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

REPLY FACTUM OF THE APPLICANTS
(Meeting Order)
(Returnable April 16, 2021)

April 9, 2021

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PART I—INTRODUCTION

1. The CannTrust Group[1] commenced these CCAA proceedings to, among other things, resolve at least $500 million in Securities Claims brought against it in the Actions. Nearly 11 months ago, the CannTrust Group obtained the appointment of the Hon. Dennis O'Connor Q.C. (the "**Court Appointed Mediator**") to mediate a settlement of the Actions. Extensive negotiations occurred over the course of 2020 and early 2021 between plaintiff counsel, the CannTrust Group, the Co-Defendants and the Insurers.

2. The CannTrust Group agreed to a framework for the settlement of the Actions and Securities Claims against CannTrust Holdings which will be implemented pursuant to the CCAA Plan, while simultaneously (i) preserving the ability of Non-Settling Defendants to benefit from that framework, and (ii) including judgment reduction and other provisions in the CCAA Plan that will make the settlement economically neutral to Non-Settling Defendants.

3. The CannTrust Plan Companies bring this motion to call meetings of their creditors to consider and vote on the CCAA Plan. The CannTrust Plan Companies agreed to adjourn the motion to provide Non-Settling Defendants with an additional month to pursue further negotiations with the assistance of the Court-Appointed Mediator. As a result of these efforts, material progress has been made towards a settlement with certain of the remaining Non-Settling Defendants.[2]

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[1] Capitalized terms used but not otherwise defined herein have the meanings given to them in the Factum of the Applicants (Meeting Order), dated March 16, 2021 ("**CannTrust Factum**").

[2] Affidavit of Greg Guyatt sworn April 9, 2021 at paras. 3-8 ("**Further Supplementary Guyatt Affidavit**"), Further Supplementary Motion Record of the Applicants (Meeting Order) dated April 9, 2021 ("**Further Supplementary Motion Record**"), Tab 1.

4. The Non-Settling Defendants continue to object to this motion unless and until the CannTrust Plan Companies deliver releases of the Securities-Related Claims against them on terms that are acceptable to them. The CannTrust Plan Companies have done what they can reasonably do to facilitate a global resolution and have sought to ensure that the settlement of the Securities Claims against CannTrust Holdings will be economically neutral to the Non-Settling Defendants. The CannTrust Plan Companies cannot afford any further delays as their available cash continues to decline towards the $50 million needed to fund the proposed settlement of the Securities Claims.

5. In furtherance of their apparent objective to halt the progress of these CCAA Proceedings to create negotiating leverage, the Non-Settling Defendants have raised every argument that they could possibly conjure with respect to the fairness of the CCAA Plan and the appropriateness of specific provisions. They argue that the Court must decide each of these issues at this stage, instead of at the sanction hearing where they are properly raised, by (i) asserting that the Court is required to conduct a sanction hearing before it can grant a meeting order, contrary to the long line of cases holding the opposite, and (ii) trying to transform every fairness argument they make into a voting issue.

6. For the reasons set out herein, each of the main issues raised by the Non-Settling Defendants (i) has been addressed by amendments to the CCAA Plan, and/or (ii) does not provide a sufficient basis for this Court to refuse to grant the requested Meeting Order.[3]

[3] The CannTrust Plan Companies have not attempted to reply to each of the myriad issues raised by the Non-Settling Defendants in their factums, which collectively span 113 pages. The CannTrust Plan Companies would be pleased to provide written submissions on any other issue raised by the Non-Settling Defendants if it would assist the Court.

PART II—REPLY

(i) The Court Should Not Address Fairness and Reasonableness at this Stage

7. The Non-Settling Defendants assert[4] that in *Target Canada Co., Re* ("***Target***"),[5] Justice Morawetz overturned the long-established body of case law holding that the Court is not required to address the fairness or reasonableness of the CCAA Plan in order to call a meeting of creditors.[6]

8. In *Target*, Justice Morawetz did not indicate that he was endorsing such a radical shift in the standard and test to be applied at the meeting order stage. Justice Morawetz merely noted the three-part test that is applied at a sanction hearing.[7] His Honour did not state that the Court is required to consider each of these elements, including the fairness and reasonableness of the CCAA Plan, in order to grant a meeting order.

9. Justice Morawetz refused to grant the meeting order in that case because the proposed plan sought to compromise certain landlord guarantee claims which the debtor company had agreed in the initial order not to compromise. Justice Morawetz held that "[i]t is incumbent upon the court, in its supervisory role, to ensure that the CCAA process unfolds in a fair and transparent manner. It is in this area that this Plan falls short."[8]

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[4] Factum of the Underwriters dated March 18, 2021 ("**Underwriters**") at paras. 20-21; Factum of KPMG LLP dated March 18, 2021 ("**KPMG**") at paras. 29-30; Factum of Mark Litwin, Fred Litwin and Stanley Abramowitz dated March 22, 2021 ("**Litwins**") at paras. 40-41; Responding Factum of Ian Abramowitz dated March 18, 2021 ("**I. Abramowitz**") at paras. 34-35.

