences, review strategic alternatives include a potential sale, and return to profitability.

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[1] For ease of reference, the Applicants will be collectively referred to herein as "**CannTrust**" or the "**Company**". 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**").

[2] *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36.

3. The relief sought will enable CannTrust to focus on the restructuring process and resolution of the Pending Litigation. Material information related to CannTrust has been publicly disclosed and there is no business to address at the AGM other than routine matters. As such, it is appropriate to delay the AGM, as requested.

PART II - THE FACTS

4. The factual background to this motion is described in the Applicants' motion record.

A. Time for the Annual General Meeting

5. Under section 94(1) of the *Ontario Business Corporations Act* ("**OBCA**") CannTrust Holdings, a company incorporated and existing under the OBCA, is required to hold an annual meeting of shareholders ("**AGM**") no later than fifteen months after its last AGM.[3]

6. CannTrust last called an AGM on June 20, 2019, meaning CannTrust Holdings must hold its next AGM by September 20, 2020.[4]

7. Under section 154(1) of the OBCA, CannTrust Holdings is required to prepare and place certain financial statements and other information before the shareholders at each AGM.[5]

8. The cost to CannTrust associated with the holding of a meeting of CannTrust Holdings' shareholders is approximately $10,000-$15,000.[6]

9. To reduce CannTrust's expenses and permit the Company and its management to focus on the CCAA process, including the SISP, the Claims Procedure, and the Mediation Procedure. CannTrust is of the view that it would be appropriate, subject to approval of this Court, to postpone

[3] Guyatt Affidavit at para 8; *Business Corporations Act*, R.S.O. 1990, c. B. 16 s. 94(1) ["***OBCA***"].
[4] *Ibid.*
[5] Guyatt Affidavit at para 10; *OBCA* s. 154(1).
[6] Guyatt Affidavit at para 35.

the calling of the AGM to a date no more than 120 days following the expiry of the Stay Period at which time CannTrust expects to have greater clarity regarding its restructuring process and to have completed the preparation of its financial statements.[7]

10. The Monitor supports CannTrust's position.

PART III - ISSUES AND THE LAW

11. The two issues before this Court are:

(a) whether the Court has the jurisdiction to extend the time for the calling of an AGM for an OBCA corporation; and

(b) whether it is appropriate to grant an extension in this case.

12. **The answer to both issues is "yes":**

(a) The Court may make the Order sought pursuant to its statutory jurisdiction under section 11 of the CCAA; and

(b) Making the Order sought is appropriate to avoid the unnecessary cost and disruption of preparing financial statements and holding an AGM, which would distract from the CCAA restructuring process. Further, shareholders are unlikely to suffer prejudice should the calling of the AGM be postponed.

A. The Court has jurisdiction to extend the timeline for an AGM under the CCAA

13. In contrast to the Canada *Business Corporations Act* ("**CBCA**"), which provides that a corporation may apply to the Court for an order extending the time for calling an annual meeting[8],

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[7] Guyatt Affidavit at paras. 13.
[8] *Canadian Business Corporations Act*, R.S.C., 1985, c. C-44, s. 133(3) [***CBCA***].

the OBCA does not include that express authority. For its remedy, CannTrust must rely on the Court's statutory jurisdiction under section 11 of the CCAA.

Section 11 of the CCAA allows a Court to make "appropriate" orders

14. The broad scope of powers provided under section 11 of the CCAA allow a Court to make "any order that it considers appropriate in the circumstances":[9]

> 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.

15. In *Ted Leroy Trucking Ltd., Re*, the Supreme Court addressed circumstances in which an order may be "appropriate" under section 11, and stated that the test is whether the order advances the policy objectives of the CCAA. Namely, whether the order will assist in avoiding the social and economic losses which typically result from the liquidation of an insolvent company:[10]

> Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. <u>The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company</u>. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs.

In reaching its conclusion, the Supreme Court further had regard to the role of the CCAA as, "creating conditions for preserving the status quo in restructuring proceedings".[11]

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[9] *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, s. 11.
[10] *Ted Leroy Trucking Ltd., Re.*, 2010 SCC 60, at para. 70.
[11] *Ibid* at para. 77.

