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
(Meeting Order)
(Returnable March 19, 2021)

March 16, 2021

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

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

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

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

Alexander Steele LSO#: 75719P
Tel: 416-601-8370
Email: asteele@mccarthy.ca

Lawyers for the Applicants

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
(Meeting Order)
(Returnable March 19, 2021)

TABLE OF CONTENTS

PAGE

PART I—INTRODUCTION

1. The CannTrust Group has significant progress in its restructuring efforts since regulatory audits of its facilities in Summer 2019 found that it was growing cannabis contrary to applicable laws.[1] As a consequence of the Health Canada Audits, shipments of all of its products were stopped, its cannabis licences were suspended and multiple putative securities class actions were commenced against it in several provinces in Canada and at the federal and state level in the United States seeking estimated aggregate damages of at least $500 million (the "**Actions**").[2]

2. Prior to and during the course of these CCAA proceedings that were commenced on March 31, 2020, the CannTrust Group has completed many of its restructuring objectives. The CannTrust Group remediated its facilities, obtained the reinstatement of its cannabis licences, right-sized its business operations, resumed production and processing operations, returned to the recreational and medical cannabis markets and, following extensive negotiations facilitated by a court-appointed mediator, agreed to a framework with the representatives of Securities Claimants for the settlement of the Actions and all Securities Claims against CannTrust Holdings and various related claims,[3] while preserving the ability of other defendants to benefit from that framework.

---

[1] Capitalized terms used and not defined herein have the meanings ascribed to them in the Affidavit of Greg Guyatt, sworn March 5, 2021 ("**Guyatt Affidavit**"), Motion Record of the Applicants (Meeting Order) dated March 5, 2021 ("**Motion Record**"), Tab 2, or the Plan of Compromise, Arrangement and Reorganization of CannTrust Holdings Inc., CannTrust Inc. and Elmcliffe Investments Inc. to be dated March 19, 2021 (the "**CCAA Plan**"), Exhibit "A" to the Affidavit of Greg Guyatt sworn March 13, 2021 ("**Supplementary Guyatt Affidavit**"), Supplementary Motion Record of the Applicants (Meeting Order) dated March 13, 2021 (the "**Supplementary Motion Record**"), Tab 1A.

[2] Guyatt Affidavit at paras. 4-5, Motion Record, Tab 2.

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

3. With each of these key milestones achieved, CannTrust Holdings Inc., CannTrust Inc. and Elmcliffe Investments Inc. (the "**CannTrust Plan Companies**") prepared a CCAA Plan to implement the settlement of the Securities Claims in a manner consistent with this framework, subject to the requisite approval of affected creditors and the Court.

4. The CannTrust Plan Companies are not seeking approval of the CCAA Plan at this stage. Rather, they are only seeking to file the CCAA Plan for consideration by the Affected Creditors at the Meetings. The CannTrust Plan Companies believe that the CCAA Plan is the only realistic route available that will allow them to emerge from the CCAA Proceedings as a going concern as:

(a) a robust marketing and solicitation process approved by the Court did not result in any executable proposals for a recapitalization or sale transaction; and

(b) limited cash in excess of the $50 million needed to fund the proposed settlement with the plaintiffs remains; and

(c) their ability to obtain financing is dependent on a clear path being provided toward a successful restructuring and exit from these CCAA Proceedings.[4]

5. If the CCAA Plan is not implemented in a timely manner, the only realistic alternative would be a liquidation of the assets of the CannTrust Plan Companies.[5] A liquidation would result in significant negative consequences for the CannTrust Group's approximately 280 employees, the consumers and medical patients that rely on its products, its suppliers and the

[4] Guyatt Affidavit at paras. 9-11, Motion Record, Tab 2.

[5] Eighth Report of the Monitor dated March 15, 2021 ("**Eighth Report**") at para. 76.

communities in which it operates and would prevent the consensual resolution of more than $500 million of Securities Claims against CannTrust Holdings.

6. Creditors are generally expected to receive a recovery under the CCAA Plan greater than or equal to their estimated recovery in a liquidation, and certainly in a more timely manner.[6]

7. This procedural step is opposed by certain co-defendants in the Actions that have not reached settlements of their respective liabilities and who may have claims for contribution and indemnity against CannTrust Holdings (the "**Non-Settling Defendants**"). The Non-Settling Defendants filed records in opposition to the granting of the Meeting Order on March 11, 2021. In the affidavits filed in support of their opposition there is no express statement of all of the grounds those parties have to the proposed Meeting Order. However, it would appear from those records that the Non-Settling Defendants oppose the granting of the Meeting Order on the basis that: (i) they should be entitled to vote on the CCAA Plan with respect to their double contingent Securities-Related Indemnity Claims; and (ii) the CCAA Plan does not fairly address their interests.

8. For the reasons set out herein, the Non-Settling Defendants are not entitled to vote on the CCAA Plan and concerns regarding the fairness of the CCAA Plan are more properly addressed at the sanction hearing. The CannTrust Plan Companies are seeking to schedule the sanction hearing for May 14, 2021, which will provide ample time for the Non-Settling

[6] Eighth Report of Ernst & Young Inc. dated March 15, 2021 (the "**Eighth Report**) at paras. 79-85.