[5] *Target Canada Co.*, 2016 ONSC 316 [***Target***].

[C] CannTrust Factum at paras. 20-21.

[7] *Target* at para. 70.

[8] *Target* at para. 72 [emphasis added].

10. The case law decided since *Target* makes it clear that such a radical shift in the law has not in fact occurred. Courts have continued to hold that they are not required to consider the fairness and reasonableness of CCAA plans at the meeting order stage.[9] Indeed, Justice Morawetz himself recently held in the course of granting a meeting order in *Lydian International Limited, Re*:

> At this time, I am not required to consider the fairness and reasonableness of the Plan. Such issues will be considered at the Sanction Hearing, and only if the Plan is approved by the Required Majority of Affected Creditors at the Meeting.[10]

11. Accordingly, the Court should not accede to the Non-Settling Defendants' request to conduct a sanction hearing at this stage. If the Court were to conduct a detailed review of the fairness and reasonableness of the CCAA Plan at the meeting order stage in every case, it would add unnecessary and duplicative complexity and costs to a debtor company's ability to proceed with a CCAA plan.

12. The sanction hearing has long been recognized as the proper forum for fairness concerns, at which time the Court will also have the benefit of the views of (i) the Monitor, expressed in its report to the Court prior to the sanction hearing (as is typical), and (ii) the Affected Creditors, expressed through their votes to accept or reject the CCAA Plan, with respect to the fairness and reasonableness of the CCAA Plan and will be in a better position to "view the big picture of the plan and assess its impact as a whole."[11]

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[9] *U.S. Steel Canada Inc. (Re)*, 2017 ONSC 1967 at para. 12; *Quest University Canada (Re)*, 2020 BCSC 1845 at para. 32; *Lydian International Limited (Re)*, 2020 ONSC 3850 at para. 18 [***Lydian***].

[10] *Lydian* at para. 18 [emphasis added].

[11] *Canadian Airlines Corp., Re*, 2000 ABQB 442 at paras. 178-179.

(ii) The Judgment Reduction Provision is Appropriate

13. The Non-Settling Defendants assert[12] that the CCAA Plan has no reasonable chance of being sanctioned by this Court because it does not require the CCAA Sanction Order to include certain provisions that are typically included in "Pierringer" orders approving partial settlements of litigation in non-insolvency contexts. Specifically, they assert that the following "essential provisions" must be included in the CCAA Sanction Order:

(a) Securities Claims against the Non-Settling Defendants must be limited to the Non-Settling Defendant's several liability (the "**Judgment Reduction**");

(b) the Settlement Parties must agree not to seek contribution and indemnity from the Non-Settling Defendants; and

(c) certain procedural protections must be granted so that documents and witnesses of the Settlement Parties are available in the ongoing litigation.

14. The latter two of these alleged concerns have been addressed in subsequent amendments to the CCAA Plan. First, the CCAA Plan provides that any contribution and indemnity claims that the Settlement Parties may have against the Non-Settlement Parties (including with respect to an Assigned Claim) will be barred.[13] Second, the CCAA Plan contemplates that the CCAA Sanction Order will include procedural protections in favour of the Non-Settling Defendants with respect to their access to documents and witnesses.[14] In any

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[12] KPMG at paras. 41-59; Underwriters at paras. 36-38; Litwins at paras. 66-68.

[13] Plan of Compromise, Arrangement and Reorganization of CannTrust Holdings Inc., CannTrust Inc. and Elmcliffe Investments Inc. under the *Companies' Creditors Arrangement Act* (Canada) and the *Business Corporations Act* (Ontario), ss. 7.3(3) and 8.2(l), Exhibit "B" to the Further Supplementary Guyatt Affidavit ("**CCAA Plan**"), Further Supplementary Motion Record, Tab 1B.

[14] CCAA Plan, s. 8.2(m). These procedural protections were first enunciated by Justice Winkler in *Ontario New Home Warranty Program v. Chevron Chemical Company*, 1999 CanLII 15098 at para. 77 (ON SCJ) [***Chevron***]. The language

event, a lack of procedural protections for non-settling defendants is not a sufficient basis for a court to refuse to approve a partial settlement, let alone prevent a CCAA plan including a settlement to be voted on by creditors.[15] Such procedural matters can be addressed in case management.

15. The necessity and appropriateness of a full Judgment Reduction must be evaluated in the context of the current circumstances of the CannTrust Plan Companies and considering the interests that a Judgment Reduction provision seeks to balance.[16]

16. The 2019 decision of the Ontario Court of Appeal in *Endean v. St. Joseph's General Hospital*, relied upon by the Non-Settling Defendants, is very instructive in this respect.[17] In that case, a plaintiff sued a hospital and oral surgeons for injuries suffered from a faulty jaw implant. The hospital and the oral surgeons cross-claimed against one another for contribution and indemnity. The plaintiff settled with the oral surgeons and a Pierringer order was issued including a full Judgment Reduction provision – the claim against the hospital was limited to its several liability to the plaintiff.