16. An order extending the timeline for the calling of the AGM under the OBCA is a justifiable effort to preserve the status quo and protect CannTrust's restructuring efforts, in line with the remedial purposes of the CCAA noted above.

The CCAA is a flexible instrument

17. The CCAA is a flexible instrument, designed to accommodate scenarios or challenges not specifically accounted for in existing legislation. In *Re Playdium Entertainment Corp.*,[12] the Court authorized the assignment of a contract despite the fact that the contact prohibited assignment without the consent of the contractual counterparties, which was refused by a counterparty, Famous Players. In authorizing the assignment under section 11 of the CCAA (or its inherent jurisdiction in the alternative), the Court commented:

> From *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at page 315, by Blair J:[13]
>
>> <u>The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy</u>. As Farley J. said in Dylex Ltd., supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". <u>It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence</u> (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! <u>Nonetheless, the orders are made, if the circumstances are appropriate</u> and the orders can be made within the framework and in the spirit of the CCAA legislation. (emphasis added)

18. The scope of the Court's statutory jurisdiction to make novel orders under section 11 of the CCAA is further acknowledge in *Ernst & Yonge Inc. v Essar Global Fund Limited*, where the Court of Appeal relied on the "broad language" of section 11 of the CCAA to find that a monitor was authorized to act as a complainant under the oppression provisions of the CBCA. The Court

[12] *Playdium Entertainment Corp., Re*, [2001] O.J. No. 4459 (ONSC [Commercial List]).
[13] *Playdium Entertainment Corp., Re*, [2001] O.J. No. 4459 (ONSC [Commercial List]), at para. 20.

of Appeal, citing its former decision in *US Steel Canada Inc.* stated, "Courts can, and sometimes should, make "creative orders" in the context of CCAA proceedings."[14] In *Stelco Inc., Re*, the Ontario Court of Appeal further described section 11 as "the engine that drives this broad and flexible statutory scheme".[15]

The Court has applied its broad discretion in OBCA matters

19. The Court has exercised its broad jurisdiction outside the CCAA context to grant relief in the corporate context, including the extension of the law regarding plans of arrangement to real estate investment trusts ("**REITs**"), which are not governed by corporate states.

20. In *HHT Investments Inc. Re*,[16] HHT applied for a final order in respect of a proposed plan of arrangement under section 182 of the OBCA. Under the arrangement, HHT proposed to re-organize as a publicly-traded REIT. The Ontario Superior Court addressed whether the proposal appropriately fell within the definition of an "arrangement" under the OBCA despite reference to an arrangement as including, among other things, an exchange of securities between "a corporation" and "another body corporate". In holding that the proposal qualified as an arrangement under the statute, the Superior Court stated:[17]

> The statutory arrangement provisions allow for the solution of difficult and awkward corporate situations and the resolution of corporate problems between companies and their shareholders

21. The CCAA, and specifically section 11, is designed to address situations exactly like the one facing CannTrust.

[14] *Ernst & Yonge Inc. v Essar Global Fund Limited*, 2017 ONCA 1014, at para. 118.
[15] *Stelco Inc., Re*, [2005] O.J. No. 11718 (ONCA), at para. 36.
[16] *HHT Investments Inc., Re*, 2014 ONSC 1582.
[17] *Ibid* at para. 12; see also *Innvest Real Estate Investment Trust, Re*, 2010 ONSC 4292, at para. 61.

The Court can employ the CCAA to relieve compliance with provincial statute

22. In CCAA proceedings, the Court has employed the doctrine of paramountcy to relieve compliance with provincial statute. In *Indalex Ltd., Re,*, the Supreme Court unanimously agreed that the super-priority of a debtor-in-possession charge made under the CCAA prevailed over a deemed trust under the Ontario *Pension Benefits Act* ("**PBA**") on the basis of the doctrine of federal paramountcy.[18]

23. In *Indalex*, the Supreme Court found that compliance with PBA (the provincial law), "necessarily entail[ed] defiance of the order made under federal law".[19] The Court also cited findings of fact which demonstrated that the *CCAA*'s purpose would be frustrated without the existence of the DIP charge.[20]

24. Although section 94(1) of the OBCA is not in conflict with comparable federal legislation, requiring CannTrust's strict compliance with the AGM timeline imposed by the OBCA would impede the timely restructuring of CannTrust's operations (as discussed in detail below), which are being directed pursuant to the federal CCAA. Requiring strict compliance with the OBCA would operate to frustrate the remedial purpose of the CCAA and the Initial Order made thereunder.