Defendants to advance any arguments they wish to make on the fairness of the CCAA Plan (if they do not reach a settlement in the meantime).

PART II—THE FACTS

(i) Background

9. The affidavit of Greg Guyatt sworn March 5, 2021 (the "**Guyatt Affidavit**") sets out in detail the facts concerning the CannTrust Group, the circumstances leading to the CCAA Proceedings, the restructuring of the CannTrust Group's business operations that has been completed during the course of the CCAA Proceedings, and the extensive negotiations facilitated by the Honourable Dennis O'Connor, Q.C. that led to the CannTrust Group reaching an agreement with the representative plaintiffs in the Ontario Class Action and the U.S. Class Action and their counsel on January 19, 2021 regarding a framework for the settlement of all Securities Claims against CannTrust Holdings and various related claims (the "**RSA**").[7]

10. On January 29, 2021, this Court issued an order (the "**CCAA Representation Order**") appointing the CCAA Representatives and CCAA Representative Counsel to represent the interests of Securities Claimants in these CCAA Proceedings, other than those that were already formally represented by counsel.[8]

[7] Guyatt Affidavit, Motion Record, Tab 2.
[8] Guyatt Affidavit at paras. 53-59, Motion Record, Tab 2.

(ii) The CCAA Plan

11. The CCAA Plan will compromise and release certain liabilities of the CannTrust Plan Companies, including all of the CannTrust Plan Companies' liabilities in connection with the Actions, and allow the CannTrust Plan Companies to emerge from the CCAA Proceedings as a going concern with a stronger, more efficient business which the CannTrust Plan Companies believe will be highly competitive in the Canadian cannabis market.[9]

12. Generally, the CCAA Plan provides for the following classes of affected creditors and treatment of their claims:

(a) General Unsecured Claims (Opco): General Unsecured Creditors of CannTrust Inc. ("**CannTrust Opco**") with Proven Claims will be entitled to distributions from the GUC Distribution Pool, to which the CannTrust Plan Companies will contribute $900,000;

(b) General Unsecured Claims (Holdings) the small number of General Unsecured Creditors of CannTrust Holdings with Proven Claims will be paid in full;

(c) General Unsecured Claims (Elmcliffe): the small number of General Unsecured Creditors of Elmcliffe Investments Inc. ("**Elmcliffe**") with Proven Claims will be paid in full pursuant to a payment arrangement to be agreed with the CannTrust Plan Companies and each such Creditor; and

(d) Securities Claims: Securities Claimants with Proven Claims will have the right to receive distributions from the Securities Claimant Trust, to which (i)

[9] Guyatt Affidavit at paras. 9-11, Motion Record, Tab 2.

CannTrust Holdings will pay or cause to be paid $50 million, (ii) CannTrust Holdings and CannTrust Opco will assign their claims against any non-settling Co-Defendants and Insurers, and (iii) Additional Settlement Parties may make further contributions of cash and assigned claims.[10]

13. In respect of certain other claims, the CCAA Plan contemplates the following:

(a) Securities-Related Indemnity Claims: The CCAA Sanction Order to be sought by the CannTrust Plan Companies will release all Securities-Related Indemnity Claims other than certain Defence Costs Indemnity Claims without any distribution under the CCAA Plan. The CCAA Plan contemplates that Non-Settlement Parties with valid Securities-Related Indemnity Claims will benefit from a judgment reduction provision to be sought in the CCAA Sanction Order, as described further below;

(b) Securities-Related Section 5.1(2) Claims: All Securities-Related Section 5.1(2) Claims will be channelled to and limited to recovery solely from the Securities Claimant Trust; and

(c) Unaffected Claims: Unaffected Claims will either be paid pursuant to the CCAA Plan or satisfied in accordance with the applicable agreements and other arrangements between Unaffected Creditors and the applicable CannTrust Plan Company.[11]

[10] Guyatt Affidavit at paras. 62-75, Motion Record, Tab 2.
[11] Guyatt Affidavit at paras. 76-83, Motion Record, Tab 2.

14. The CCAA Plan provides a mechanism for other Co-Defendants and Insurers to settle the Securities-Related Claims asserted against them in the Actions, make contributions to the Securities Claimant Trust and become a Settlement Party that will benefit from the releases and other relief contemplated in the CCAA Plan.[12]

(iii) The Meeting Order

15. A detailed description of the Meeting Order sought by the CannTrust Group is provided in the Guyatt Affidavit and the Eighth Report. The key features of the Meeting Order include the following:

(a) there will be four classes of Affected Creditors for the purposes of considering and voting on the resolution to approve the CCAA Plan, specifically (i) three separate classes of Creditors holding General Unsecured Claims against CannTrust Opco, Elmcliffe and CannTrust Holdings, respectively (the "**GUC Classes**"), and (ii) a class of Creditors holding Securities Claims (the "**Securities Claimant Class**");[13]

(b) meetings of each of the GUC Classes and the Securities Claimant Class would be scheduled for April 30, 2021 and would occur by videoconference;[14]

(c) there are detailed procedures that will be carried out by the CannTrust Plan Companies and the Monitor to provide notice of the CCAA Plan, the Meetings