17. The manufacturer of the implant and the distributor of the implant were not parties to the action and both were bankrupt. The plaintiff proceeded to trial against the hospital and the trial judge apportioned fault as follows: 5% to the hospital, 20% to the oral surgeons, 50% to

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in the CCAA Plan is substantively identical to the Pierringer order granted by Justice Perell recently in *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 4328 at para. 53.

[15] *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2018 QCCS 2945 at paras. 54-55 [***Aquadis***], aff'd *Arrangement relatif à 9323-7055 Québec inc.*, 2018 QCCA 1345; *Hollinger Inc., Re*, 2012 ONSC 5107 at paras. 61-63, 84, 112 [***Hollinger***].

[16] *Allianz v. Canada (Attorney General)*, 2017 ONSC 4484 at para. 23.

[17] *Endean v. St. Joseph's General Hospital*, 2019 ONCA 181 [***Endean***].

the manufacturer and 25% to the distributor. The plaintiff was only granted a judgment against the hospital for 5% of its damages.

18. Justice Zarnett, writing for the unanimous Court of Appeal, held that the purpose of a Judgment Reduction provision is "to effectively put the non-settling defendant in the same economic position as if it paid the plaintiff in full and recovered any indemnity from the settling defendant."[18] It does this by requiring the plaintiff to reduce its recovery from the non-settling defendant "by the amount the non-settling defendant would have been able to recover from the settling defendant as indemnity."[19] If the settling defendant is solvent, this will be the amount of the settling defendant's proportionate share of the plaintiff's damages – thus the plaintiff agrees to limit its claim against the non-settling defendants to their several liability.[20] If the settling defendant is insolvent, the non-settling defendant will not be able to recover on its indemnity and the plaintiff's claim against the non-settling defendant is not required to be limited accordingly.[21]

19. Justice Zarnett noted that before the Pierringer order, the hospital did not have any ability to recover from the manufacturer or the distributor. They were not a party to the proceeding and the hospital had "no practical means of collecting any indemnity even if they had claimed it, as each of the manufacturer and distributor was bankrupt."[22]

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[18] *Endean* at para. 53.

[19] *Endean* at para. 53 [emphasis added].

[20] *Endean* at paras. 27-28, 53.

[21] *Endean* at para. 49. See also *The Owners of Strata Plan KAS3204 v Navigator Development Corporation*, 2020 BCSC 1954 at paras. 24-25.

[22] *Endean* at para. 51.

20. By limiting the liability of the hospital to exclude the liability apportioned to the manufacturer and distributor – an amount that the hospital could not hope to actually recover – the trial judge had inappropriately put the hospital in a better position:

> The effect of the interpretation the hospital seeks is to put the hospital in a better position than it was in before the Pierringer Order. Before the Pierringer Order, the hospital was at risk, if found at fault to any degree, to pay all of the Hearsey appellants' damages without the ability to obtain indemnity from the manufacturer and distributor. This risk was on the hospital, regardless of the degrees of fault of the concurrent tortfeasors. As interpreted by the hospital, the Pierringer Order would free the hospital of that risk. The hospital would be placed in as good a position as it would have been had it claimed indemnity from the manufacturer and distributor and had the manufacturer and distributor been creditworthy and able to pay indemnity, rather than being bankrupt. No reason why this should be the case was suggested.[23]

21. Contrary to the argument of the Non-Settling Defendants, recoverability is not irrelevant when considering the proper scope of a Judgment Reduction provision – it is at the very heart of the rationale for the provision. As a result, it is appropriate for the Judgment Reduction provision to be limited to the amount that the Non-Settling Defendants could have actually recovered from CannTrust Holdings and the other Settlement Parties on account of their indemnities, as contemplated by the CCAA Plan.

22. A similar Judgment Reduction provision was recently granted in the CCAA proceedings of *Aquadis International Inc.*, with leave to appeal being denied by the Quebec Court of Appeal.[24] In that case, Aquadis sold defective faucets to a number of Canadian retailers. The Monitor commenced proceedings on behalf of Aquadis' creditors against the manufacturer and distributor of the faucets, insurers and certain other parties. The Monitor

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[23] *Endean* at para. 57 [emphasis added].

[24] *Aquadis*, leave to appeal denied: *Arrangement relatif à 9323-7055 Québec inc.*, 2018 QCCA 1345.

reached settlements with certain of the insurers and sought approval of those settlements in the CCAA proceedings.

