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 AND BOOK OF AUTHORITIES OF MARK LITWIN, FRED LITWIN AND STANLEY ABRAMOWITZ
(Responding to Meeting Order Motion)
(Returnable April 16, 2021)

March 22 , 2021

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PART I - OVERVIEW

"Nobody would join a public company without having appropriate indemnities in place."
- CannTrust CEO Greg Guyatt, Cross Examination at p.14, q. 41

1. Mark Litwin, Fred Litwin, and Stanley Abramowitz (collectively, the "**Litwins**") oppose the motion for an Order (the "**Meeting Order**") accepting the filing of the plan of arrangement (the "**Plan**") of CannTrust Holdings Inc. ("**CannTrust**"), CannTrust Inc. and Elmcliffe Investments Inc. (collectively, the "**Applicants**") and authorizing the Applicants to hold meetings to vote on the Plan.

2. The Applicants served an initial version of the Plan on March 5, 2021, based on a professed "belief"[1] as to a binary "take-it-or-leave-it option", with the alternative being a liquidation of CannTrust. Yet, two days after opposition from multiple parties, the Original

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[1] Although the entire Plan was presented to the Court based on the professed "belief" of the Company (see paragraphs 9-11 of the March 5, 2021 affidavit of Greg Guyatt), when it was sought to test that "belief" on cross-examination as to a "belief" in other options the questions were refused with Company counsel saying that "the belief of the Company is neither here nor there" and irrelevant (Transcript P.89-90, Q.308).

Settlement Parties ("**OSP**")[2] (as explained below, who collectively are the decision makers for CannTrust and make up the company's state of mind) put forward a revised version – the Plan – that was also then said to be a "take-it-or-liquidate" alternative. Perhaps unsurprisingly given the short time and lack of consultation, this jury-rigged "fix" thrown together in haste didn't actually solve the problems and in some ways made the situation worse. However, the fact of the amendment and its haste does demonstrate the fallacy of the take-it or leave-it proposition. It also highlighted the personal self-interest driving the human OSP who make up the Applicants' state of mind at present.

3. The Applicants argue that all objectors (including the Litwins) have no basis for objection either under the CCAA in general or the proposed revised Plan in particular. This is incorrect on both counts. The Plan is incapable of being sanctioned – the Plan does not and cannot meet the statutory test for approval in this form. The problems cannot and should not wait to be dealt with at a Sanction Hearing. Rather, consistent with extensive jurisprudence from analogous situations, this Honourable Court should dismiss the Applicants' motion without prejudice to their ability to return with a plan that is capable of being sanctioned. The premise of urgency on which the false take-it-or-liquidation proposition is proffered does not exist; but even if the urgency were real it would underscore the need to get the Plan right now and not waste the two or three months it will take to get to a Sanction Hearing with a Plan incapable of being sanctioned. [3]

4. A key aspect leading to the Applicants' CCAA filing was contingent liabilities related to securities class actions against CannTrust and certain of its officers, directors and former employees. The Litwins are named as defendants in some of the proceedings because of their director/officer responsibilities with CannTrust. However, an intensive investigation by a Special Committee of CannTrust's board with the assistance of legal and other

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[2] All capitalized terms used but not defined herein have the meaning ascribed to them in the Plan.

[3] In fact, under the terms of the RSA the company has discretion as to what is in the Plan and is only obliged to propose a bar order that is achievable and proper as a matter of law. If it does that, the class action plaintiffs are bound to support the Plan. Therefore it is vitally important for this Honourable Court to understand that if it provides guidance as to the impropriety of the current plan as CCAA courts in cases like *Phillip Services* and *Target*, both *infra*, have done, it is not "killing" the Plan but rather saving it.

professionals concluded that the officers and directors who were continuing at CannTrust were not involved in the alleged improper conduct. The group covered by this conclusion included the OSP and the Litwins. As a result, Mark Litwin and Stanley Abramowitz remained in their respective director and officer capacities throughout the restructuring. CannTrust publicly disclosed this conclusion in October 2019 and nothing has emerged to change it.

5. Each of the Litwins has contractual and other indemnity rights from, and claims against, the Applicants. Those rights are found in the corporate by-laws, contractual indemnification agreements provided to each of the Litwins directly by CannTrust and CannTrust Inc., and through an indemnification agreement with CannaMed Financial Inc. ("**CannaMed**") which was a Selling Shareholder in the May 2019 offering. The latter agreement is a contract that expressly provided the Litwins with indemnities from CannTrust, and had a further important term: CannTrust covenanted that it would not settle any claim that triggered the indemnity without the Litwins' consent unless that settlement provided a full release to the Litwins. This promise is now being breached by the Applicants in filing the Plan without the Litwin's consent or even any consideration or vote proffered – expropriation that is prohibited under the CCAA. Leaving aside that it is wrong and impermissible in law, if companies were permitted to renege on contractual promises not to strand their contracting parties high, dry and alone when trouble hits, that could well have serious negative consequences on the Canadian capital markets as discussed subsequently.

6. In cross, the Chief Executive Officer of the Applicants rightly accepted the bedrock principle of CCAA law and practice that persons in the same or similar positions are to be treated equally or equitably. However, the Plan proposed demonstrably offends that principle. As detailed hereinafter, the Litwins are in the same position (in terms of lack of involvement in any alleged wrongdoing and being owed indemnification obligations) as each of the OSP yet are being treated very differently. The OSP other than CannTrust are to receive full releases from all claims asserted against them with no cash contribution by them. In contrast, the Litwins are to remain exposed to all claims while having their

indemnity and contribution claims against CannTrust and others unilaterally degraded or stripped away entirely without being permitted to prove claims, vote on a plan, or receive any distribution. This proposed Plan, approved on behalf of the corporate Applicants by management and directors who are receiving full releases for no payment, also prefers some "equity claimants" over others in contravention of CCAA jurisprudence and the express provisions of the CCAA itself. In most CCAA cases, classes are formed entirely above the equity and all the equity claims get no vote. There is no precedent, and it is fundamentally wrong, to attempt to create a class that gives some equity claims a vote and a distribution (as well as retaining equity in the emerging entity) and not provide other equity claims with the ability to put forward a claim, have a vote and receive a distribution.