[12] Guyatt Affidavit at para. 85, Motion Record, Tab 2.
[13] Guyatt Affidavit at para. 96, Motion Record, Tab 2.
[14] Guyatt Affidavit at paras. 97-98, Motion Record, Tab 2.

and the sanction hearing, including a notice that will be sent to all Known Securities Claimants;[15]

(d) a process is provided for Securities Claims to be proven and proxies to be filed solely for the purposes of voting on the CCAA Plan at the meeting of the Securities Claimant Class;[16] and

(e) the vote on the resolution to approve the CCAA Plan for each of the GUC Classes and, subject to further order of the Court, the Securities Claimant Class will be decided by approval of the Plan by a majority in number of the Affected Creditors holding Voting Claims representing at least two-thirds that are in attendance personally or by proxy and voting at the applicable Meeting.[17]

16. Following the Meetings, the CannTrust Group will seek the CCAA Sanction Order from the Court on May 14, 2021 or such later date as the Court may set.[18]

PART III—ISSUES AND THE LAW

17. The issues on this procedural motion are:

(a) Should the Court grant the Meeting Order, including authorizing and directing the CannTrust Plan Companies to call and conduct the Meetings in accordance with the Meeting Order? ***Yes.***

(b) Should the Court extend the Stay Period until May 14, 2021? ***Yes.***

---

[15] Guyatt Affidavit at paras. 99-101, Motion Record, Tab 2.
[16] Guyatt Affidavit at paras. 108-11 and 118-119, Motion Record, Tab 2.
[17] Guyatt Affidavit at paras. 115-117, Motion Record, Tab 2.
[18] Guyatt Affidavit at para. 125, Motion Record, Tab 2.

(i) Purpose of the CCAA

18. The remedial purpose of the CCAA is to permit the debtor company to continue to carry on business and avoid the devastating social and economic consequences of liquidating its assets.[19] This purpose guides the exercise of all judicial discretion under the CCAA, including the decision of whether to direct a meeting of creditors and the classification of creditors at those meetings.[20]

(ii) The Low Threshold for Calling Meetings of Creditors

19. Sections 4 and 5 of the CCAA provide that this Court may order a meeting of creditors "in such manner as the court directs" where, as here, a debtor company proposes a compromise or arrangement between it and any class of unsecured or secured creditors.[21]

20. The threshold to be satisfied in order to file a plan and call a meeting of creditors is low.[22] At this stage, the Court is not required to address the overall fairness and reasonableness of the CCAA Plan or the appropriateness of specific provisions of the CCAA Plan.[23] These issues are more appropriately raised at the sanction hearing.[24]

21. In order to refuse to grant the Meeting Order, the Court must be satisfied that there is *no reasonable chance* that (i) the CCAA Plan would be approved by the Affected Creditors;

---

[19] *Century Services Ltd., Re*, 2010 SCC 60 at para. 15; *9354-9186 Québec inc. v. Callidus Capital Corp*, 2020 SCC 10 at paras. 40-42 [***Callidus***];

[20] *Nova Metal Products Inc. v. Comiskey (Trustee of)*, 1990 CarswellOnt 139 at para. 64 [***Comiskey***]; *Canadian Airlines Corp., Re*, 2000 CarswellAlta 623 at para. 14 (QB) [***Canadian Airlines***].

[21] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, ss. 4, 5 ("**CCAA**").

[22] *Quest University Canada (Re)*, 2020 BCSC 1845 at para. 46 [***Quest University***]; *Federal Gypsum Co (Re)*, 2007 NSSC 384 at para 12; *Comiskey* at para. 90.

[23] *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia*, 1991 CarswellOnt 220 at para. 11 (Gen. Div.); *Quest University* at para. 32.

[24] *T. Eaton Co., Re*, 1999 CanLII 15024 at para. 6 (ONSC); *Stelco Inc., Re*, 2005 CanLII 41379 at para. 15 (ONSC), aff'd 2005 CanLII 42247 (ONCA); *Jaguar Mining Inc. (Re)*, 2014 ONSC 494 at para. 48.

(ii) the CCAA Plan would be approved by the Court; or (iii) the CCAA Plan would be successfully implemented.[25]

22. CannTrust Group satisfies the threshold for filing the CCAA Plan for consideration by the Affected Creditors.

(iii) Creditor Approval

23. There is no basis for concluding that the CCAA Plan cannot achieve the approval of the required majorities. Indeed, considering that (i) the recovery of General Unsecured Creditors under the CCAA Plan is equal to or greater than the recovery they could expect to receive in a liquidation,[26] and (ii) the CCAA Plan is consistent with the settlement framework for Securities Claims agreed upon in the RSA with the CCAA Representatives and CCAA Representative Counsel who have been appointed by this Court to represent the interests of Securities Claimants,[27] it is reasonable to expect that the CCAA Plan will be approved by the Affected Creditors at the Meetings.

(iv) Court Approval

24. There is similarly no basis for concluding at this stage that the CCAA Plan could not be sanctioned by this Court. The CCAA Plan complies with the statutory requirements of the CCAA and is consistent with its objectives as it will facilitate the CannTrust Group emerging from these proceedings as a going concern.