23. To make these settlements economically neutral to non-settling parties, the order approving the settlement contained a Judgment Reduction provision that any defective product claim brought against the non-settling parties would be reduced by:

(a) a proportionate amount of the settlement proceeds paid by the settling defendants; and

(b) the amount that the non-settling party could have in fact recovered against the settling defendants had the liability of the settling defendants not been discharged.[25]

24. The Court dismissed the objections of the non-settling parties and held that the Judgment Reduction provision based on recoverability was appropriate and created an outcome that was "economically neutral" for the non-settling parties.[26]

25. The Non-Settling Defendants have referred the Court to several Judgment Reduction provisions granted in settlements related to CCAA proceedings, however in the majority of these cases the settling defendants were not the debtor company – they were defendants that were presumptively solvent. In *Labourer's Pension Fund v. Sino Forest Corporation* and in *Sears Canada Inc., Re*, the settling defendants were certain directors.[27] In *Hollinger Inc., Re*,

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[25] *Aquadis* at paras. 12, 42-44. See e.g. *9323-7055 Quebec Inc., Re*, Fubon Transaction Approval and Release Order dated June 20, 2018, Court File No. 500-11-049838-150 at para. 15.

[26] *Aquadis* at paras. 49, 51, 53.

[27] *Labourer's Pension Fund v. Sino Forest Corporation*, Order (Director Settlement Approval) dated November 16, 2016, Court File No. CV-11-431153-00CP; *Sears Canada Inc., Re*, Order (Approval Order) dated August 25, 2020, Court File No. CV-17-11846-00CL.

the settling defendants were Torys LLP and KPMG LLP.[28] In the latter case, Hollinger noted that the purpose of the Judgment Reduction provision was to "make the settlements by Torys and KPMG an economically neutral event for the Non-Settling Defendants."[29]

26. The Judgment Reduction contemplated by the CCAA Plan will reduce the amount of the judgments that can be obtained collectively against the Non-Settling Defendants by (i) the $50 million to be contributed by the CannTrust Plan Companies to the Securities Claimant Trust, and (ii) the amount that the Non-Settling Defendants would have actually recovered against a Released Party but for the release of the Non-Settling Defendants' contribution and indemnity claims.[30]

27. The Non-Settling Defendants cannot establish that the Judgment Reduction provision, which is functionally identical to the relief granted in *Aquadis* and is designed to make the settlement economically neutral to the Non-Settling Defendants, has no reasonable chance of being granted by this Court.

(iii) CCAA Plans Should Treat Creditors Equitably – Not Necessarily Equally

28. The Non-Settling Defendants assert[31] that the CCAA Plan does not have any reasonable chance of being sanctioned by this Court because it breaches the *pari passu* principle by not treating all equity claims equally. As a threshold matter, this argument

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[28] *Hollinger*.

[29] *Hollinger* at para. 34.

[30] CCAA Plan, ss. 7.3(2) and 8.2(k); CannTrust Factum at paras. 34-36.

[31] Underwriters at para. 31-34; KPMG at paras. 33-34; Litwins at paras. 74-76; Responding Factum of the Respondent, Peter Aceto dated March 18, 2021 ("**Aceto**") at paras. 41-42.

concerns the fairness of the CCAA Plan in its treatment of various creditors and thus should be dealt with at the sanction hearing for the reasons stated above.

29. In any event, courts supervising CCAA proceedings have held on numerous occasions when considering the fairness of a CCAA plan that equitable treatment is not necessarily equal treatment.[32] In *Sammi Atlas Inc., Re*, the CCAA plan provided that distributions to creditors would be made on a sliding scale, with smaller creditors receiving distributions representing a higher percentage of their proven claims. In response to an objection from a larger creditor that the CCAA plan was unfair as all creditors were not being treated equally, Justice Farley held:

> A Plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights.[33]

30. The Non-Settling Defendants have alleged that the CCAA Plan treats them differently than other similarly situated creditors with equity claims. A careful consideration of the rights and interests of these creditors and their contributions to the CannTrust Plan Companies and the CCAA Plan reveals that the Non-Settling Defendants are not similarly situated at all.

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[32] *Sammi Atlas Inc., Re*, 1998 CanLII 14900 at para. 4 (Gen. Div.) [***Sammi Atlas***]; *Air Canada, Re*, 2004 CanLII 34416 at para. 6 (ON SC); *Skeena Cellulose Inc., Re*, 2003 BCCA 344 at paras. 39, 59-60 [***Skeena***]; *Central Guaranty Trustco Ltd., Re*, 1993 CarswellOnt 228 at para. 8; *Lutheran Church - Canada, Re*, 2016 ABQB 419 at para. 156; *Homburg Invest Inc., Re*, 2014 QCCS 3135 at para. 43.

[33] *Sammi Atlas* at para. 4 [emphasis added]. See also *Armbro Enterprises Inc., Re*, 1993 CarswellOnt 241 at para. 6 [***Armbro***] where a creditor opposed the sanctioning of a CCAA plan on the basis that the new common shares to be issued under the plan were not being allocated equally among the unsecured creditors. Justice Blair sanctioned the plan, holding that since the major creditor's cooperation was essential for any CCAA plan to work, it was appropriate that they receive a greater portion of the shares.