7. It would be a "waste of time and money" for this Plan to proceed to a Meeting. The OSP are not permitted to invoke the powers of the CCAA and use CannTrust's assets to effect a partial settlement of class action claims against the Applicants and benefit themselves – conflicted officers and directors (and a personal holding company) – at the expense of similarly situated defendants in those class actions, including the Litwins.

8. This Plan is reflective of unsound public policy. If it proceeds, it will negatively impact the willingness of qualified individuals to serve as directors and officers of Canadian public companies and further harm the Canadian capital markets.

PART II - THE FACTS

A. THE LITWINS

9. Mark Litwin ("**Mark**") was a director of CannTrust from 2015 until March 11, 2021, when he resigned to oppose the Meeting Order. He has indemnity agreements from two of the Applicants as well as under CannTrust's by-laws for all claims, including costs, in relation to his having been a director of CannTrust. His indemnity rights were acknowledged and monthly bills submitted for reimbursement under his indemnity since September 2019 have been paid by the Applicants to date.

10. Stanley Abramowitz ("**Stan**") was corporate secretary of CannTrust in the same period and resigned for the same reason. He has identical indemnity agreements from two of the Applicants as well as under CannTrust's by-laws. His indemnity rights were acknowledged in the same way to date. Fred Litwin ("**Fred**') also has indemnity agreements.

Exhibits B, E, F,G and H to the March 11 Affidavit of Jocelyn Kemp

11. Mark and Stan are defendants in the class actions as board member and officer, respectively, at the relevant times. Fred is a defendant in the Zola action. As already noted, an investigation by CannTrust's Special Committee and McCarthy Tetreault concluded that the Litwins had no knowledge of or participation in any improper activity. As a result, the Litwins all continued in their roles with the Applicants throughout the restructuring.

October 24, 2019 press release, Guyatt Cross Exhibit 5

Transcript of Guyatt Cross Examination, P. 40-44, Q. 150-161

12. The Litwins are affiliated with CannaMed, a "Selling Shareholder" in the May 2019 prospectus offering made by CannTrust. CannaMed obtained a detailed indemnity from CannTrust in connection with that offering which extends to *inter alia* Mark and Stan personally (the "**Selling Shareholders Indemnity**"). The Selling Shareholders Indemnity prohibits CannTrust from settling, compromising or consenting to the entry of any judgment with respect to any litigation in respect of which indemnification or contribution could be sought "unless such settlement, compromise or consent includes an unconditional release of each Indemnified Party from all liability arising out of such litigation..." or unless it has obtained the Indemnified Parties' consent. The "Indemnified Parties" include CannaMed and its "officers, directors… shareholders…," which includes the Litwins and their holding companies Forum Financial Corporation, Mar-Risa Holdings Inc. and York Capital Funding Inc.

Indemnification and Contribution Agreement, Exhibit I to March 11 Affidavit of Jocelyn Kemp, sections 1.2(b) and 1.3(e)

Transcript of Guyatt Cross Examination, P. 75-76, Q. 264-269

13. The Applicants did not seek to disclaim any of the Litwins' indemnities (including the Selling Shareholders Indemnity) under the CCAA. As noted above, CannTrust has performed under the indemnities by reimbursing defence costs submitted since September 2019 . The CEO of CannTrust said he intends to cause CannTrust to continue to pay defence costs until the Plan is sanctioned unless he is "instructed otherwise". Apparently after the Plan is sanctioned, CannTrust intends to stop paying despite the express terms of the contracts to the contrary.

> Transcript of Guyatt Cross Examination, P. 52, Q. 192-194; P. 55-58, Q. 202-213; P. 69-70, Q. 247-248

14. CannTrust refused questions as to whether the Litwins' indemnity for legal expenses is being covered by CannTrust's directors' and officers' insurance policy.

> Transcript of Guyatt Cross Examination, P. 58-59, Q. 214

B. THE ORIGINAL SETTLEMENT PARTIES OR OSP

15. "Original Settlement Parties" is a term defined in the Plan to capture three categories of Persons: (i) the Applicants; (ii) all of the independent directors and officers of CannTrust who were found to have had no involvement in CannTrust's improper conduct except the Litwins; and (iii) Cajun Capital Corporation ("**Cajun**").

16. The current and former board member OSP are Mark Dawber, John Kaden, Robert Marcovitch, Shawna Page and Mitchell Sanders ("**Sanders**"). Kaden resigned as a director in the fall of 2019. The officers are Greg Guyatt (originally CFO and currently CEO) and Ilana Platt (Chief Regulatory Officer). Together, as established in cross, these individuals comprised CannTrust's decision-makers or directing minds as to the RSA and Plan(s).

> Transcript of Guyatt Cross Examination, P.10-11, Q. 21-28; P. 32-33, Q. 124- 27

17. The OSP who are members or former members of the CannTrust board collectively held approximately 1.25 million shares of CannTrust in 2019. Assuming they are now still

shareholders (because of an MCTO), they would retain equity if the Plan is implemented. Guyatt (an OSP) will also receive a payment under the KERP.

Transcript of Guyatt Cross Examination, P. 33-35, Q. 127-134; P. 17-18, Q.54-59

18. Cajun is a holding company owned and controlled by Sanders. Cajun was one of two Selling Shareholders in CannTrust's May 2019 prospectus offering. The other was CannaMed. Cajun is a party to the same Selling Shareholders Indemnity as CannaMed.

Transcript of Guyatt Cross Examination, P. 25, Q. 92-93

19. The OSP are to benefit from broad full and final releases under the Plan that would essentially prevent any claims being pursued against them with respect to anything to do with CannTrust including claims for contribution and indemnity by the Litwins or anyone else.