---

[25] *ScoZinc Ltd. (Re)*, 2009 NSSC 163 at paras 6-7; Quest University at para. 32; *Comiskey* at para. 90; *Bargain Harold's Discount Ltd. v. Paribas Bank of Canada*, 1992 CarswellOnt 159 (Gen Div) at paras 35-39;

[26] Eighth Report at paras. 83.

[27] Guyatt Affidavit at paras. 53-57, Motion Record, Tab 2.

25. To the extent that the Non-Settling Defendants or any other stakeholder are arguing that the CCAA Plan could not be sanctioned because it is not fair and reasonable, those concerns are more appropriately addressed at the sanction hearing.

26. To the extent that the Non-Settling Defendants are arguing that they should be entitled to vote on the CCAA Plan, and the CCAA Plan could not be sanctioned without giving them that vote, it is appropriate that they not have a vote for the reasons set out below.

(v) Securities-Related Indemnity Claims are Not Entitled to Vote

27. In *9354-9186 Québec inc. v. Callidus Capital Corp.*, the Supreme Court of Canada recently addressed the rights of creditors to vote on CCAA plans of compromise or arrangement. The Supreme Court stated that a creditor with a provable claim can generally vote on a plan of compromise or arrangement that affects its rights, subject to any specific provisions of the CCAA that may restrict its voting rights or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote.[28]

28. The Non-Settling Defendants holding Securities-Related Indemnity Claims are not entitled to vote on the CCAA Plan as:

(a) even if they were placed in the Securities Claimant Class, they would not have a right to vote or receive distributions as a result of the rule against double proofs;

---

[28] *Callidus* at paras. 56-58.

(b) the CCAA Plan does not affect their rights as affected creditors to whom the CCAA Plan has been proposed; and

(c) the CCAA expressly restricts the right of creditors holding equity claims to vote on a CCAA plan.

a. Rule Against Double Proof

29. The "rule against double proof" provides that there cannot be two proofs of claim filed for the same debt, even though there may be two separate contracts or sources of liability in respect of that debt.[29] The rule against double proof is designed to ensure the *pari passu* distribution of the assets of the debtor on a *pro rata* basis among its unsecured creditors, which is a central tenet of insolvency legislation.[30]

30. In the Actions, the Securities Claimants seek damages for their alleged losses related to misrepresentations by CannTrust Holdings in its public disclosure. The Securities-Related Indemnity Claims consist of potential claims over against CannTrust Holdings by the Non-Settling Defendants for contribution and indemnity in respect of the same damages that are claimed against CannTrust Holdings by the Securities Claimants.

31. Securities Claimants will be proving their Securities Claims for voting purposes, either individually or through the CCAA Representatives acting on their behalf. If the Non-Settling Defendants were placed in the Securities Claimant Class, any Securities-Related Indemnity Claim that they may attempt to prove for their liability related to the Actions would be

[29] *Olympia & York Developments Ltd., Re*, 1998 CarswellOnt 4552 at para. 23 (Gen. Div.) [***Olympia***]; *Aslan, Re*, 2013 ONSC 4112 at para. 15, var'd on other grounds, *Aslan, Re*, 2014 ONCA 245 at para. 16 [***Aslan ONCA***].

[30] *Olympia* at para. 25; *Aslan ONCA* at para. 16; *Nortel Networks Corporation (Re)*, 2015 ONCA 681 at paras. 23-24.

duplicative of claims asserted by the Securities Claimants and violate the rule against double proofs.

b. Non-Settling Defendants Not Impacted in a Practical Sense

32. Pursuant to section 4 of the CCAA, a debtor company may propose a compromise to a subset of its creditors and the Court may direct a meeting of those creditors.[31] The Non-Settling Defendants are not included in a class to which the CCAA Plan is proposed.

33. Following the delivery of the responding motion records of the Non-Settling Defendants, the CannTrust Plan Companies made certain amendments to the CCAA Plan to add two key provisions which benefit Non-Settling Defendants holding Securities-Related Indemnity Claims. The result of these provisions is that the Non-Settling Defendants are not impacted by the CCAA Plan in a practical sense.

34. First, the Non-Settling Defendants will benefit from a judgment reduction provision to be sought in the CCAA Sanction Order. The amount of any judgment or other award obtained by a Securities Claimant or the Securities Claimant Trust against the Non-Settling Defendants is reduced by the amount that the Non-Settling Defendant would have recovered against a Released Party on account of any Securities-Related Indemnity Claims if such claims had not been released by the CCAA Plan or CCAA Sanction Order. This judgment reduction would be allocated between the various Non-Settling Defendants on a *pro rata* basis.[32]

---

[31] CCAA, s. 4.
[32] CCAA Plan, s. 7.3(2), Supplementary Motion Record, Tab 1A.

35. An example illustrates why the rights of Non-Settling Defendants are not impacted. In the absence of the CCAA Plan, the Securities Claimants would be free to settle the Securities Claims against CannTrust Holdings for $50 million. Such a payment would satisfy a portion of the Securities Claimants' damages and accordingly, reduce the Non-Settling Defendants' potential joint and several liability. If a judgment is subsequently obtained against the Non-Settling Defendants and the Non-Settling Defendants sought contribution and indemnity from CannTrust Holdings, ***only*** the incremental value of its assets above the $50 million paid to the plaintiffs would be available to satisfy that indemnity claim. Stated differently, the overall outcome for the Non-Settling Defendant would be the judgment against them, less the $50 million paid to the plaintiffs by CannTrust Holdings and a potential recovery on account of the indemnity against CannTrust Holdings – but by which point CannTrust Holdings may be in liquidation.