The Court is the appropriate forum to seek an extension

25. CannTrust cannot obtain the relief sought in any other forum. The OBCA does not provide another avenue for the relief sought by CannTrust.

[18] *Indalex Ltd., Re,* 2013 SCC 6 at para 60 [***Indalex***]; see also *U.S. Steel Canada Inc., Re,* 2014 ONSC 6145.
[19] *Ibid,* at para 60.
[20] *Ibid,* at para 58.

26. Where a provincial statute is given exclusive jurisdiction to determine a matter, the Court's discretionary power under the CCAA cannot be used to override it.[21] This principle does not apply in CannTrust's circumstances.

27. In *Richtree Inc., Re,* the Court declined to rely on the CCAA to relieve a reporting issuer from certain filing requirements under the *Securities Act.* The *Securities Act* expressly provided that the Ontario Securities Commission may grant or refuse the exemptions sought. The declining relief, the Court stated:[22]

> …However, the proper forum for debating the effect of the filing requirements on Richtree is not on this motion, but at the OSC. The legislature has decided that it is the proper forum for balancing the interests of the company and its stakeholders on the one hand and the interests of the members of the public on the other. I conclude that the court has no jurisdiction under the *CCAA* to grant the exemptions sought.

28. Preserving CannTrust's resources and focusing the time and effort of its management and advisor team restructuring the business is central to its restructuring process and falls within the contemplation of section 11 of the CCAA.

B. It is appropriate to grant an extension of the time for the calling of the AGM

29. In the relatively uncharted waters of applying its discretion to extend the time for the calling of an AGM of an OBCA company, and in the absence of clear statutory of jurisprudential direction, the Court should consider precedents from similar and well-developed jurisprudence for the principles that should guide its discretion – specifically those principles from cases addressing meeting timeline extensions under section 133(3) of the CBCA.

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[21] *Richtree Inc., Re,* [2005] OJ No 251 at para 10 [***Richtree***].
[22] *Richtree,* at paras 9, 12.

30. Two principles emerge from the jurisprudence relating to section 133(3) of the CBCA that are relevant to this application:

(i) A balancing of the interests of the corporation against the risk of harm to shareholders is required;

(ii) Efficient use of the corporation's resources is an important consideration and it is common for CCAA Courts to grant an extension of time for calling an AGM.

i. Balancing of the interests of the corporation against the risk of harm to shareholders

31. The first principle emerges from the decision of Justice Pepall of this Court in *Re IMAX Corp.*[23] In *IMAX*, the applicant requested the extension because of delays resulting from the discovery of certain accounting errors in its financial statements. The extension was granted despite opposition. Pepall J. held that:

> *"In exercising its discretion, the court will consider <u>the interests of the company balanced against any meaningful risk of harm to the shareholders</u> arising from the granting of an extension."*[24] *(Emphasis added.)*

32. In undertaking this balancing exercise, Pepall J. considered the following factors under the rubric of the best interests of the corporation:

> *"Without the financial statements, little purpose would be served by holding a meeting of shareholders at this time. Furthermore, <u>from a practical perspective</u>, IMAX would be required to hold two rather than one meeting within a short period of time thereby <u>incurring additional costs</u> for IMAX and its shareholders ... <u>Preparing for and holding an annual meeting of shareholders at this time would be a drain on the resources of IMAX's senior management</u> and may ultimately result*

[23] *Re IMAX Corp*. (2007), 41 B.L.R. (4th) 289 (Ont. S.C.J.)]"***IMAX***"]
[24] *IMAX* at para 23

> *in further delaying the company's filing of its financial statements."*[25] *(Emphasis added.)*

On the other side of the scale, she found no meaningful risk of harm to shareholders because there was no evidence of any shareholder proposal having been delivered to IMAX, there was no evidence of any steps having been taken to request a shareholders' meeting, and shareholders would continue to receive disclosure in the interim.[26]