C. THE INVESTIGATION

20. Upon learning of alleged improper conduct, the board formed a Special Committee and performed a comprehensive investigation of the directors, management and employees (among other things). The Litwins were not members of the Special Committee. CannTrust described the investigation as encompassing a comprehensive independent review of CannTrust's email and other documents, as well as interviews with current and former employees, certain directors, members of senior management and all then-current members of the board.

Transcript of Guyatt Cross Examination, P. 40-41, Q. 150-152

October 24, 2019 press release, Guyatt Cross Exhibit 5

21. The investigation resulted in a pass/fail test. If the Special Committee concluded a person was implicated in the conduct then he or she was asked to resign, failing which he or she was terminated. As an example, Mr. Guyatt at the time was the CFO. He certified the accuracy of the 2019 first quarter financial statements and signed the May 2019 prospectus. He was located at the Vaughan premises since February 2019 and had familiarized himself

with operations; he "passed" the investigation and remained at the company, becoming the CEO a few months later. He now is an OSP making no cash contribution.

Transcript of Guyatt Cross Examination, P. 18-22, Q. 60-76; P.15, Q. 44

22. In connection with the investigation, CannTrust's then CEO (Peter Aceto) was terminated and its Board Chair (Eric Paul) was asked to and resigned by July 25, 2019. The investigation was complete by October 24, 2019, and by then anyone who was found to have been involved in the wrongdoing had been separated from the company.

July 25 and October 24, 2019 Press Releases, Guyatt Cross Exhibits 4 & 5

Transcript of Guyatt Cross Examination, P. 39, Q. 146-147

23. As with Mr. Guyatt and Mr. Sanders, the Litwins passed. The investigation confirmed that the Litwins had no involvement in or knowledge of the improper conduct. The Litwins continued in their roles with the company, along with the OSP (other than Kaden).

D. THE CLASS ACTIONS AND PROPOSED PARTIAL SETTLEMENT

24. Securities class actions commenced in connection with CannTrust's improper conduct (which are defined as "Actions" and listed in Schedule "A" to the Plan) make allegations of both primary market and secondary market liability. The primary market claim relates to alleged prospectus misrepresentations made by CannTrust in connection with its May 2019 share offering (i.e., two months before alleged improper conduct was disclosed). The secondary market claim relates to the allegation that CannTrust generally failed to disclose improper conduct beginning June 1, 2018. Actions were commenced in both Canada and the United States and seek damages of hundreds of millions of dollars.

25. The class actions were initiated after disclosure of CannTrust's alleged improper conduct led to the suspension of critical cannabis licenses and the lay-off of many employees. Before and during its CCAA stay, CannTrust implemented a remediation plan, had its cannabis licenses reinstated and resumed operations. It has presented a business plan that shows it will be cash flow positive. Indeed, with over $70 million of cash, zero debt

and relatively few liabilities, the enterprise is presented as a solvent going concern depending on its contingent liabilities.

Transcript of Guyatt Cross Examination, P. 103-104, Q. 343-346; P. 131-134, Q. 420-434

26. Settlement of the class actions was a principal focus of the CCAA and is the focus of the Plan. However, while it is evident that the Applicants and the class action plaintiffs have negotiated a partial settlement of the class actions for the payment to the plaintiffs of $50 million and the assignment of certain causes of action, there is no evidence as to the basis for that settlement or its reasonableness in the circumstances. There is no assessment before the Court (even on a confidential basis) as to the merits or value of the claim apart from Mr. Guyatt's initial affidavit in the CCAA where he said the company had spent a lot of time preparing for and defending the litigation. There have been no defences filed or discovery and no additional affidavits or witness statements provided. The Settlement Related Agreements, including most importantly the Securities Claimants Trust, have apparently not been finalized and at all events have not been put before the Court.

Transcript of Guyatt Cross Examination, P. 45-47, Q. 167-171; P. 51, Q.187; P.7-72, Q. 249-256

27. The $50 million proposed settlement would resolve the class actions against the OSP but leave the Non-Settlement Parties to continue to defend them. The $50 million payment for the benefit of the OSP is to be funded by CannTrust alone.

28. CannTrust did not seek or obtain consent for the settlement from CannaMed or the Litwins pursuant to the Selling Shareholders Indemnity, nor does the proposed settlement provide any release for them let alone the unconditional one that is CannTrust's contractual obligation.

Transcript of Guyatt Cross Examination, P. 78-83, Q. 278-292

29. When the RSA came before the CannTrust board on January 18 2021, Mark declared a conflict and abstained from voting, raising concerns as to the RSA and the

position of other Board members. The rest of the board, parties to and benefitting from, the settlement in their personal capacities, voted in favour of the RSA. To repeat, each of those directors, in his or her personal capacity, will obtain full releases through the settlement, without making any payment .

Transcript of Guyatt Cross Examination, P. 10, Q. 21-23

30. After factoring in the payment of the $50 million to the class action plaintiffs and upon payment to its unsecured creditors, the Applicants say they will be positioned to emerge from CCAA protection as a solvent going concern with the same shareholders as when they filed in March 2020 – including class members who did not sell their CannTrust shares and including all of the OSP who were shareholders. Apparently no consideration has been given by CannTrust to an option of letting the CCAA stay lapse and proceed as a going concern while continuing to defend the class actions even though its CEO Greg Guyatt acknowledged in cross-examination that this alternative may be possible, and that he would "love to use that money [the $50 million set aside for the settlement] to run the business." Questions as to other possible options for CannTrust were refused.

Transcript of Guyatt Cross Examination, P. 101-104, Q. 338-346; P. 96-100, Q. 328-335

E. THE MEETING ORDER MOTION AND THE PLAN

31. The March 5 Meeting Order motion record sought to file a plan different from the version now defended in the Applicants' factum. Features described at paragraphs 34 to 38 of that factum were not in the original plan. As discussed, these new features do not save the Plan or permit it to be sanctioned. Many failings remained and new ones were added.