36. The outcome under the CCAA Plan is the same. Any potential joint and several judgment against the Non-Settling Defendants would being reduced by the $50 million to be paid to the Securities Claimant Trust by CannTrust Holdings and a judgment reduction equal to the potential recovery against CannTrust Holdings calculated as of the Effective Time, shared among all of the Co-Defendants on a *pro rata* basis.[33]

37. Second, any claim against CannTrust Holdings for indemnification of defence costs incurred by the Non-Settling Defendant who successfully defend a Securities-Related Claim

[33] It is appropriate for the quantum of the judgment reduction be calculated as of the Effective Time: *Stelco Inc., Re*, 2006 CanLII 1773 at para. 16 (ONSC).

will be an Unaffected Claim and will not be compromised under the CCAA Plan (assuming the indemnity claim is otherwise valid and enforceable against CannTrust Holdings).[34]

38. In *Lemare Holdings Ltd., Re*, a creditor had entered into a broad subordination agreement providing that it would only be paid after all other creditors.[35] The debtor company sought to file a plan and call a meeting of its creditors. The plan required that the sanction order include a declaration that the creditor was not entitled to receive any amounts until all other debt had been paid. The creditor opposed the granting of the meeting order on the basis that it should be given a vote as the plan and sanction order were affecting its rights. The Court dismissed this objection, holding that "where the effect of the [declaration] on [the creditor's] rights leaves it in a position, as I find it does, where those rights are not impaired by the proposed Plan, then *I see no basis for requiring that [the creditor] have a vote*."[36]

c. <u>Equity Claims Not Entitled to Vote</u>

39. Section 22.1 of the CCAA, which came into force on September 18, 2009, provides that creditors having equity claims may not, as members of that class, vote at any meeting unless the court orders otherwise.[37] The starting point is that equity claims do not have a vote, regardless of whether the plan may be affecting their rights or not.

---

[34] CCAA Plan, s. 2.3(i), Supplementary Motion Record, Tab 1A. The Non-Settling Defendants may benefit from the judgment reduction provision with respect to any Defence Costs Indemnity Claims they may have if they do not successfully defend the Securities-Related Claim.

[35] *Lemare Holdings Ltd., Re*, 2014 BCSC 893 [***Lemare Holdings***].

[36] *Lemare Holdings* at para. 36 [emphasis added].

[37] CCAA, s. 22.1.

40. Claims for contribution and indemnity against a debtor company by auditors, underwriters and other co-defendants for any liability that may be imposed on them in a securities class action commenced by shareholders of the debtor company are equity claims.[38]

41. Accordingly, the CCAA specifically limits the right of equity claimants such as the Non-Settling Defendants to vote on the CCAA Plan. There is no free-standing statutory right to vote that is being denied by the proposed Meeting Order.

d. Rights of Non-Settling Defendants Not Being Confiscated Without a Vote

42. The Non-Settling Defendants might rely on *Menegon v. Philip Services Corp.* ("***Philip Services #1***") to argue that it is inappropriate for this Court to grant the meeting order because their rights are being confiscated without a vote.[39] That decision is the result of very different circumstances that are not present in this case.

43. *Philip Services #1* involved a cross-border restructuring in Canada and the U.S. under the CCAA and Chapter 11 to, among other things, resolve securities class actions commenced against the debtor companies alleging misrepresentations in its public disclosure related to a public offering. The auditors and underwriters were also named as defendants in these actions.

44. The debtor company reached a settlement of the securities actions. The settlement was to be implemented by way of plans in the CCAA and Chapter 11 proceedings. Crucially, the plans provided that creditors with claims against the corporate parent, such as the contribution

[38] *Sino-Forest Corporation (Re)*, 2012 ONSC 4377 at paras. 82, 84-85, 96-97 [***Sino-Forest ONSC***]; aff'd *Sino-Forest Corporation (Re)*, 2012 ONCA 816 at paras. 36-56.

[39] *Menegon v. Philip Services Corp.*, 1999 CarswellOnt 3240 (Gen. Div.) [***Philip Services #1***].

and indemnity claims of the auditors and underwriters related to the securities actions, would be dealt with in the U.S. plan but the Canadian plan would also be binding on them.

45. The debtor company brought a motion seeking approval of the settlement. The auditors and underwriters brought a cross-motion for a declaration that the Canadian plan was not fair and reasonable. Justice Blair agreed with the general principle that "generally speaking matters relating to the fairness and reasonableness are better considered in the overall context of the final sanctioning hearing."[40] However, since the debtor company had sought early approval of the settlement (unlike here) – relief that was inextricably linked with the overall fairness of the Canadian plan – the Court was required to consider fairness at an earlier stage.

