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
(Stay Extension and CCAA Representation)
(Returnable January 29, 2021)

January 27, 2021

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PART I—OVERVIEW

1. Prior to June 2019, the Applicants operated an award-winning and growing business. Following non-compliance findings made by Health Canada during regulatory audits of CannTrust's facilities, CannTrust's licences were suspended, its production and processing operations were halted, its revenue was reduced to nil and multiple putative securities class actions were commenced against it in several provinces in Canada and at the federal and state levels in the United States (as detailed further herein, the "**Actions**").[1]

2. CannTrust commenced these *Companies' Creditors Arrangement Act* ("**CCAA**") proceedings to obtain the breathing space necessary to obtain the reinstatement of its licences, restore its operations, return to market and explore a global resolution of the Actions and other claims against it. CannTrust has either completed, or made significant progress with respect to, each of these objectives.

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[1] Capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Affidavit of Greg Guyatt, sworn January 20, 2021 ("**Guyatt Affidavit**"), Motion Record (Stay Extension and CCAA Representation) dated January 20, 2021 ("**Motion Record**"), Tab 2.

3. The Hon. Dennis O'Connor, Q.C. (the "**Court-Appointed Mediator**") was appointed by this Court to mediate a global settlement of the claims associated with the Actions, which has facilitated intense and ultimately productive negotiations involving CannTrust and its relevant stakeholders over the past several months.

4. With the assistance of the Court-Appointed Mediator, CannTrust has recently reached a milestone restructuring support agreement (the "**RSA**") with the lead plaintiffs and counsel in the Ontario Class Action and the U.S. Class Action (defined below). Each have been awarded carriage of class actions commenced in Canada and the United States, respectively, that assert claims against CannTrust and others on behalf of a global class of CannTrust shareholders. The RSA provides a framework for the settlement of all Securities Claims (defined below) against CannTrust and various related claims.

5. On this motion, CannTrust seeks relief that is necessary and appropriate to allow it to complete its remaining objectives and move towards the development and filing of a formal CCAA plan with a view to exiting these CCAA Proceedings and emerging as a going concern.

6. As set out further herein, CannTrust seeks (i) an extension of the Stay Period up to and including April 30, 2021, and (ii) the appointment of the proposed CCAA Representatives and CCAA Representative Counsel to represent the interests of all Canadian and Non-U.S. Securities Claimants and U.S. Securities Claimants, as applicable, in these proceedings in relation to their Securities Claims and any related claims.

7. Since none of the class actions against CannTrust is certified, Securities Claimants generally are not formally represented, and with limited exceptions, do not have representation in the CCAA Proceedings. Securities Claimants are an important stakeholder group and should have

meaningful representation in these CCAA Proceedings so that they can effectively participate in a timely and cost-efficient manner.

8. CannTrust is not seeking approval of the RSA or the settlement framework set out therein. No determination is being made as to the validity or quantum of any claim, or the allocation of the settlement funds to be paid by CannTrust as contemplated by the RSA. In fact, the RSA contemplates the possibility of other parties being added to the settlement, whether as a result of further developments in the Mediation Process or otherwise. The settlement framework will be incorporated within a CCAA Plan to be developed by CannTrust and put forward for approval by creditors and the Court. At this stage, CannTrust is merely seeking to appoint the proposed CCAA Representatives and CCAA Representative Counsel to represent a vulnerable, disparate group of creditors.

9. Securities Claimants that are already formally represented are expressly carved out of the proposed representation order and are entirely unaffected by it.[2] They will continue to be free to assert any Securities Claims and advance their position with respect to the CCAA Plan and the settlement framework when it is ultimately put forward.

10. Time is of the essence. CannTrust must implement a settlement of Securities Claims and emerge from these CCAA Proceedings in the near term or it will run out of its remaining cash. The appointment of the proposed CCAA Representatives and CCAA Representative Counsel is necessary for CannTrust to continue to progress toward a successful restructuring. Any further delays will only serve to imperil CannTrust's ability to emerge from these CCAA Proceedings as

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[2] As set out herein, the CCAA Representation Order provides that Zola Finance Holdings Ltd and Igor Gimelshtein; 1604070 Alberta Ltd., Jeff Dyck, and Diran Avedian; and Shmuel Farhi and their respective counsel are not affected by the appointment of the CCAA Representatives and CCAA Representative Counsel.

a going concern, to the detriment of its approximately 280 employees, the medical patients and other consumers that rely on its products, the communities that it operates in, its creditors and other stakeholders.