32. The Plan provides recovery to four classes of creditors, defined as Affected Creditors. The four classes are the only classes eligible to vote or receive a distribution:

(a) Three classes of creditors holding General Unsecured Claims; and

(b) The Securities Claimant Class, which is a class of creditors holding Securities Claims and expressly excludes creditors holding Securities-Related Indemnity Claims.

33. Securities Claims under the Plan include any Claim against CannTrust asserted by a plaintiff or putative plaintiff relating to, among other things, the drop in CannTrust's share price following the public disclosure in July 2019 of its improper activities. These are principally the securities class actions referred to above.

34. The OSP are to obtain full and final releases of the Released CannTrust Claims for CannTrust's contribution of $50 million, the assignment of certain of CannTrust's causes of action against third parties and the insurance claims of the individual OSP.

35. In contrast, the Securities-Related Claims of Securities Claimants against Non-Settlement Parties (including the Litwins and CannaMed) are not to be compromised or released. Securities Claimants may continue to pursue such claims against Non-Settlement Parties. However, as a double whammy, the Plan proposes to fully and forever discharge Securities-Related Indemnity Claims. Holders of Securities-Related Indemnity Claims are not permitted to prove their claims against the Applicants, vote on the Plan or receive a distribution under the Plan. In the result, CannaMed and Cajun (and the Litwins and Sanders), parties and indemnitees under the same Selling Shareholders Indemnity, are being treated completely differently from each other in the Plan, just as the Litwins are being treated differently from Messrs. Kaden, Sanders and Guyatt among others as directors and officers, even though they are also in the same position.

36. The amendments to the Plan made on March 13 do two things to Non-Settlement Parties with indemnity claims that the original plan did not do:

(a) Inject the term of "Defence Costs Indemnity Claim" (any claim against CannTrust for indemnification, reimbursement or advancement of defence costs incurred by a Non-Settlement Party or other Person in connection with defending against the Actions or any other Securities-Related Claim) and purport to make such claims "Unaffected Claims" but only if and when the person has "successfully defended" the Securities-Related Claim and their indemnity "is otherwise valid and enforceable" against CannTrust; and

Plan sections 1.1 and 2.3(i)

Transcript of Guyatt Cross-Examination, P. 118-119, Q. 394-395

(b) Propose that, **to the extent provided in the Sanction Order**, any judgment obtained by a Securities Claimant or the Securities Claimant Trust in respect of a Securities-Related Claim against a Non-Settlement Party shall be reduced by the amount that the court determines would have been recovered by such Non-Settlement Party pursuant to a Securities-Related Claim after taking account of CannTrust's payment of $50 million and all other Securities-Related Indemnity Claims made on a pro rata basis (while at the same time maintaining a clawback of the settlement payment if the total amount recovered by the Securities Claimants exceeds $250 million).

Plan sections 7.3(2) and 4.2(d)

37. The amendments to the Plan substantially vary the terms and reduce, or wholly eliminate as a practical matter, the protections that the various indemnities held by the Litwins were to provide. The Plan still does not permit any of the Non-Settlement Parties to make a claim, receive compensation or receive a vote. The second change is manifestly inadequate especially when the Plan provides CannTrust with an interest in the ongoing litigation.

PART III - ISSUE AND RESOLUTION

38. Can or should the Plan be filed and voted on in the face of its fundamental flaws that render it incapable of being sanctioned? The Applicant's motion should be dismissed without prejudice to their ability to bring back a plan capable of approval.

PART IV - LAW AND ARGUMENT

(A) Courts do not order a creditors' meeting for a plan incapable of sanction

39. Section 4 of the CCAA provides that a judge “may” order a meeting of the unsecured creditors of a company to consider and vote on a plan. The CCAA judge has the discretion to refuse to call a creditors’ meeting.

CCAA, s. 4

40. The gatekeeping function of the Court under section 4 of the CCAA is not procedural “rubber stamping”. Objections to the plan that raise matters of substance or significance require the Court to consider whether it makes sense to allow the plan to proceed to a meeting of creditors or whether doing so “would only result in a waste of time and money”.

Target Canada Co. (Re), 2016 ONSC 316 at paras. 67-69, 84-86 [*Target*]

41. The Court must review the terms of the Plan with a view to whether the Plan could meet the required criteria for approval:

(a) Whether there has been strict compliance with all statutory requirements;

(b) Whether all materials filed and procedures carried out were authorized by the CCAA; and

(c) Whether the plan is fair and reasonable**.**

Target at para. 70.

42. Where a Court finds that the plan cannot satisfy the required criteria (even if approved by creditors), it dismisses the motion seeking approval of the meeting order. Calling a meeting of creditors to vote on such a plan would be inappropriate as it would only result in delaying the inevitable, to the detriment of all those involved.

Re Doman Industries Ltd., 2003 BCSC 376 [*Doman*]

Re Crystallex International Corporation, 2013 ONSC 823 at para. 9 [*Crystallex*]

Target at paras. 68-69, 86

43. In *Doman*, the Court refused to order the meeting of creditors on the basis that “It would be inappropriate for me to authorize the calling of creditor meetings to consider the

[plan] when I know that this Court would refuse to sanction it on the basis that it purports to bind parties who were not given the opportunity to vote on it".

> *Doman* at para. 9
>
> See also, *Lemare Holdings Ltd. (Re)*, 2014 BCSC 893 at para. 28

44. In *Crystallex*, Justice Newbould refused to allow a proposed plan to be filed and for a creditors' meeting to be called because the proposed plan could not be implemented in the form in which it was presented. Justice Newbould stated:

> …I am in agreement with Tysoe J. (as he then was) in Re Doman Industries Ltd.,,, that if the court does not have jurisdiction to approve a plan, it would be inappropriate to authorize the calling of a meeting of creditors to consider the plan.
>
> *Crystallex* at para. 9

45. CCAA courts have been very careful to caution that the important flexibility provided to the parties and supervising courts is to be exercised in accordance with the fundamental principles established under the CCAA (even in cases like *Red Cross* and *ABCP* where there were much broader public interests and issues dependent on the success of the plan). Here there are no systemic public interest issues and, for example, no one has suggested or put before this Court that the employees as a group would not generally retain their jobs at the grow sites in any alternative to the Plan. Indeed, in its 8th Report the Monitor does not address this and purports to analyze only two alternatives it selects (Plan or liquidation) and in that analysis only addresses the impact on Affected Creditors - a term that excludes the indemnity promises made to the Non-Settling Defendants that the company now proposes to vary or breach and will ask this Court to sanction. In failing to do so the Monitor must by implication have formed the view that the indemnitees are not stakeholders in the estate. This is simply wrong.