46. Justice Blair recognized that the compromise of rights for contribution and indemnity against the debtor company "is not a reason for impugning the fairness and reasonableness of the Plans, because the ability to compromise claims against it is essential to the ability of a debtor corporation to restructure its affairs."[41] However, in the particular circumstances of the case, Justice Blair held that it was inappropriate for the meetings to proceed without the auditors and underwriters being given a vote based on the following findings:

(a) the auditors and underwriters would have had a right to vote under the CCAA;[42]

(b) that right was being in inappropriately confiscated by requiring the auditors and underwriters to participate in the Chapter 11 proceedings while simultaneously binding them to the Canadian plan;

[40] *Philip Services #1* at para. 45.
[41] *Philip Services #1* at para. 35.
[42] *Philip Services #1* at para. 40.

(c) the underwriters and auditors would be treated less favourably in the Chapter 11 proceedings;[43] and

(d) the auditors and underwriters were being negatively affected by the Canadian and U.S. plans as their contribution and indemnity claims against the debtor company were being released while their potential liability was not being correspondingly limited.[44]

47. Justice Blair made the general statement that "the rights of creditors under the CCAA cannot be compromised unless the creditor has been given a right to vote, in the appropriate class, on the proposed compromise."[45]

48. To the extent that *Philip Services #1* is being relied on for the proposition that any creditors with equity claims who are affected by a plan must be given an opportunity to vote on it, that holding has been overtaken by the subsequent amendments to the CCAA in September 2009 that clarified that equity claims do not have a right to vote, and the holdings of the Supreme Court of Canada in *Callidus.*

49. Moreover, for the reasons set out above, the Non-Settling Defendants do not have a voting right that is being inappropriately denied by the proposed Meeting Order. *Philip Services #1* involved a different plan structure and is distinguishable because (i) the Non-Settling Defendants are not being required to participate in a foreign proceeding where they will be treated less favourably, (ii) the Non-Settling Defendants will benefit from the above-noted judgment reduction and defence cost provisions that will result in them being not

[43] *Philip Services #1* at para. 39.
[44] *Philip Services #1* at para. 37.
[45] *Philip Services #1* at para. 42.

impacted by the CCAA Plan in a practical sense, and (iii) the CannTrust Group is not seeking approval of the settlement with the CCAA Representatives, so the Court is not required to examine the fairness of the CCAA Plan at this stage.

50. The circumstances here bear more similarity to the second attempt by the auditors and underwriters to oppose Philip Services proceeding with a meeting of its creditors, which was rebuffed by Justice Blair.[46] In *Philip Services Corp., Re* ("***Philip Services #2***"), the debtor company put forward a different Canadian plan to its secured creditors under which unsecured creditors would be unaffected. The auditors and underwriters again brought a motion for a declaration that the new plan was not fair and reasonable.

51. Justice Blair refused to grant the declaration sought as the auditors and underwriters were unaffected by the plan. They had no realistic ability in either case to recover anything against the debtor company as its secured debt was greater than the value of its assets. Justice Blair held as follows:

> … Here, the reality is - no matter what form of Plan is put forward, and, indeed, no matter what form of restructuring is pursued - there is no prospect that the Contingent Claimants will recover anything as against Philip in Canada. They recognize this… What they want is leverage, i.e., the ability to continue to pursue their object of negotiating a compromise which would enable them to obtain a release from, or at least a cap to, their exposure.
>
> The objective is understandable. However, <u>I do not think the Contingent Claimants have the right, in the present circumstances of this case, to block and further delay the restructuring process - at peril of destroying hundreds of millions of dollars of value in the debtor company</u> - by insisting that Philip continue to negotiate with them as part of the

[46] *Philip Services Corp., Re*, 1999 CarswellOnt 4673 (Gen. Div.) [***Philip Services #2***].

> Canadian Plan, when it is evident that such negotiations have become ineffective. There are interests of others at stake…[47]

52. Similarly, in *GT Group Telecom Inc., Re*, noteholders sought to adjourn a creditor meeting on the basis that the plan did not deal with all applicants, and their claims were against an excluded applicant, thus the plan was indirectly affecting their interests without a vote.[48] The motion was dismissed and the creditor meeting was permitted to proceed. Justice Farley distinguished *Philip Services #1* on the basis that the noteholders were not affected by the plan and thus not entitled to a vote:

> Thus as to the complaint of fundamental fairness (i) of not being involved in negotiations for the proposed plan, … and (iii) the inability to vote on the proposed plan, I would note that as to the bookend complaints of the Bank founded on Blair J.'s views in [*Philip Services*], Blair J. was discussing a situation where there were affected creditors. … I see no necessity here in these circumstances to require any remedy for these complaints.[49]

53. Justice Farley noted that "it is not enough for a party, displeased with a plan, to ask the court to adjourn the meeting so that there can be further negotiations."[50]

(vi) Implementation of the CCAA Plan

54. There is no basis for concluding that the CCAA Plan cannot be implemented. The previous cases where the Court refused to call a creditor meeting on the basis that the plan could not be sanctioned or implemented were based on findings absent in this case:

---

[47] *Philip Services #2* at paras. 17-18.

[48] *GT Group Telecom Inc., Re*, 2002 CarswellOnt 4509 (Gen. Div.) [***GT Group Telecom***].

[49] *GT Group Telecom* at para. 5.

[50] *GT Group Telecom* at para. 13.