11. For the reasons set out herein, this Court has jurisdiction to appoint the proposed CCAA Representatives and CCAA Representative Counsel to represent the Securities Claimants in these CCAA Proceedings and it is appropriate to do so.

PART II—FACTS

A. Background

(i) Circumstances Leading to the CCAA Proceedings

12. In June and July 2019, regulatory audits of CannTrust's facilities took place, after which Health Canada determined that CannTrust was growing and storing cannabis contrary to applicable law (collectively, the **"Health Canada Audits"**).[3]

13. Following the Health Canada Audits, among other things, shipments of all CannTrust's cannabis products were stopped, its cannabis licenses were partially suspended and multiple putative securities class actions were commenced against CannTrust in several provinces in Canada and at the federal and state levels in the United States.[4]

14. Prior to receiving the Health Canada Reports, CannTrust was not party to, nor was any of its property the subject of, any legal proceedings or regulatory actions material to it.[5] Following

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[3] Guyatt Affidavit, para. 5, Motion Record, Tab 2.
[4] Guyatt Affidavit, para. 6, Motion Record, Tab 2.
[5] Guyatt Affidavit, para. 51, Motion Record, Tab 2.

CannTrust's announcement on July 8, 2019 that it was in breach of regulations, the price of CannTrust shares fell significantly.[6]

15. CannTrust commenced these CCAA Proceedings in order to obtain the breathing space necessary to, among other things:

(a) complete the remainder of its remediation work and obtain the reinstatement of its licences;

(b) right-size its business to better reflect its current and anticipated operational footprint;

(c) restore cultivation and processing operations and return to the recreational and medical cannabis market upon the reinstatement of its licences;

(d) facilitate the continuation of the Board of Directors' review of strategic alternatives, including any potential sale of or other strategic transaction involving CannTrust; and

(e) explore a global resolution of the Actions and address the other claims and contingent claims against CannTrust in a single forum.

(ii) Significant Progress Made in the CCAA Proceedings

16. Since commencing these proceedings on March 31, 2020, CannTrust has either completed, or made significant progress with respect to, each of the above objectives:

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[6] Affidavit of Serge Kalloghlian sworn on January 20, 2021 ("**Kalloghlian Affidavit**"), para. 19, Motion Record, Tab 3.

(a) CannTrust completed the remainder of its remediation work and obtained the reinstatement of its licences;

(b) CannTrust restructured its operations and took certain steps to right-size its business;

(c) CannTrust resumed production and processing operations at the Fenwick Facility and Vaughan Facility and announced: (i) on December 2, 2020 that it was returning to the recreational cannabis marketplace; and (ii) on January 8, 2021 that it was re-entering the medical cannabis market;

(d) CannTrust carried out a sale and investment solicitation process;

(e) CannTrust has implemented a claims process in order to ascertain the universe of claims that may exist against CannTrust and the directors and officers of CannTrust other than the Excluded Equity Claims which are subject to the Mediation Process; and

(f) CannTrust obtained the appointment of the Court-Appointed Mediator to mediate a global settlement of the claims associated with the Actions, and has been diligently participating in the Mediation Process.

17. The Stay Period has been extended on several occasions, most recently on October 28, 2020. The Stay Period currently runs until and including January 31, 2021.[7]

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[7] Guyatt Affidavit, para. 19, Motion Record, Tab 2.

B. The Litigation Facing CannTrust

(i) Canadian Actions

18. In Canada, five of the eight putative class action lawsuits were commenced in Ontario and on January 28, 2020, the Honourable Mr. Justice Hainey issued an endorsement awarding carriage of the Ontario putative class actions (the **"Ontario Class Action"**) to a consortium comprised of Henein Hutchinson LLP, Strosberg Sasso Sutts LLP, A Dimitri Lascaris Law Professional Corporation, and Kalloghlian Professional Corporation (**"Ontario Class Action Counsel"**).[8]

19. The lead representative plaintiffs in the Ontario Class Action are the proposed CCAA Canadian Representatives.[9] Ontario Class Action Counsel are the proposed CCAA Canadian Representative Counsel.