46. CannTrust is a public commercial enterprise in the cannabis business. It has used the CCAA breathing space to fix its business and now apparently believes the enterprise has value and is financeable. It proposes to use some of its cash-on-hand (raised in part

based on promises the company made to directors, officers, underwriters and auditors) to settle litigation apparently without knowing how much of that cash is going to plaintiffs' counsel. Existing equityholders will keep their *pro rata* ownership of the emerging entity.

> Transcript of Guyatt Cross Examination, P. 63-67, Q. 224-240, P. 70-72, Q. 249-255

47. To do so it has to ask this Court to ignore and even bless terms that are completely contrary to fundamental CCAA principles and which would likely have a broader negative impact on the usage of important commercial documents necessary to attract participants and facilitate transactions in the Canadian capital markets. The CCAA's flexibility cannot be invoked for this purpose and would indeed be contrary to the basis on which courts have said that flexibility is to be employed.

48. For the reasons expanded upon below, the Plan is incapable of being sanctioned. It contravenes the test for approval in at least four material ways:

- (a) The Plan purports to compromise claims without permitting those creditors to participate in the process;
- (b) The Plan purports to unilaterally amend pre-filing contracts, and hide this improper result by mislabeling those contracts as being "unaffected";
- (c) The Plan fails to treat similarly situated creditors equitably; and
- (d) Some equity claims receive distributions and all of the existing equity is completely unaffected, notwithstanding that certain creditor claims are being released without consideration.

(B) The Plan is incapable of being sanctioned

i. The Plan purports to terminate the Selling Shareholders Indemnity without allowing the Litwins to participate in the process

49. As described above, the Selling Shareholders Indemnity provides the Litwins with a consent right and a concomitant obligation upon CannTrust. If CannTrust wants to settle an indemnified claim, it contractually bound itself to either obtain the Litwins' consent or get them a tag-along unconditional release. In breach of contract, CannTrust is now proposing a Plan that does neither. Moreover the Plan purports to prevent the Litwins from making a

claim on these breaches without an opportunity to prove their claims, vote on a plan or receive a distribution.

50. It is a fundamental principle of insolvency law that creditors cannot be bound by a plan if they were not given an opportunity to vote on it. Section 6(1) of the CCAA provides that:

> *If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding*
>
> > *(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company…*
> >
> > CCAA, s. 6
> >
> > Sarra, Janis P. Rescue! The Companies' Creditors Arrangement Act, 2nd ed. Toronto: Carswell, 2013 at p. 525
> >
> > Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed. Toronto: Carswell, 2005 at N§43

51. Section 6 establishes two requirements: first, that for a compromise to be binding, a double majority of the creditors in the affected class must vote in favour of the compromise, and second, that the compromise is only binding on the class of creditors who voted for the compromise.

52. Justice Blair (as he then was) dealt with facts analogous to the present case in *Philip Services* where the CCAA debtors attempted to effectively deprive holders of certain indemnity claims of a meaningful vote on a CCAA plan that purported to compromise their claims by shipping their claims to the U.S. Justice Blair stated:

> *[36] The effect of the Canadian Plan, as presently structured, is to deprive Deloitte & Touche, the Underwriters and others such as the former directors and officers of Philip who may have claims of contribution and indemnity as against Philip arising out of the same*

"nucleus of operative facts" pertaining to the class action claims, from pursuing those contribution claims in the Canadian CCAA proceeding. … At the same time, the Canadian Plan, by its very terms, is to be binding upon all holders of claims against Philip — including those which are subject to the Canadian Plan: see section 9.15 of the Canadian Plan. This is to be accomplished without even according the right to those claimants to vote on the Plan.

[37] The binding nature of the Canadian Plan has the effect of requiring the responding claimants to provide releases in favour of Philip while they are at the same time not released by Philip from claims that might be subsequently asserted against them. …

[38] <u>In my opinion it is the loss of the right to vote in the Canadian Plan which lies at the heart of the present dilemma.</u> The mere fact that a Canadian creditor's rights are to be dealt with and affected by single or parallel insolvency proceedings in the U.S. Bankruptcy Court — or that the reverse may be the case (U.S. creditor/Canadian Court) — is not necessarily sufficient, in itself, to undermine the fairness and reasonableness of a proposed Plan: …. <u>In Canadian insolvency proceedings under the CCAA, however, it is the right to vote on the compromise or arrangement which the debtor company proposes to make with them which is the central counterpart, on the part of the creditors, to the debtors right to attempt to make that compromise or arrangement. In my view, having chosen to initiate and take advantage of the CCAA proceedings, Philip cannot now evade the implications and statutory requirements of those proceedings by seeking to carve out certain pesky — and potentially large — contingent claimants, and to require them to be dealt with under a foreign regime (where they will be treated less favourably) while at the same time purporting to bind them to the provisions of the Canadian Plan. All of this without the right to vote on the proposal</u>.

…

[42] <u>The rights of creditors under the CCAA cannot be compromised unless,</u>

> (a) *<u>The creditor has been given a right to vote, in the appropriate class, on the proposed compromise</u>;*
>
> (b) *The creditor's vote is in accordance with a value ascribed to the claim by a Court approved procedure;*
>
> (c) *The class in which the creditor has been appropriately placed has voted by a majority in number and two-thirds in value in favour of the compromise; and*
>
> (d) *The Court has sanctioned the compromise on the basis that it is fair and reasonable (with considerable deference being given by the Court in this regard to the votes of the creditors).*

> *Menegon v. Philip Services Corp.* (1999) 11 C.B.R. (4th) 262 (ONSC) at paras. 36-38, 42 [*Philip Services*].