31. With respect to the Securities Claimants, they have asserted Securities Claims against CannTrust Holdings and the other Settlement Parties in which they claim damages for losses they incurred due to alleged misrepresentations in the disclosure of CannTrust Holdings. In the absence of the CCAA Plan, they would be entitled to seek judgment and compensation for these losses. Under the CCAA Plan, they will receive distributions from the Securities Claimant Trust for these losses.

32. In contrast, the Non-Settling Defendants only have a contingent claim for contribution and indemnity against CannTrust Holdings and the other Settlement Parties, if they are found liable to the Securities Claimants. These are derivative claims. The Non-Settling Defendants do not have any independent right to recover on the indemnity absent liability being imposed on them.[34] In the absence of the CCAA Plan, the Non-Settling Defendants may seek to reduce their overall liability by recovering some of their liability to the Securities Claimants from CannTrust Holdings or the other Settlement Parties. Under the CCAA Plan, their overall liability will be reduced by the Judgment Reduction provision.

33. Accordingly, the outcomes under the CCAA Plan appropriately mirror the rights that the Securities Claimants and the Non-Settling Defendants, respectively, may have been able to exercise outside of the CCAA process, taking into account that the CannTrust Group does not have sufficient resources to pay in full all of the Securities Claims (which are asserted to be in excess of $500 million) and any valid derivative claims of the Non-Settling Defendants for contribution and indemnity.

[34] *Chevron* at para. 52.

34. As it relates to the outcome for other Co-Defendants, they have reached settlements with the CCAA Representatives and the CCAA Plan reflects those settlements. The Non-Settling Defendants have not agreed to settlements, so they are not similarly situated and are not treated the same. The Non-Settling Defendants can obtain the exact same treatment under the CCAA Plan if they similarly agree to make a contribution that is acceptable to the CCAA Representatives.

(iv) The Non-Settling Defendants Do Not Have a Contractual Veto

35. Certain of the Non-Settling Defendants argue that the terms of their pre-filing agreements with CannTrust Holdings prohibit CannTrust Holdings from settling the Actions without their consent (the "**Settlement Covenants**").[35] The Non-Settling Defendants argue that the Settlement Covenants essentially provide them with a veto over any CCAA plan.

36. Contractual provisions that would effectively give the counterparty a veto over the restructuring defeat the policy objectives of the CCAA and are not enforceable in CCAA proceedings.[36] In any event, the CCAA provides this Court with very broad discretion to sanction the indefinite, or even permanent, stay of contractual rights where the exigencies of the particular reorganization require it.[37]

37. In *Doman Industries Ltd., Re,* relied upon by the Non-Settling Defendants, the Court held that it did have jurisdiction to grant a permanent stay of contractual rights related to

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[35] Underwriters at paras. 7, 27 and 55; Litwins at para. 49; Factum of the Respondent, Eric Paul dated March 18, 2021 ("**Paul**") at para. 13.

[36] *Bellatrix Exploration Ltd (Re)*, 2021 ABCA 85 at para. 66.

[37] *Skeena* at para. 37; *Armbro* at para. 13; *Dylex Ltd., Re*, 1995 CanLII 7370 at para. 8 (ON SC); *Pope & Talbot Ltd., Re*, 2009 BCSC 1552 at para. 129.

events of default prior to or during the CCAA proceedings.[38] The Court held that it did not have jurisdiction to stay contractual rights that would only come into existence after the implementation of the CCAA plan.[39] The settlement of the Securities Claims by the CannTrust Plan Companies which is allegedly in breach of the Settlement Covenants will occur upon implementation of the CCAA Plan, not afterwards, so it is within this Court's jurisdiction to grant.

38. The Non-Settling Defendants also assert that they have some ill-defined general unsecured claim against CannTrust Holdings for its alleged breach of the Settlement Covenants. The Non-Settling Defendants do not have any potential claims arising from an unenforceable provision in an agreement, even if breached. Further, the Non-Settling Defendants' only potential losses arising from this alleged breach are: (i) their ongoing liability for Securities Claims; and (ii) having to continue to incur defence costs. In both cases, they have that exposure anyway, absent the CCAA Plan being implemented. With respect to the former, the Non-Settling Defendants are merely seeking to adorn equity claims in breach of contract clothing, an approach that was clearly rejected in *Sino-Forest*.[40] With respect to the latter, such defence cost claims are unaffected under the CCAA Plan. Accordingly, the Non-Settling Defendants do not have any claims arising from any potential breach of the Settlement Covenants that must be paid before the equity claims of the Securities Claimants.

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[38] *Doman Industries Ltd., Re*, 2003 BCSC 376 at para. 17. See also *Gauntlet Energy Corp.*, 2003 ABQB 718, where a contract provided that title to a certain asset would only pass to the debtor company upon the counterparty being paid in full. The counterparty argued that the Court did not have the jurisdiction to approve a sale of the asset in breach of this contractual provision. The Court disagreed, noting at para. 58 that "[i]nterference with contractual rights of creditors and non-creditors is consistent with the objective of the CCAA to allow struggling companies an opportunity to survive whenever reasonably possible."