20. Separate class action lawsuits were commenced by Merchant Law Group in British Columbia, Alberta and Québec (collectively, the **"Merchant Class Actions"**). None of the Merchant Class Actions has been certified.[10]

21. An action was commenced in Ontario against CannTrust Holdings and other defendants by two shareholders, Zola Finance Holdings Ltd. and Igor Gimelshtein (the "**Zola Plaintiffs**"), related to the drop in CannTrust Holdings' share price after July 8, 2019 (the **"Zola Action"**). The amounts claimed in this lawsuit overlap with the Ontario Class Action and have not been

[8] Guyatt Affidavit, paras. 53-54, Motion Record, Tab 2.
[9] The lead representative plaintiffs in the Ontario Class Action are Patrick Hrusa and Dharambir Singh.
[10] Guyatt Affidavit, para. 55, Motion Record, Tab 2.

quantified by CannTrust at the present time.[11]

22. The representative plaintiffs in the Merchant Class Actions and the Zola Plaintiffs will be excluded from the Securities Claimants represented by the CCAA Representatives and CCAA Representative Counsel because they are already formally represented by counsel.[12]

(ii) U.S. Securities Class Actions

23. In the United States, four of the five putative securities class actions were commenced in the Southern District of New York and alleged violations of the *Securities Act of 1933* (United States) and the *Securities Exchange Act of 1934* (United States). An order consolidating the federal putative class actions was granted on April 6, 2020. Labaton Sucharow LLP was appointed as lead counsel (**"U.S. Class Action Counsel"**) in the consolidated action (the **"U.S. Class Action"**).[13]

24. The lead representative plaintiffs in the U.S. Class Action are the proposed CCAA U.S. Representatives.[14] U.S. Class Action Counsel in association with Weisz Fell Kour LLP are the proposed CCAA U.S. Representative Counsel.

25. A separate case is pending in California State Court alleging claims pursuant to the State *Securities Act* (the **"California Class Action"**). The plaintiff's counsel in the California Class Action has agreed to temporarily suspend the steps in the litigation and has been liaising with U.S. Class Action Counsel in connection with CannTrust's global settlement discussions in the

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[11] Guyatt Affidavit, para. 56, Motion Record, Tab 2.
[12] Kalloghlian Affidavit, para. 28, Motion Record, Tab 3.
[13] Guyatt Affidavit, para. 57, Motion Record, Tab 2.
[14] The lead representative plaintiffs in the U.S. Class Action are Granite Point Master Fund, LP and Granite Point Capital Scorpion Focussed Ideas Fund.

Mediation Process.[15]

26. Neither the U.S. Class Action nor the California Class Action has been certified.[16]

(iii) The Securities Claimants

27. The proposed CCAA Representation Order contemplates that:

(a) CCAA Canadian Representatives and CCAA Canadian Representative Counsel will be appointed to represent all Canadian and Non-U.S. Securities Claimants, which are all Securities Claimants other than U.S. Securities Claimants;

(b) CCAA U.S. Representatives and CCAA U.S. Representative Counsel will be appointed to represent all U.S. Securities Claimants, which are all Persons having Securities Claims who purchased the publicly traded common shares of CannTrust Holdings on the New York Stock Exchange or on any U.S.-based trading platform.

28. Securities Claimants are the holders of Securities Claims, meaning:

(a) any Claim against CannTrust Holdings asserted by a plaintiff or putative plaintiff in an Action; and

(b) any other Claim against CannTrust Holdings that has been or could be asserted by or on behalf of a current or former shareholder of CannTrust Holdings or another Person in relation to the purchase, sale or ownership by such Person (including as

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[15] Guyatt Affidavit, para. 58, Motion Record, Tab 2.
[16] Guyatt Affidavit, para. 59, Motion Record, Tab 2.

a legal, registered or beneficial purchaser, seller or owner) on or before the Filing Date of an equity interest (as defined in the CCAA) in CannTrust Holdings.[17]

29. Excluded from these Securities Claimants for the purposes of the relief sought in the proposed CCAA Representation Order, are:

(a) Zola Finance Holdings Ltd and Igor Gimelshtein – the two plaintiffs in the Zola Action;

(b) 1604070 Alberta Ltd., Jeff Dyck, and Diran Avedian – the representative plaintiffs in the Merchant Class Actions;

(c) Shmuel Farhi; and

(d) their respective counsel.[18]

PART III—ISSUES

30. The issues for determination on this motion and the position of CannTrust on each are as follows:

(a) Should the stay of proceedings be extended? ***Yes. The stay extension is necessary to allow CannTrust to continue to move forward towards completing its few remaining restructuring objectives and putting forward a CCAA Plan for approval by its creditors and the Court.***

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[17] Draft Representation Order, Schedule "A" Definitions, Motion Record, Tab 6.
[18] Draft Representation Order, para. 7, Motion Record, Tab 6.