53. At paragraphs 42 to 51 of the Applicants' factum, the Applicants unsuccessfully seek to distinguish *Philip Services* on a procedural basis while sidestepping the *ratio* of the decision. Justice Blair found that Philip Service's plan failed to comply with the procedural and statutory requirements of the CCAA regime in that it sought to exclude certain claimants from participation in its process (by providing that their claims against Philip Services were to be governed by and treated in the U.S. proceedings while at the same time seeking to bind them to the provisions of the Canadian CCAA plan) without affording those claimants any right to vote. That *ratio* and the wisdom underlying it applies directly to this case.

> *Philip Services* at para. 57.

54. Beginning at paragraph 28 the Applicants factum argues that the Securities-Related Indemnity Claims should not be entitled to vote on the Plan because giving the Securities-Related Indemnity Claims a value greater than zero would offend the rule against double proofs. This is not correct for the reasons described below, and in any case, completely ignores the procedural protections that must be followed before it is possible to dispense with a potential claim on the basis that it has no value.

55. Those protections must, at a minimum, include identifying the nature and amounts of the Securities-Related Indemnity Claims that holders believe they have. This requires running a claims process to solicit those claims, consider and value the claims that are filed, including through a proper adjudication and assuming disallowance in whole or part where the claimant then has a forum to be heard, and a right of appeal of any determination. The Applicants have failed to conduct such a process.

56. A plan that gives certain equity claims a vote and distribution, and which compromises other equity claims without even the ability to identify and value those claims, is not capable of being sanctioned.

57. The Applicants argue that it would be a waste of time and money to conduct such a claims process, because, they say, it is a foregone conclusion that all Securities-Related Indemnity Claims will be valued at zero on account of the rule against double proofs. That is not true, and in any case, is not a conclusion that the Applicants should be entitled (and ask the Court) to simply assume without providing the holders of those claims with the ability to establish their claims.

58. In fact, it is not possible to predict in advance what would be the results of a claims process for Securities-Related Indemnity Claims given the multitude of holders of Securities-Related Indemnity Claims (being, at least, every past and current officer and director of CannTrust, every past and current officer and director of CannTrust Inc., Fred, each of the Underwriters, CannaMed, every director, officer, manager, shareholder, member, employee, representative and agent of CannaMed, Cajun, and every director, officer, manager, shareholder, member, employee, representative and agent of Cajun) and the many forms of by-laws and contractual indemnity agreements that are being compromised under the Plan.

59. The Applicants argue that the rule against double proofs prohibits two proofs of claim filed for the same debt, and that all of the Securities-Related Indemnity Claims (for which they have not run a claims process to identify) are for potential claims over against CannTrust for indemnity in respect of the same damages that are claimed against CannTrust by the Securities Claimants. While the Litwins do not concede that the rule against double proofs has any applicability in the context of this Plan, in any case, as but one example, claims against CannTrust under the Selling Shareholders Indemnity will be for damages claimed against the Selling Shareholders directly by the Securities Claimants for shares sold by those Selling Shareholders – not for the same damages claimed against CannTrust for the treasury shares sold by CannTrust in the May 2019 offering.

60. Further, and as they must given the weakness of their first position, the Applicants then argue at paragraphs 32 to 38 of their factum, that the amended Plan does not affect the Non-Settling Defendants as a result of the addition to the Plan of section 7.3(2) and the definition of Defence Costs Indemnity Claim. As stated above, the Selling Shareholders

Indemnity claim covers a direct claim against the Selling Shareholders as opposed to a related claim. As such, the addition of section 7.3(2) and the definition of Defence Costs Indemnity Claim have no application. The Plan purports to release the Selling Shareholders Indemnity Claims including those of the Litwins as shareholders, officers and directors and they are therefore directly affected.

61. Contrary to the suggestion that the Plan does not affect the Selling Shareholders Indemnity, what the Applicants are actually attempting to do is disclaim (or breach) CannTrust's obligation to obtain the Selling Shareholders' consent to the settlement of the Action or their full release. The CCAA provides a mechanism to do so – disclaim the contract pursuant to section 32 of the CCAA and compromise the resulting claim in a plan. Doing this would give the Selling Shareholders a "restructuring claim" that they would be entitled to prove and vote in a plan. Instead, the Applicants are attempting to simply get released from the claim without permitting the Selling Shareholders to participate in the Plan in contravention of the CCAA. The Applicants were aware of and used the disclaimer section during the stay period for other contracts but have not even attempted to do so for the Selling Shareholders Indemnity – instead they are in effect doing so *sub silentio*.

CCAA, s. 32
Transcript of Guyatt Cross Examination, P. 52, Q. 192-194

ii. The Plan purports to unilaterally amend pre-filing contracts, and hide this improper result by mislabeling those contracts as being "unaffected"

62. The March 13 amendments to the Plan fail to address the concerns raised by holders of Securities Related Indemnity Claims but rather attempt to circumvent them through the addition of faulty Pierringer-type language and an amendment to the definition of "Unaffected Claims" to include certain defence costs.

63. The purpose of the Pierringer-type language ostensibly is intended to reduce the exposure of the Non-Settling Defendants by the amount they would otherwise have been able to recover from CannTrust under their indemnities. The Applicants wrongly suggest that

the amendment to the definition of “Unaffected Claims” preserves the Non-Settling Defendants’ cost reimbursement rights. However, both amendments fail to properly address issues raised by the release of the Securities Related Indemnity Claims.