(a) In *Crystallex International Corp., Re*, noteholders sought to call a meeting of creditors to consider and vote on a plan that contained a number of provisions that were contrary to the terms of the debtor company's DIP facility. The meeting order was denied because the plan could not have been implemented.[51]

(b) In *Doman Industries Ltd., Re*, the plan contained a condition precedent to implementation that the sanction order would stay certain contractual rights. The Court declined to call the meeting on the basis that it did not have the jurisdiction to grant that particular relief in the sanction order and, accordingly, the plan could not be implemented.[52] In this case, the CCAA Plan is not conditional on any relief that the Court does not have the jurisdiction to grant.

(c) In *Target Canada Co., Re*, the plan sought to compromise certain guarantee claims of landlords contrary to the debtor's agreement at the outset of the proceedings that those claims would not be compromised, which was reflected in the initial order.[53] In this case, no such agreement or provision exists.

(d) In *Unique Broadband Systems, Re*, the plan would have extinguished the debtor company's shares which appeared to retain some residual value. The Court declined to call the meeting on the basis that the interests of shareholders had not been considered at all in the proposed plan.[54] In this case, the interests of the Non-Settling Defendants have been addressed in the CCAA Plan in a way that leaves them not impacted in a practical sense.

---

[51] *Crystallex International Corp., Re*, 2013 ONSC 823 at para. 9.
[52] *Doman Industries Ltd., Re*, 2003 BCSC 376 at para. 30.
[53] *Target Canada Co.*, 2016 ONSC 316 at paras. 80-84.
[54] *Unique Broadband Systems (Re)*, 2013 ONSC 676 at paras. 54 and 126.

(vii) The Classification of Affected Creditors is Fair and Reasonable

55. Section 22(1) of the CCAA provides that a debtor company may, with the approval of the Court, divide its creditors into classes for the purpose of meetings to vote on a plan.[55]

56. Section 22(2) of the CCAA further provides that, for the purposes of Section 22(1), creditors with a "commonality of interest" may be included in the same class. The following factors to be considered in determining whether creditors have a "commonality of interest" are listed in section 22(2):

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.[56]

57. Classification is a fact-specific determination that must be evaluated in the unique circumstances of every case. The exercise must be approached with the flexible and remedial jurisdiction of the CCAA in mind.[57]

---

[55] CCAA, s. 22(1).

[56] CCAA, s. 22(2). These criteria, which were added to the CCAA as part of the 2009 amendments, codify factors considered in case law pre-dating these amendments: *Canadian Airlines* at para. 31; *Trican Well Service Ltd v. Delphi Energy Corp*, 2020 ABCA 363 at para. 15.

[57] *Canadian Airlines* at para. 18.

58. “Commonality of interest” does not mean “identity of interest”. “Commonality of interest” is based on the principle that a class consists of those persons whose interest are not so dissimilar as to make it impossible for them to consult together with a view to their common interests.[58] The classification of creditors is viewed with respect to the legal rights they hold in relation to the debtor company in the context of the proposed plan, as opposed to their rights as creditors in relation to each other.[59] It is a non-fragmentation test designed to facilitate, rather than hinder, the restructuring.

59. The proposed Meeting Order approves four classes of Affected Creditors for the purposes of considering and voting on the resolution to approve the CCAA Plan, specifically (i) three separate classes of Creditors holding General Unsecured Claims against CannTrust Opco, Elmcliffe and CannTrust Holdings, respectively, and (ii) a class of Creditors holding Securities Claims.[60]

60. General Unsecured Creditors of CannTrust Opco, Elmcliffe and CannTrust Holdings each receive distinct treatment under the CCAA Plan, accordingly it is appropriate for them to be placed in separate classes for voting on that treatment.[61]

61. Section 22.1 of the CCAA requires equity claims such as the Securities Claims to be placed in a class separate from general unsecured creditors.[62] The CannTrust Plan Companies are proposing that Securities Claims be given a vote as the CCAA Plan contemplates that they will be entitled to received distributions from the Securities Claimant Trust in accordance with

---

[58] *Canadian Airlines* at para 20.
[59] *SemCanada Crude Company (Re)*, 2009 ABQB 490 at para 22.
[60] Guyatt Affidavit at paras. 63-65, Motion Record, Tab 2.
[61] Guyatt Affidavit at paras. 66-75, Motion Record, Tab 2.
[62] CCAA, s. 22.1.

the Allocation and Distribution Scheme attached to the CCAA Plan.[63] The CannTrust Plan Companies are proposing that the same double majority apply to the Securities Claimant Class for the purposes of considering their level of support for the CCAA Plan, subject to further order of the Court.[64]

(viii) Proof of Claim and Voting Procedure for Securities Claims is Appropriate

62. The Meeting Order provides all Securities Claimants with an opportunity to prove their Securities Claims for voting purposes and vote on the CCAA Plan, either on their own behalf should they choose to do so, and otherwise it authorizes the CCAA Representatives and CCAA Representative Counsel to exercise these rights on behalf of all Securities Claimants should they not choose to do so themselves.[65]

63. It is appropriate to authorize the CCAA Representatives to file a proof of claim on behalf of all Securities Claimants other than (i) the Securities Claimants that were excluded from their representation, and (ii) any Securities Claimants that elect to opt out of that representation for voting purposes on the CCAA Plan. CCAA representatives have been authorized to file claims and vote on behalf of their constituents in other CCAA proceedings.[66]

64. The Meeting Order provides a process similar to a typical CCAA claims procedure order under which the Monitor and the CannTrust Plan Companies will adjudicate the proofs

[63] Guyatt Affidavit at para. 73, Motion Record, Tab 2.