(b) Should the proposed CCAA Representatives and CCAA Representative Counsel be appointed to represent the Securities Claimants in these CCAA Proceedings? ***Yes. The Court has jurisdiction to appoint the proposed CCAA Representatives and CCAA Representative Counsel, it is appropriate for representatives to be appointed for the Securities Claimants and the proposed CCAA Representatives and CCAA Representative Counsel are suitable and the most well-positioned to take on this role.***

PART IV—LAW AND ARGUMENT

A. Extension of the Stay Period Should Be Granted

31. Section 11.02(2) of the CCAA gives the court the discretion to grant or extend a stay of proceedings, "for any period that the court considers necessary."[19] 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.[20] The court will also consider, among other factors, whether the debtor company has sufficient available cash resources during the extension of the stay period, and whether the Monitor supports the requested stay extension.[21]

32. The requested extension of the Stay Period is necessary and appropriate and will further the purpose of the CCAA, as it will, among other things, facilitate CannTrust (i) developing its

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[19] *Companies Creditor's Arrangement Act*, R.S.C. 1985, c. C-36, s. 11.02(2).
[20] *U.S. Steel Canada Inc., Re*, 2016 ONSC 3106 at para. 2; *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758 at paras. 12-15.
[21] *Canwest Global Communications Corp. (Re.)*, 2009 CarswellOnt 7169 at para. 43 (SCJ) [***Canwest Global***].

CCAA Plan to be presented to affected creditors and the Court for approval, (ii) taking the steps necessary to seek approval of the settlement in the U.S. Class Action, and (iii) pursuing additional financing that will be necessary to allow CannTrust sufficient financial resources to implement the CCAA Plan and have sufficient working capital to emerge from the CCAA Proceedings as a going concern.[22]

33. CannTrust believes that an extension of the Stay Period until April 30, 2021 would provide it with a reasonable period to make substantial progress towards these objectives.[23] The length of the proposed stay extension is commensurate with the length of stay extensions previously granted by this Court.[24]

34. CannTrust has acted, and continues to act, in good faith and with due diligence.[25] CannTrust is expected to have sufficient liquidity to operate throughout the proposed stay extension period.[26] The Monitor supports the proposed stay extension.[27]

35. Accordingly, it is appropriate for the Court to grant the proposed Stay Extension Order.

B. CCAA Representatives and CCAA Representative Counsel Should be Appointed

(i) Court Has Jurisdiction to Make These Appointments

36. The jurisdiction of Canadian Courts to appoint representatives and representative counsel in insolvency proceedings pursuant to section 11 of the CCAA and Rule 10.01 of the *Rules of*

[22] Guyatt Affidavit, para. 85, Motion Record, Tab 2.
[23] Guyatt Affidavit, para. 86, Motion Record, Tab 2.
[24] Guyatt Affidavit, para. 83, Motion Record, Tab 2.
[25] Guyatt Affidavit, para. 83, Motion Record, Tab 2.
[26] Guyatt Affidavit, para. 84, Motion Record, Tab 2.
[27] Sixth Report of the Monitor dated January 25, 2021 at para. 65 (the "**Sixth Report**").

Civil Procedure "is undoubted."[28]

37. Section 11 of the CCAA grants a court broad discretion to "make any order that it considers appropriate in the circumstances".[29] An order will be appropriate where it furthers efforts to achieve the remedial purpose of the CCAA – namely allowing the debtor company to emerge from the CCAA Proceedings as a going concern and avoiding the social and economic losses resulting from a liquidation.[30]

38. Rule 10.01(f) of the *Rules of Civil Procedure* permits courts to "appoint one or more persons to represent any person or class of persons who are…unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served", where it is "necessary or desirable" to do so.[31]

39. In *Dugal v. Research In Motion*, the Honourable Mr. Justice Colin Campbell stated that the test for a Rule 10 representation order is a "simple balance of convenience test":

> …the court is to consider the inconvenience that would be experienced by each party if the order were or were not granted.[32]

40. In *Fraser Papers Inc., Re*, Pepall J. (as she then was) stated that section 11 of the CCAA and the *Rules of Civil Procedure* provide the Court with broad jurisdiction in respect of a representative counsel motion.[33]

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[28] *Urbancorp Toronto Management Inc., Re*, 2016 ONSC 5426 at para. 10 [***Urbancorp***]; *JTI-Macdonald Corp.*, Re, 2020 ONSC 61 at para. 21 [***JTI-Macdonald***].
[29] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 11.
[30] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70 [***Century Services***].
[31] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 10.01(f).
[32] *Dugal v Research In Motion Ltd. (2007)*, [2007] O.J. No. 4535 at para. 21 (SCJ).
[33] *Fraser Papers Inc., Re*, 2009 CarswellOnt 6169 at para. 7 (SCJ) [***Fraser Papers***].