33. CannTrust's current shareholders would not be prejudiced by an extension to the deadline for calling the AGMs since:

(i) the Monitor appointed to monitor the business and affairs of CannTrust reports to the Court regularly on the business of CannTrust and the progress of these CCAA proceedings and those reports are posted on the website established by the Monitor for these proceedings (the "**Monitor's Website**");

(ii) Draft internal unaudited statements of the financial position for each of the Applicants as at December 31, 2019 were included as an exhibit to the Initial Affidavit and are publicly available on the Monitor's Website; and

(iii) CannTrust provides regular updates on its business and the progress of its restructuring through materials filed with the Court, including through cash flow forecasts prepared in consultation with the Monitor and the chief restructuring officer, FTI Consulting Canada Inc. These updates are posted on the Monitor's Website, and shared through the issuance of press releases

[25] *IMAX* at para 23 and 25
[26] *IMAX*, at paras. 16 and 26

and other public disclosures, which are publicly available on the System for Electronic Document Analysis ("**SEDAR**").[27]

34. Since shareholders are already well-informed of CannTrust's status and conduct, requiring CannTrust to hold an AGM at this time would not provide any material benefit to current shareholders and would instead cause CannTrust to incur significant expense and distract its management and the Board from its restructuring efforts, to the detriment of CannTrust and its other stakeholders.[28]

ii. Efficient use of resources and extensions of time for AGMs in CCAA Proceedings

35. The second principle is best illustrated by the numerous cases in which a section 133(3) extension has been granted in proceedings involving the CCAA. One example is *Canwest Global Communications Corp.*[29] in which Pepall J. held:

> *"CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted."[30] (Emphasis added.)*

36. As a corporation subject to CCAA proceedings, CannTrust's cash resources are tightly restricted and CannTrust is focused on the restructuring process and the management of its operations for the benefit of all of its stakeholders in accordance with the priority of their claims.

[27] Guyatt Affidavit at para 45.
[28] Guyatt Affidavit at para 46.
[29] *Re Canwest Global Communications Corp*., 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J.) **["*Canwest*"]**
[30] *Ibid*. at para. 54. See also *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 at para. 44 in which the Court (Morawetz, J) granting the CCAA initial order also extended the time for the AGM of the debtor; Sino-Forest was originally formed under the OBCA but filed articles of continuance under the CBCA.

Holding an AGM is costly and in the circumstances, its management and advisors' time would be better spent focusing on the restructuring process.

37. Further, holding the AGM and completing the required financial statements at this stage will only stand to benefit one stakeholder group of the Applicants: current shareholders. Incurring the significant expenses associated with the AGM would deplete CannTrust's resources and potentially prejudice CannTrust's other stakeholders, including (i) trade and other creditors who have priority over equity claimants in any distribution pursuant to the CCAA, and (ii) former shareholders.

C. Validating service

38. Rule 16.08 of the *Rules of Civil Procedure* allows the Court to validate service which is effected in a manner other than prescribed. Personal service on the holders of CannTrust Holding's 141,487,193 common shares issued and outstanding would be impractical and a waste of resources. A press release to the market and posting on the internet (through SEDAR and the Monitor's website) have made this application known to the market, and anyone with an interest in opposing has been given adequate opportunity to get the application materials and respond to the application if they wish to do so. In view of the number of shareholders, personal service is not a practical alternative.

39. In *Re Growthworks* the Honourable Justice Brown approved a request for an extension of time for an AGM where the applicant had proposed a similar methodology for notifying shareholders of the application.[31]

[31] *Re Growthworks* (unreported), decision of Justice Brown dated February 28, 2014; see also decision of Justice Newbould dated October 21, 2014, both available at: http://cfcanada.fticonsulting.com/gcfl/courtOrders.htm

40. Notification of shareholders by issuance of a press release and posting the press release on the applicant's website and on SEDAR has also been approved as an alternative form of service in a number of other similar proceedings pursuant to section 133 of the CBCA.[32]

PART IV - ORDER REQUESTED

41. For the reasons set out above, CannTrust requests an order extending the time CannTrust Holdings Inc. to call its AGM to a date no more than 120 days following the expiry of the Stay Period, and an order validating service of the motion materials.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of September, 2020.