[39] *Doman* at paras. 24-25.

[40] *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.

(v) Replies to the Other Arguments Raised by the Non-Settling Defendants

To assist the Court in considering the numerous other arguments raised by the Non-Settling Defendants in their various factums, these arguments and the CannTrust Group's reply to each are summarized in the following chart:

Argument of Non-Settling Defendants	**Reply of the CannTrust Group**
The CCAA Plan Does Not Contravene the CCAA	
The CCAA Plan contravenes section 5.1(2) of the CCAA. (Underwriters at para. 25; KPMG at paras. 26-27)	Section 5.1(2) of the CCAA provides that certain claims against directors may not be "compromised."[41] Section 5.1(2) of the CCAA is to be read narrowly with respect to claims that relate to pre-filing activity.[42] The CCAA Plan does not compromise or release these claims.[43] It merely limits the holders of such claims to recovery against the Securities Claimant Trust.[44] Courts have sanctioned CCAA plans that have similarly limited recovery on account of these claims to D&O insurance policies.[45] The Alberta Court of Appeal recently noted that there is "clear authority" for the proposition that this does not violate the

[41] *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, section 5.1(2) [***CCAA***].

[42] *Allen-Vanguard Corporation (Re)*, 2011 ONSC 5017 at para. 93.

[43] CCAA Plan, s. 1.1, "Channelled Claims" and "Released Claims".

[44] CCAA Plan, ss. 4.6(f), 8.2(n).

[45] See e.g. Amended Plan of Compromise and Arrangement – Montreal Maine & Atlantic Canada Co., June 8, 2015 at s. 3.3(k) [***Amended MMAC Plan***]; Plan of Compromise and Reorganization – Sino Forest Corporation, December 3, 2012 at ss. 4.9, 7.2(c) [***Sino-Forest CCAA Plan***]; Plan of Compromise and Arrangement – Delphi Energy Corp. and Delphi Energy (Alberta) Limited, ss. 3.3(c), 8.1(k) (Schedule "B" to the Information Circular dated July 29, 2020).

Argument of Non-Settling Defendants	Reply of the CannTrust Group
	CCAA.[46] The Settlement Parties will assign their insurance claims relating to Securities-Related Matters to the Securities Claimant Trust, so limiting Securities-Related Section 5.1(2) Claims to recovery from the Securities Claimant Trust is appropriate and consistent with the approach taken in other CCAA proceedings.
The CCAA Plan contravenes section 6(8) of the CCAA. (Underwriters at paras. 26-28; KPMG at para. 35)	To the extent that the Non-Settling Defendants are arguing that the CCAA Plan contravenes section 6(8) of the CCAA[47] because General Unsecured Creditors of CannTrust Opco are not being paid in full, CannTrust Opco is not paying any equity claims against it. Therefore, the fact that it is not paying General Unsecured Claims against it in full does not contravene section 6(8) of the CCAA. The only entity that is paying any equity claims against it, CannTrust Holdings, is paying all General Unsecured Claims against it in full. To the extent that the Non-Settling Defendants are arguing that the CCAA Plan contravenes section 6(8) of the CCAA because they have non-equity claims against CannTrust Holdings that are not being paid in

[46] *Trican Well Service Ltd v Delphi Energy Corp*, 2020 ABCA 363 at para. 23.

[47] CCAA, s. 6(8).

Argument of Non-Settling Defendants	Reply of the CannTrust Group
	full, for the reasons set out above, the claims of the Non-Settling Defendants are either equity claims or are Unaffected Claims under the CCAA Plan.[48]
The CCAA Plan contravenes section 19(2) of the CCAA. (Underwriters at para. 29)	Although unnecessary, the CCAA Plan has been amended to explicitly state that claims that cannot be compromised due to section 19(2) of the CCAA are Unaffected Claims.[49]
The Rule Against Double Proof Applies	
The Securities Claimants should not be given a vote either due to the rule against double proof. (I. Abramowitz at paras. 43-44)	The rule against double proof provides that the principal creditor may prove its claim, and the claim of the derivative creditor is disallowed.[50] Claims for contribution and indemnity are derivative claims – the Securities Claimants are the principal creditor.[51] The rule against double proof extends to voting.[52]
The rule against double proof does not apply because a claims process has not been run to identify and quantify	The rule against double proof does not need to apply because the Securities-Related Indemnity Claims are not included in the Securities Claimant Class. The CannTrust Plan Companies have proposed a CCAA

[48] See para. 38 above.

[49] CCAA, s. 19(2); Amended CCAA Plan, s. 2.3(k).

[50] See e..g. *Aslan, Re*, 2014 ONCA 245 at para. 17.

[51] *Chevron* at para. 52.

[52] *Quintette Coal Ltd. (Re) (Trustee of)*, 1991 CanLII 303 at para. 35 (BC SC).