41. Canadian Courts have relied on these provisions to appoint counsel to represent a broad range of claimants in complex CCAA proceedings, including to represent current or former employees,[34] large investor groups with potential claims against the debtor companies[35] and class members in CCAA proceedings involving securities class actions.[36]

42. Accordingly, this Court has jurisdiction to appoint representatives and representative counsel to represent the Securities Claimants in these CCAA Proceedings.

(ii) Appropriate to Appoint Representatives for the Securities Claimants

43. In assessing whether it is appropriate to make a representation order, courts have considered the following factors: (i) the vulnerability and resources of the group sought to be represented; (ii) any benefit to the companies under CCAA protection; (iii) the facilitation of the administration of the proceedings and efficiency; (iv) the social benefits to be derived from representation of the group; (v) the avoidance of a multiplicity of legal retainers; (vi) whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and is prepared to act for the group seeking the order; (vii) the balance of convenience and fairness; and (viii) the position of other stakeholders and the Monitor.[37]

44. As detailed further below, each of these eight factors militates in favour of appointing representatives for the Securities Claimants.

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[34] *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 at paras. 10, 12 (SCJ) [***Nortel***]; *Canwest Global* at para. 14; *Fraser Papers* at para. 7; *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 at para. 35.

[35] *League Assets Corp., Re*, 2013 BCSC 2043 at paras. 63-76; *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 at para. 38; *Eron Mortgage Corp., Re*, 1998 CarswellBC 1851 at para. 3 (SC).

[36] *Cash Store Financial Services, Re*, 2015 ONSC 6087 at paras. 6-8; *Labourers' Pension Fund of Central and Easter Canada (Trustees of) v Sino-Forest Corp.*, 2015 CarswellOnt 6975 (SCJ).

[37] *Canwest Publishing Inc.*, 2010 ONSC 1328 at para. 21 [***Canwest Publishing***]; *JTI-Macdonald* at para. 26; *1057863 B.C. Ltd. (Re)*, 2020 BCSC 1359 at para. 125.

a. The Securities Claimants are a Vulnerable Group

45. The vulnerability and resources of the group that is proposed to be represented is an important factor that weighs in favour of the appointment of representative counsel.[38]

46. Most of the Securities Claimants are retail investors who likely lack the financial resources to pursue litigation of this type and scale.[39] Despite significant individual losses, the legal and expert costs of advancing these claims on an individual basis is not justified.[40]

47. The Securities Claimants are located in provinces across Canada, as well as in the United States. Without the appointment of representatives and representative counsel, the Securities Claimants may not have the resources or the ability to effectively participate or advance their claims within these CCAA Proceedings.[41]

48. It is settled that until certification, proposed class members are not in a solicitor-client relationship with plaintiffs' counsel.[42] In the present case, while class actions have been commenced in both Canada and the United States, no substantive steps have been taken in those actions, including certification.

49. This renders the Securities Claimants a particularly vulnerable group of stakeholders affected by these CCAA Proceedings, who will benefit from the formal appointment of representatives and representative counsel.

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[38] *Canwest Publishing* at para. 24; *JTI-Macdonald* at para. 28.
[39] Kalloghlian Affidavit, para. 37, Motion Record, Tab 3.
[40] Kalloghlian Affidavit, para. 38, Motion Record, Tab 3.
[41] Kalloghlian Affidavit, para. 38, Motion Record, Tab 3.
[42] *Pearson v Inco Ltd.*, 2001 CarswellOnt 4340 at para. 18 (SCJ); *JTI-Macdonald* at para. 39.

b. <u>CannTrust and Its Stakeholders Will Benefit</u>

50. CannTrust commenced these CCAA Proceedings for the purpose of, in addition to other reasons, exploring a CCAA plan as a means to resolve the Actions and all other claims and contingent claims against it.[43] The appointment of CCAA Representatives and CCAA Representative Counsel will help to ensure that the Securities Claimants will be able to participate on an equal footing and it will help to avoid inconsistencies and inefficiencies in CannTrust's ongoing restructuring efforts in the following ways:

(a) all Securities Claimants will be represented and addressed under the jurisdiction of this Court;[44]

(b) the CCAA Representatives and CCAA Representative Counsel will be in a position to communicate and consult with each other, Securities Claimants, the Monitor and its counsel, CannTrust and its counsel, and other stakeholders and their respective counsel, including in relation to any negotiations with respect to settlement;[45]

(c) the CCAA Representatives and CCAA Representative Counsel will be able to obtain input from Securities Claimants in relation to their activities in their respective roles;[46]

(d) the CCAA Representatives and CCAA Representative Counsel will be able to respond to inquiries from Securities Claimants;[47]

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[43] Guyatt Affidavit, para. 72, Motion Record, Tab 2.
[44] Guyatt Affidavit, para. 79(a), Motion Record, Tab 2.
[45] Guyatt Affidavit, para. 79(b), Motion Record, Tab 2.
[46] Draft Representation Order, para. 8(b), Motion Record, Tab 6.

(e) the CCAA Representatives and CCAA Representative Counsel will be able to inform Securities Claimants of their rights and the progression of the restructuring efforts of CannTrust and provide the advice needed by the Securities Claimants to participate effectively in the restructuring process;[48] and

(f) the CCAA Representatives and CCAA Representative Counsel will represent the interests of the Securities Claimants in the proceedings, including in relation to any negotiations with respect to the settlement of Securities Claims and the prosecution or settlement of any related claims.[49]

51. This will help CannTrust in its endeavour to resolve the Actions and all of claims and contingent claims against it by (i) instilling confidence when negotiating a global settlement that affected interested have been adequately represented, and (ii) ensuring consistency in the treatment of the Securities Claimants to the extent appropriate.[50]

c. Facilitating Efficiency and the Administration of the Proceedings

52. Courts have frequently recognized that the appointment of representatives for a large, disparate group of creditors will facilitate efficiency and the administration of CCAA proceedings.[51]

53. In the CCAA proceedings commenced by Canadian tobacco companies to, among other things, explore a global resolution of tobacco-related claims against them, the Honourable Mr.

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[47] Guyatt Affidavit, para. 79(c), Motion Record, Tab 2.
[48] Guyatt Affidavit, para. 79(d) and 79(e), Motion Record, Tab 2.
[49] Guyatt Affidavit, para. 79(f), Motion Record, Tab 2.
[50] Guyatt Affidavit, para. 72, Motion Record, Tab 2.
[51] See e.g. *Canwest Publishing* at para. 24; *Target Canada Co., Re*, 2015 ONSC 1028 at paras. 34-35.

Justice McEwen recognized that the appointment of representative counsel to represent the interests of those with tobacco-related claims would be crucial to a successful restructuring:

> Without Representative Counsel the administration of these proceedings would be cumbersome and perhaps undoable. The appointment of Representative Counsel will facilitate efficiency and make the proceedings more cost effective by providing a clear mechanism for communicating with the TRW Claimants.[52]

54. Without the requested appointments, the task of defending multiple class actions and responding to unrepresented claimants with varying levels of resources and legal knowledge would be both costly and administratively burdensome on CannTrust.

55. The proposed CCAA Representatives and CCAA Representative Counsel will streamline the process whereby there will be single point of contact as among the Securities Claimants and their counsel. In turn, these representatives will be the point of contact as between CannTrust, the Monitor, the Court and the Court-Appointed Mediator for the purposes of communication and key steps in the CCAA Proceedings. The reduction in the administrative burden and the improved efficiency resulting therefrom will benefit both CannTrust and the Securities Claimants.

d. Upholding Social Benefits

56. The appointment of representatives for the Securities Claimants will help to fulfill the objective of the CCAA: to facilitate restructuring. The likelihood of a successful reorganization is enhanced when common ground is achieved and where stakeholders are treated fairly.[53]

57. The CCAA Representatives and CCAA Representative Counsel will be able to provide

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[52] *JTI-Macdonald* at para. 29.

[53] *Century Services* at para. 22; *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at para. 50, leave to appeal dismissed 2008 CanLII 46997 (SCC).

the advice needed by the Securities Claimants to participate effectively in the restructuring process and they will be able to ensure the Securities Claimants are adequately represented during negotiations and that they are treated in a fair and consistent manner.