McCarthy Tétrault LLP

Lawyers for the Applicant
CannTrust Holdings Inc.

[32] See *Sprott Resources Lending, Corp (Re)*, 2013 ONSC 4350 at Schedule "A" and *Re Lorus Therapeutics Inc.* (unreported), decision of Justice Morawetz dated October 23, 2013 and the related affidavit referencing the manner of service.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Ernst & Yonge Inc. v Essar Global Fund Limited*, 2017 ONCA 1014

2. *HHT Investments Inc., Re*, 2014 ONSC 1582

3. *Indalex Ltd., Re*, 2013 SCC 6

4. *Innvest Real Estate Investment Trust, Re*, 2010 ONSC 4292

5. *Playdium Entertainment Corp., Re*, [2001] O.J. No. 4459

6. *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J.)

7. *Re IMAX Corp.* (2007), 41 B.L.R. (4th) 289 (Ont. S.C.J.)

8. *Re Growthworks* (unreported), decision of Justice Morawetz dated January 19, 2012 and related order dated February 3, 2012

9. *Re Lorus Therapeutics Inc.* (unreported), decision of Justice Morawetz dated October 23, 2013 and related affidavit (without exhibits)

10. *Richtree Inc., Re*, [2005] OJ No 251

11. *Sino-Forest Corporation (Re)*, 2012 ONSC 2063*Sprott Resources Lending, Corp (Re)*, 2013 ONSC 4350

12. *Stelco Inc., Re*, [2005] O.J. No. 1171

13. *Ted Leroy Trucking Ltd., Re.*, 2010 SCC 60

14. *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145

SCHEDULE "B"
RELEVANT STATUTES

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

General power of court

11 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.

[…]

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

***Ontario Business Corporations Act,* R.S.O. 1990, c.B.16**

Shareholders' meetings

94 (1) Subject to subsection 104 (1), the directors of a corporation,

(a) shall call an annual meeting of shareholders not later than eighteen months after the corporation comes into existence and subsequently not later than fifteen months after holding the last preceding annual meeting; and

(b) may at any time call a special meeting of shareholders.

Information to be laid before annual meeting

154 (1) The directors shall place before each annual meeting of shareholders,

(a) in the case of a corporation that is not an offering corporation, financial statements for the period that began on the date the corporation came into existence and ended not more than six months before the annual meeting or, if the corporation has completed a financial year, the period that began immediately after the end of the last completed financial year and ended not more than six months before the annual meeting;

(b) in the case of a corporation that is an offering corporation, the financial statements required to be filed under the *Securities Act* and the regulations thereunder relating separately to,

(i) the period that began on the date the corporation came into existence and ended not more than six months before the annual meeting or, if the corporation has completed a financial year, the period that began immediately after the end of the last completed financial year and ended not more than six months before the annual meeting, and

(ii) the immediately preceding financial year, if any;

(c) the report of the auditor, if any, to the shareholders; and

(d) any further information respecting the financial position of the corporation and the results of its operations required by the articles, the by-laws or any unanimous shareholder agreement.

***Canada Business Corporations Act*, R.S.C. 1985, c. C-44**

Calling annual meetings

133. (1) The directors of a corporation shall call an annual meeting of shareholders

(a) not later than eighteen months after the corporation comes into existence; and

(b) subsequently, not later than fifteen months after holding the last preceding annual meeting but no later than six months after the end of the corporation's preceding financial year.

Calling special meetings

(2) The directors of a corporation may at any time call a special meeting of shareholders. Order to delay calling of annual meeting

(3) Despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

***Rules of Civil Procedure* (Ontario)**

Rule 3.02

3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

(2) A motion for an order extending time may be made before or after the

expiration of the time prescribed.

(3) An order under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to an appellate court may be made only by a judge of the appellate court.

Rule 16.08

16.08 Where a document has been served in a manner other than one authorized by these rules or an order, the court may make an order validating the service where the court is satisfied that,

(a) the document came to the notice of the person to be served; or

(b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

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