[64] Guyatt Affidavit at paras. 120-121, Motion Record, Tab 2.

[65] Guyatt Affidavit at para. 104, Motion Record, Tab 2.

[66] In the Matter of U.S. Steel Canada Inc., Meetings Order dated March 16, 2017 at para. 32 (Court File No. CV-14-10695-00CL); In the Matter of Nortel Networks Corporation et al., Plan Filing and Meeting Order dated December 1, 2016 at para. 17 (Court File No. 09-CL-7950).

of claim filed by Securities Claimants for the purposes of voting at the Securities Claimant Meeting.[67]

(ix) Stay Extension

65. 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."[68] The CannTrust Group is seeking a short extension of the Stay Period from April 30, 2021 to and including May 14, 2021, the date of the sanction hearing. The short proposed extension of the Stay Period is necessary and appropriate.[69]

PART IV—ORDER REQUESTED

66. For the reasons set out above, the CannTrust Group requests that this Court grant the Meeting Order. The requested relief is in the best interests of the CannTrust Group and its stakeholders, is appropriate in the circumstances and should be granted by the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of March, 2021.

McCarthy Tétrault LLP

Lawyers for the Applicants

---

[67] Guyatt Affidavit at para. 111, Motion Record, Tab 2.

[68] CCAA, s. 11.02(2); *U.S. Steel Canada Inc., Re*, 2016 ONSC 3106 at para 2.

[69] Guyatt Affidavit at para. 130, Motion Record, Tab 2.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Century Services Ltd., Re*, 2010 SCC 60

2. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10

3. *Nova Metal Products Inc. v. Comiskey (Trustee of)*, 1990 CarswellOnt 139 (ONCA)

4. *Canadian Airlines Corp, Re*, 2000 CarswellAlta 623 (QB)

5. *Quest University Canada (Re)*, 2020 BCSC 1845

6. *Federal Gypsum Co (Re)*, 2007 NSSC 384

7. *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia*, 1991 CarswellOnt 220 (Gen Div)

8. *T. Eaton Co., Re*, 1999 CanLII 15024 (ONSC)

9. *Stelco Inc., Re*, 2005 CanLII 41379 (ONSC), aff'd *Stelco Inc., Re*, 2005 CanLII 42247 (ONCA)

10. *Jaguar Mining Inc. (Re)*, 2014 ONSC 494

11. *ScoZinc Ltd. (Re)*, 2009 NSSC 136

12. *Bargain Harold's Discount Ltd. v. Paribas Bank of Canada*, 1992 CarswellOnt 159 (Gen. Div.)

13. *Olympia & York Developments Ltd., Re*, 1998 CarswellOnt 4552 (Gen Div)

14. *Aslan, Re*, 2013 ONSC 4112

15. *Aslan, Re*, 2014 ONCA 245

16. *Nortel Networks Corporation (Re)*, 2015 ONCA 681

17. *Stelco Inc., Re*, 2006 CanLII 1773 (ONSC)

18. *Lemare Holdings Ltd., Re*, 2014 BCSC 893

19. *Sino-Forest Corporation (Re)*, 2012 ONSC 4377

20. *Sino-Forest Corporation (Re)*, 2012 ONCA 816

21. *Menegon v. Philip Services Corp.*, 1999 CarswellOnt 3240 (Gen. Div.)

22. *Philip Services Corp., Re*, 1999 CarswellOnt 4673 (Gen. Div.)

23. *GT Group Telecom Inc., Re*, 2002 CarswellOnt 4509 (Gen. Div.)
24. *Crystallex International Corp., Re*, 2013 ONSC 823
25. *Doman Industries Ltd., Re*, 2003 BCSC 376
26. *Target Canada Co.*, 2016 ONSC 316
27. *Unique Broadband Systems (Re)*, 2013 ONSC 676
28. *Trican Well Service Ltd v. Delphi Energy Corp*, 2020 ABCA 363
29. *SemCanada Crude Company (Re)*, 2009 ABQB 490
30. In the Matter of U.S. Steel Canada Inc., Meetings Order dated March 16, 2017 (Court File No. CV-14-10695-00CL)
31. In the Matter of Nortel Networks Corporation et al., Plan Filing and Meeting Order dated December 1, 2016 (Court File No. 09-CL-7950)
32. *U.S. Steel Canada Inc., Re*, 2016 ONSC 3106

SCHEDULE "B"
RELEVANT STATUTES

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

s. 4

Compromise with unsecured creditors **–** Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

s. 5

Compromise with secured creditors – Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

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) and (3)

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.

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. 22(1)

Company may establish classes – A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

s. 22(2)

Factors – For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

s. 22.1

Class — creditors having equity claims – Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

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

FACTUM OF THE APPLICANTS
(Meeting Order)
(Returnable March 19, 2021)

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

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

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

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

Alexander Steele LSO#: 75719P
Tel: 416-601-8370
Email: asteele@mccarthy.ca

Lawyers for the Applicants