58. The appointment of the CCAA Representatives and CCAA Representative Counsel is an important and necessary step in this restructuring process. Since none of the class actions against CannTrust is certified, Securities Claimants are generally not formally represented, and with limited exceptions, they do not have formal representation in the CCAA Proceedings. The Securities Claimants are an important stakeholder group and so should have meaningful representation so that they can participate effectively in these CCAA Proceedings.

59. Additionally, the appointment of Representatives and Representative Counsel is consistent with the objective of resolving all Securities Claims and not merely those in a particular Action. It will avoid inconsistencies and delays that would be associated with multiple and potentially conflicting groups.

e. Avoiding a Multiplicity of Retainers

60. The appointment of Representatives and Representative Counsel means that the Securities Claimants will not need to each engage counsel to advance their individual claims. This avoids both fragmentation and duplication of efforts and resources, which is an additional benefit to both CannTrust and the Securities Claimants.[54]

f. Representative Counsel is Prepared to Act for the Securities Claimants

61. Each CCAA Representative and CCAA Representative Counsel is prepared to act in the

[54] *Canwest Publishing* at para. 24.

applicable capacity if so appointed.[55] Representative counsel have not already been appointed for Securities Claimants or those who have similar interests.

g. Position of Other Stakeholders and the Monitor

62. The Monitor supports the appointment of the CCAA Representatives and CCAA Representative Counsel.[56] CannTrust is not aware of any stakeholder that may oppose the appointment other than the two Zola Plaintiffs, although they have not served any material indicating the basis for any opposition.

63. The Zola Plaintiffs are expressly carved out of the proposed CCAA Representation Order and are entirely unaffected by it. Whether or not the Zola Plaintiffs assert claims that are the same as, or different than, the claims asserted in the Ontario Class Action or U.S. Class Action is entirely irrelevant to the determination on this motion. The Zola Plaintiffs will remain free to assert any claims they may have and take any positions they may wish with respect to the CCAA Plan to be developed by CannTrust and the settlement framework to be included therein. The Zola Plaintiffs will be able to continue to participate in the Mediation Process.

64. The Zola Plaintiffs have previously unsuccessfully opposed the extension of the Stay Period. The potential opposition by the Zola Plaintiffs to the proposed CCAA Representation Order, an order that does not affect them, is solely an attempt to further impede the progress of CannTrust's restructuring.

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[55] Guyatt Affidavit, para. 77, Motion Record, Tab 2; Kalloghlian Affidavit, paras. 46, 57, Motion Record, Tab 3; Affidavit of James W. Johnson sworn on January 20, 2021 ("**Johnson Affidavit**") at para. 11, Motion Record, Tab 4.
[56] Sixth Report at para. 50.

h. Balance of Convenience Favours Appointment

66. The appointment of the proposed CCAA Representatives and CCAA Representative Counsel will benefit the vulnerable, disparate group of creditors that comprise the Securities Claimants by improving access to justice, but also CannTrust by reducing the administrative burden associated with these CCAA Proceedings and the putative class actions and other claims asserted against CannTrust. The appointment of CCAA Representatives and CCAA Representative Counsel will improve the likelihood of CannTrust successfully exiting the restructuring process as well as the likelihood of achieving a global settlement. Securities Claimants that already have representation will be unaffected. CannTrust will not be funding the CCAA Representatives and CCAA Representative Counsel.[57]

67. Overall, there are significant benefits to CannTrust and its stakeholders and no tangible prejudice to other interested parties if the CCAA Representation Order is granted. The balance of convenience supports the appointment of the proposed CCAA Representatives and CCAA Representative Counsel.

(iii) Suitability of CCAA Representatives and CCAA Representative Counsel

68. The proposed CCAA Canadian Representative Counsel is comprised of the coalition of Henein Hutchinson LLP, Strosberg Sasso Sutts LLP, A Dimitri Lascaris Law Professional Corporation, and Kalloghlian Professional Corporation. They have demonstrated expertise in securities matters, in complex class action matters and in CCAA matters.

69. The proposed CCAA U.S. Representative Counsel is comprised of Weisz Fell Kour LLP,

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[57] Kalloghlian Affidavit, para. 43, Motion Record, Tab 3.

a boutique insolvency firm in Toronto with extensive experience in CCAA matters, in association with Labaton Sucharow LLP, a U.S. firm which has significant expertise in securities class actions.