64. The context for this cannot be forgotten. This Plan is proposed by an operating company that is solvent depending on the treatment of contingent unsecured claims. The Plan proposes to deprive innocent officers and directors (the Litwins) of their indemnity rights (while allowing other innocent officers and directors to be released from the litigation) at precisely the moment when needed – in the face of a class proceeding. While this is not to say that such indemnities can never be compromised, doing so in the present circumstances, and doing so in this manner by a unilateral variation with no vote raises much broader and more serious implications. As CannTrust’s CEO noted in his cross-examination, no one would join a public company as a board member or officer without an indemnity. To permit such indemnities to be rendered worthless just when they should provide protection is undesirable policy and would be sure to have a chilling impact on people who would otherwise serve on such boards. To paraphrase Mr. Guyatt no one would join the Board of a public company with an indemnity that can be rendered useless when it is needed most.

65. This bad result is made all the more unnecessary by the likelihood that if the indemnities were honoured and tag-along releases included, the overall pot could be enhanced substantially through the participation of the D&O Insurers. Inexplicably (given the self-interested opinions or belief from the OSP affiant proffered in the affidavit to seek the Meeting Order), questions as to the affiant’s belief regarding this option were refused.

Transcript of Guyatt Cross Examination, P. 87-89, Q. 305-308

66. The amended Plan’s proposed Pierringer-type language fails to address the concerns of the Non-Settling Defendants for at least three reasons:

(a) The provision is not incorporated into the operative sections of the Plan, but rather is stated to be “subject to the Sanction Order”;

(b) Unlike proper Pierringer Orders, the proposed language fails to shield the Non-Settling Defendants from the full extent of CannTrust's proportionate liability; and

(c) The provision fails to provide discovery rights and other procedural protections recognized as essential by the jurisprudence.

Ontario New Home Warranty Program v. Chevron Chemical., 1999 CanLII 15098

Micevic v. Johnson & Johnson, 2019 ONSC 665 at paras. 43-45

67. Similarly, U.S. courts have consistently held that contractual indemnity rights should not be extinguished by bar orders in securities class actions: "Settlements and associated bar orders must also be fair to the non-settling parties whose rights are at stake". This is relevant in the context of the U.S. class actions whose class members make up the majority of the plaintiffs' claims.

West End Capital Management v. Pixelplus Co., 580 F. Supp. 2d 343 (S.D.N.Y. 2008)

Compudyne Corp. v. Shane, 05 Civ. 4300 (RWS) (S.D.N.Y. Jul. 17, 2007)

68. The adumbration of the many failings of the Pierringer-type language canvassed in the factum of KPMG is adopted by the Litwins and will not be repeated.

69. As a further stand-alone defect, the Plan purports to unilaterally change the contractual terms and protections currently enjoyed by the Litwins under their indemnities. The proposed treatment of the Defence Costs Indemnity Claim under the Plan requires that in order to be unaffected the Non-Settlement Party has to "successfully defend" such Securities Related Claim. This introduces two changes from the current reimbursement rights of the Litwins. First, it contemplates a deferment of payment to the conclusion of the litigation as opposed to the contractual obligation of payment as such costs are incurred. Second, it makes the payment conditional upon the subjective element of "success" in the litigation (while being silent as to the result in the event of a settlement – a situation made even worse by the fact that CannTrust retains a financial interest in the litigation through the clawback).

70. The terms of the Litwins' indemnity agreements, as well as the company's by-laws, are unambiguous, have been respected by CannTrust until this time. In its public disclosures CannTrust told the public (and its directors and officers) : "The indemnification agreements also provide for the advancement of defence expenses to the indemnitees by the Corporation". The company is to pay the indemnitees their costs as they are incurred and not wait for the end. The applicable documents use the terms "as incurred", "at all times", and "within ten days after notice". Even if the company was to somehow argue that all of these obligations are ambiguous, it would be no further ahead. The Court of Appeal has held that evidence of performance is admissible to resolve ambiguity. In the present case, the Litwins' accounts for legal expenses have been submitted monthly throughout the proceeding (including throughout the CCAA) and CannTrust's CEO has, with access to legal advice, caused them to be paid (consistent with CannTrust's public disclosure). This clearly demonstrates the parties' intention and understanding that the obligation is to pay along the way which is manifestly the commercially sensible interpretation. CannTrust now seeks to turn " advancement" into the polar opposite.

Transcript of Guyatt Cross Examination, P. 56, Q. 204-206

May 9, 2019 CannTrust Circular, Guyatt Cross Exhibit 3 at p. 30

Shewchuk v. Blackmount Capital Inc., 2016 ONCA 912

71. The Plan's proposed treatment of the Litwins' indemnity rights is a unilateral amendment of a pre-filing contractual obligation. It has been repeatedly held that the CCAA Court does not have the jurisdiction to do that.

Bellatrix Exploration Ltd., Re (2020), 77 CBR (6th) 230 (ABQB) at para. 118

Cooper-Standard Automotive Canada Ltd., Re, (2009) 69 BLR (4th) 41 (ONSC) at para. 17

72. Moreover, the deferral of payment would create an additional unfairness: a collection risk which will be affected by CannTrust's solvency at an unknown future point in time possibly years from now after the company has granted security to its DIP and Exit financier. The collection risk is further increased by the fact that the terms of the Securities Claimant

Trust have not yet been established and the governing trust indenture has not yet been drafted. Therefore, the terms of potential cost reimbursement arrangements, if any, are unknown. Even leaving aside the interim funding burden, a Court absolutely could not countenance paying Plaintiffs' counsel, using the settlement funds to pursue claims unsuccessfully then telling the successful defendants the cupboard is bare to pay their costs order. That the litigation trust terms are not before the Court is inexcusable after a year in CCAA.

Transcript of Guyatt Cross Examination, P. 63-64, Q. 224-230

73. The Applicants contend at paragraph 32 to 38 of their factum that the amendments to the Plan result in the Non-Settlement Parties being "not impacted" by the Plan. This characterization is simply incorrect as a matter of fact and law. The Applicants seek to change indemnity rights in a way that negatively impacts the Litwins without acknowledging the change and without compensating the Litwins.

iii. The Plan fails to treat similarly situated creditors equitably

74. It is well settled law that creditors within the same ranking or class should be treated *pari passu*. The *pari passu* requirement is a principle rooted in fairness that governs in all insolvency proceedings. The Court in *Nortel* described the principle as ensuring "the assets of the insolvent debtor are to be distributed amongst classes of creditors ratably and equally, as those assets are found at the date of insolvency".