Argument of Non-Settling Defendants	**Reply of the CannTrust Group**
Securities-Related Indemnity Claims. (Litwins at paras. 55-58)	plan to a class consisting of Securities Claimants, as is their right. The CCAA permits a debtor to propose a plan to one or more classes of its creditors, as it chooses, and does not require a plan to be proposed to all of its creditors.[53] In any event, running a claims process to identify and quantify Securities-Related Indemnity Claims that, by their very nature, are derivative claims[54] and would be disqualified for voting and distribution purposes due to rule against double proof[55] would be pointless and only serve to delay the process and increase costs.
The rule against double proof would not apply with respect to the claims of the Securities Claimants against CannaMed as a selling shareholder. (Litwins at para. 59)	The rule against double proof does not need to apply to claims for contribution and indemnity by CannaMed Financial Inc. ("**CannaMed**") for any liability imposed on it related to the shares that it sold in the 2019 offering. CannaMed is not entitled to vote on the CCAA Plan as (i) the CCAA Plan does not

[53] CCAA, s. 4.

[54] *Chevron* at para. 52.

[55] CannTrust Factum at paras. 29-31.

Argument of Non-Settling Defendants	Reply of the CannTrust Group
	affect CannaMed's rights as a creditor with a claim within a class to whom the CCAA Plan has been proposed, and (ii) it would only hold an equity claim.[56]
Other Alleged Fairness Concerns	
The CCAA Plan unilaterally amends the contractual indemnity rights of the Non-Settling Defendants. (Litwins at paras. 69-71; Paul at para. 12)	Amendments to the CCAA Plan provide that Defence Costs Indemnity Claims are Unaffected Claims if they are valid and enforceable against CannTrust Holdings.[57] To the extent the Non-Settling Defendants still argue that their contractual indemnity rights have been impacted in some manner, as noted above, the Court has the discretion to sanction the indefinite, or even permanent, stay of contractual rights.[58] Indemnities for defence costs related to litigation alleging misconduct prior to the filing date are pre-filing claims that may be impacted in the CCAA Proceedings regardless of whether the costs are actually incurred before or after the filing date.[59]

[56] CannTrust Factum at paras. 32-41.

[57] CCAA Plan, s. 2.3(i).

[58] See above at paras. 36-37.

[59] *Nortel Networks Corporation, Re*, 2012 ONSC 5653 at para. 75-81.

Argument of Non-Settling Defendants	**Reply of the CannTrust Group**
The CCAA Plan does not include provisions that may be found in U.S. Pierringer Orders. (KPMG at para. 59; Litwins at para. 67)	Canadian courts have noted that caution is needed before seeking to import features of U.S. Pierringer orders into Canada due to the meaningful differences in the procedural and substantive law between jurisdictions.[60] In any event, the CCAA Plan contemplates that an order will be sought from the U.S. Court approving the settlement of the U.S. Class Action and "containing a bar order in customary form containing such judgment reduction provisions as may be required by the *Private Securities Litigation Reform Act*.[61] The Non-Settling Defendants are free to assert that the bar order provisions are insufficient before the U.S. Court – which is the proper forum for such arguments.
The Non-Settling Defendants have been denied procedural fairness as the proofs of claim they filed in the Claims Procedure, which were not called for, were not adjudicated. (Underwriters at paras. 47-48)	The Non-Settling Defendants have not provided any authority for the proposition that all claims must be called for and adjudicated in a claims procedure. The purpose of claims procedure orders is to assist a debtor company in ascertaining the relevant claims against it so that it may develop a plan.[62] The CCAA does not require debtor companies to run a claims procedure before they may put forward a plan.

[60] See e.g. *Allianz* at para. 23.

[61] CCAA Plan, s. 1.1, "U.S. Approval Order", s. 9.1(d).

[62] *Timminco Limited (Re)*, 2014 ONSC 3393 at paras. 41-43.

Argument of Non-Settling Defendants	**Reply of the CannTrust Group**
The Assigned Claims should be pursued by an independent third party. (KPMG at para. 62)	The Non-Settling Defendants have referenced prior cases where a litigation trust has been established to prosecute claims on behalf of the general body of the debtor company's creditors. In this case, the Assigned Claims will be pursued by CCAA Representative Counsel on behalf of the Securities Claimants. CCAA Representative Counsel have each won carriage motions in Canada and the United States with respect to the Actions and have been appointed by this Court as representative counsel to the Securities Claimants. The Assigned Claims will surely be litigated more efficiently and effectively by CCAA Representative Counsel than by a third party starting from ground zero at this stage.
Meetings cannot be called while negotiations related to the CCAA Plan are ongoing. (Underwriters at paras. 49-54) (Aceto at para. 39)	The purpose of the CCAA is to facilitate compromises between an insolvent debtor company and its creditors.[63] Consistent with this purpose, Courts have permitted CCAA plans to be voted on by creditors, and even sanctioned them, where they contain mechanisms for other parties to settle and benefit from the plan.[64] For example, in *Montreal, Maine & Atlantic Canada Co.*, a meeting order was called with respect to a CCAA plan which included a mechanism for non-settling defendants to make contributions and obtain

[63] *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, 1990 CarswellBC 394 at para. 10 (CA).