70. The proposed CCAA Canadian Representatives, CCAA Canadian Representative Counsel, CCAA U.S. Representatives and CCAA U.S. Representative Counsel have each already prevailed in contested carriage motions and assert claims against CannTrust and others on behalf of a global class of CannTrust shareholders.[58]

71. The proposed CCAA Representatives and CCAA Representative Counsel thus have the requisite expertise, knowledge, support staff and infrastructure to advise multiple clients and facilitate effective communication and information sharing among the CCAA Representatives, the Securities Claimants, the Applicants, the Monitor, the Court and other stakeholders.[59]

72. There is currently no one better placed than the proposed CCAA Representatives and CCAA Representative Counsel to represent the interests of the Securities Claimants as a group.

(iv) Time is of the Essence

73. CannTrust has only recently returned to the medical and recreational cannabis markets and is still in the process of ramping up its operations and the distribution of its products. CannTrust is projected to remain cash flow negative throughout the proposed extension of the Stay Period.[60] As at January 10, 2021, CannTrust had approximately $78.8 million in cash on

[58] Kalloghlian Affidavit, para. 7, Motion Record, Tab 3.
[59] Kalloghlian Affidavit, paras. 47-57, Motion Record, Tab 3; Johnson Affidavit at paras. 9-11, Motion Record, Tab 4.
[60] Guyatt Affidavit at para. 71.

hand, including the $50 million contemplated for settlement purposes.[61] That is projected to decline to approximately $62.0 million by the week ending May 2, 2021.[62]

74. To remain as a going concern, CannTrust must implement a settlement of Securities Claims and emerge from the CCAA Proceedings in the near term or it will run out of its remaining cash (i.e., the cash it has on hand in excess of the $50 million it needs to fund the proposed settlement). At this stage, every week matters if CannTrust is going to remain a going concern.

PART V—ORDER REQUESTED

75. For the reasons set out above, the Applicants request that this Court grant the proposed Stay Extension Order and CCAA Representation Order. The requested relief is necessary and appropriate in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of January, 2021.

McCarthy Tétrault LLP
Lawyers for the Applicant

[61] Sixth Report at para. 54.
[62] Cash Flow Forecast, Appendix "D" to the Sixth Report, p. 30.

SCHEDULE "A" – LIST OF AUTHORITIES

1. *U.S. Steel Canada Inc., Re*, 2016 ONSC 3106

2. *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758

3. *Canwest Global Communications Corp. (Re.)*, 2009 CarswellOnt 7169 (SCJ)

4. *Urbancorp Toronto Management Inc., Re*, 2016 ONSC 5426

5. *JTI-Macdonald Corp.*, Re, 2020 ONSC 61

6. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60

7. *Dugal v Research In Motion Ltd.* (2007), [2007] O.J. No. 4535 (SCJ)

8. *Fraser Papers Inc., Re*, 2009 CarswellOnt 6169 (SCJ)

9. *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 (SCJ)

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

11. *League Assets Corp., Re*, 2013 BCSC 2043

12. *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299

13. *Eron Mortgage Corp., Re*, 1998 CarswellBC 1851

14. *Cash Store Financial Services, Re*, 2015 ONSC 6087

15. *Labourers' Pension Fund of Central and Easter Canada (Trustees of) v Sino-Forest Corp.*, 2015 CarswellOnt 6975 (SCJ)

16. *Canwest Publishing Inc.*, 2010 ONSC 1328

17. *1057863 B.C. Ltd. (Re)*, 2020 BCSC 1359

18. *Pearson v Inco Ltd.*, 2001 CarswellOnt 4340 (SCJ)

19. *Target Canada Co., Re*, 2015 ONSC 1028

20. *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, leave to appeal dismissed 2008 CanLII 46997 (SCC)

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. 11.02(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.

***Rules of Civil Procedure*, R.R.O. 1990, Regulation 194**

s. 10.01(1)

Proceedings in which Order may be Made **–** In a proceeding concerning,

> (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
>
> (b) the determination of a question arising in the administration of an estate or trust;
>
> (c) the approval of a sale, purchase, settlement or other transaction;
>
> (d) the approval of an arrangement under the *Variation of Trusts Act*;
>
> (e) the administration of the estate of a deceased person; or
>
> (f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served.

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)

Proceeding commenced at Toronto

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(Stay Extension and CCAA Representation)
(Returnable January 29, 2021)

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