[64] See e.g. Sino-Forest CCAA Plan, s. 11.2.

Argument of Non-Settling Defendants	Reply of the CannTrust Group
	the benefit of the releases in the CCAA plan. Negotiations with these non-settling defendants continued and of the 13 non-settling defendants, all but one settled between the meeting order hearing and the sanction hearing.[65] The CannTrust Plan Companies are not seeking to schedule the Sanction Hearing until June 11, 2021. The Non-Settling Defendants will have an additional two months to advance negotiations with the assistance of the Court-Appointed Mediator.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of April, 2021.

McCarthy Tétrault LLP

Lawyers for the Applicants

[65] *Montreal, Maine & Atlantic Co, Re*, Judgment on the Motion for the Convening of a Creditors' Meeting dated May 5, 2015, Court File No. 450-11-000167-134; Plan of Compromise and Arrangement of Montreal, Maine & Atlantic Canada Co. dated March 31, 2015 at s. 1.1, Settlement Agreements, Schedule "A" – List of Released Parties; Amended MMAC CCAA Plan at Schedule "A" – List of Released Parties

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Target Canada Co.*, 2016 ONSC 316
2. *U.S. Steel Canada Inc. (Re)*, 2017 ONSC 1967
3. *Quest University Canada (Re)*, 2020 BCSC 1845
4. *Lydian International Limited (Re)*, 2020 ONSC 3850
5. *Canadian Airlines Corp., Re*, 2000 ABQB 442
6. *Ontario New Home Warranty Program v. Chevron Chemical Company*, 1999 CanLII 15098 (ON SCJ)
7. *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 4328
8. *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2018 QCCS 2945, leave to appeal denied: *Arrangement relatif à 9323-7055 Québec inc.*, 2018 QCCA 1345
9. *Hollinger Inc., Re*, 2012 ONSC 5107
10. *Allianz v. Canada (Attorney General)*, 2017 ONSC 4484
11. *Endean v. St. Joseph's General Hospital*, 2019 ONCA 181
12. *The Owners of Strata Plan KAS3204 v Navigator Development Corporation*, 2020 BCSC 1954
13. *9323-7055 Quebec Inc., Re*, Fubon Transaction Approval and Release Order dated June 20, 2018, Court File No. 500-11-049838-150
14. *Labourer's Pension Fund v. Sino Forest Corporation*, Order (Director Settlement Approval) dated November 16, 2016, Court File No. CV-11-431153-00CP
15. *Sears Canada Inc., Re*, Order (Approval Order) dated August 25, 2020, Court File No. CV-17-11846-00CL
16. *Sammi Atlas Inc., Re*, 1998 CanLII 14900 (ON SC)
17. *Air Canada, Re*, 2004 CanLII 34416
18. *Skeena Cellulose Inc., Re*, 2003 BCCA 344
19. *Central Guaranty Trustco Ltd., Re*, 1993 CarswellOnt 228
20. *Lutheran Church - Canada, Re*, 2016 ABQB 419

21. *Homburg Invest Inc., Re*, 2014 QCCS 3135

22. *Armbro Enterprises Inc., Re*, 1993 CarswellOnt 241

23. *Bellatrix Exploration Ltd (Re)*, 2021 ABCA 85

24. *Dylex Ltd., Re*, 1995 CanLII 7370 (ON SC)

25. *Pope & Talbot Ltd., Re*, 2009 BCSC 1552

26. *Doman Industries Ltd., Re*, 2003 BCSC 376

27. *Gauntlet Energy Corp.*, 2003 ABQB 718

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

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

30. *Allen-Vanguard Corporation (Re)*, 2011 ONSC 5017

31. Amended Plan of Compromise and Arrangement – Montreal Maine & Atlantic Canada Co., June 8, 2015

32. Plan of Compromise and Reorganization – Sino Forest Corporation, December 3, 2012

33. Plan of Compromise and Arrangement – Delphi Energy Corp. and Delphi Energy (Alberta) Limited (Schedule "B" to the Information Circular dated July 29, 2020)

34. *Aslan, Re*, 2014 ONCA 245

35. *Quintette Coal Ltd. (Re) (Trustee of)*, 1991 CanLII 303 (BC SC)

36. *Nortel Networks Corporation, Re*, 2012 ONSC 5653

37. *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, 1990 CarswellBC 394 (CA)

38. *Montreal, Maine & Atlantic Co, Re*, Judgment on the Motion for the Convening of a Creditors' Meeting dated May 5, 2015, Court File No. 450-11-000167-134

39. Plan of Compromise and Arrangement of Montreal, Maine & Atlantic Canada Co. dated March 31, 2015

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. 5.1(2)

Exception – A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

s. 6(8)

Payment – equity claims – No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

s. 19(2)

Exception – A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;

(b) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

(c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or

(e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

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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(Returnable April 16, 2021)

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