Nortel Networks Corporation (Re), 2015 ONCA 681 at paras. 23, 25 *[Nortel]*

75. The Litwins are in the same position as the other officers and directors of CannTrust who passed the investigation test and yet are the only ones who passed who are not OSP. The OSP are to receive a broad release while the Actions continue against the Litwins (while the Plan purports to extinguish the Litwins' indemnity and contribution claims against CannTrust and the OSP as addressed above).

Plan, ss. 1.1 and 7.2

76. The Plan contravenes the *pari passu* principle in the vastly different treatment of the Litwins and the OSP. There is no justifiable basis to distinguish between the treatment of these two groups such that the Plan cannot be considered to be fair and reasonable.

iv. The existing equity is unaffected notwithstanding that creditor claims are being released without consideration

77. Another fundamental tenet of insolvency law is that equity ranks behind unsecured creditors. It is the antithesis of this principle to have equity unaffected by a CCAA plan while creditor claims are being compromised, or, as in this case, completely extinguished without any consideration.

78. The Applicants will argue that the plaintiffs are entitled to choose with whom and when to settle, and who to release from the lawsuits they have brought. No doubt this is true outside of the CCAA. However, use of the powerful tools of the CCAA to effect a partial settlement requires the parties to fit within the statutory and developed caselaw regarding the types of orders a court may make in a CCAA proceeding, including that similarly-situated creditors be treated equitably. As wide as the parameters are for a CCAA court to provide a framework and breathing space to allow a debtor to restructure, there are important boundaries relating to procedural and substantive rights as to what a CCAA plan can accomplish – boundaries that have been ignored by the Applicants in this case. The Plan, its unilateral modification of contracts and rights, without fair or balanced treatment of the Litwins (and other Non-Settlement Parties) is incapable of being sanctioned.

PART V - ORDER SOUGHT

79. The Litwins respectfully request that the Applicants' motion be dismissed without prejudice to their ability to seek approval of an amended Plan.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of March, 2021.

Peter Howard

Stikeman Elliott LLP
Lawyers for the Litwins

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

Target Canada Co. (Re), 2016 ONSC 316

Re Doman Industries Ltd., 2003 BCSC 376

Re Crystallex International Corporation, 2013 ONSC 823

Lemare Holdings Ltd. (Re), 2014 BCSC 893

Menegon v. Philip Services Corp. (1999) 11 C.B.R. (4th) 262 (ONSC)

Ontario New Home Warranty Program v. Chevron Chemical., 1999 CanLII 15098

Micevic v. Johnson & Johnson, 2019 ONSC 665

West End Capital Management v. Pixelplus Co., 580 F. Supp. 2d 343 (S.D.N.Y. 2008)

Compudyne Corp. v. Shane, 05 Civ. 4300 (RWS) (S.D.N.Y. Jul. 17, 2007)

Shewchuk v. Blackmount Capital Inc., 2016 ONCA 912

Bellatrix *Exploration Ltd., Re* (2020), 77 CBR (6th) 230 (ABQB)

Cooper-Standard Automotive Canada Ltd., Re, (2009) 69 BLR (4th) 41 (ONSC)

Other Authorities

Sarra, Janis P. Rescue! The Companies' Creditors Arrangement Act, 2nd ed. Toronto: Carswell, 2013 at p. 525

Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed. Toronto: Carswell, 2005 at N§43

SCHEDULE "B"
RELEVANT STATUTES

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

Compromise with unsecured creditors

4 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.

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

> **(a)** on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> **(b)** in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a provincial pension plan as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection

2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) 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.

Agreements

Disclaimer or resiliation of agreements

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

(4) In deciding whether to make the order, the court is to consider, among other things,

> **(a)** whether the monitor approved the proposed disclaimer or resiliation;
>
> **(b)** whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> **(c)** whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

> **(a)** if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);
>
> **(b)** if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or
>
> **(c)** if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

(9) This section does not apply in respect of

(a) an eligible financial contract;

(b) a collective agreement;

(c) a financing agreement if the company is the borrower; or

(d) a lease of real property or of an immovable if the company is the lessor.

W. End Capital Mgmt., LLC v. Pixelplus Co.

United States District Court for the Southern District of New York

October 1, 2008, Decided; October 1, 2008, Filed

06 Civ. 2951 (TPG)

Reporter
580 F. Supp. 2d 343 *; 2008 U.S. Dist. LEXIS 76482 **

WEST END CAPITAL MANAGEMENT, LLC, individually and on behalf of all others similarly situated, Plaintiffs, - against - PIXELPLUS CO., LTD., SEO KYU LEE MOON SUNG KIM, SANG-SOO LEE, OU SEB LEE, DONGWOO CHUN, HA JIN JHUN, TAEK JIN NAM, CHOONG-KI KIM, JEFFRIES & COMPANY, INC., AND W.R. HAMBRECHT + CO., LLC, Defendants.

Core Terms

Underwriter, indemnification, Nonsettling, proposed settlement, fees and expenses, Settlement, asserting, successful defense, contractual right, contractual, prosecuting, commencing

Counsel: **[**1]** For West End Capital Management, LLC, Lead Plaintiff: Eric T. Chaffin, LEAD ATTORNEY, Seeger Weiss LLP, New York, NY; William H. Narwold, LEAD ATTORNEY, Motley Rice LLC (CT), Hartford, CT; Kim Elaine Miller, Kahn Gauthier Swick, LLC, New York, NY; Lewis Stephen Kahn, Kahn, Gauthier Law Group, L.L.C., New Orleans, LA.

For Lead Plaintiffs, Lead Plaintiff: Kim Elaine Miller, Kahn Gauthier Swick, LLC, New York, NY.

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Inna Oxenuk, Plaintiff, Pro se.

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For Jefferies & Company, Inc., WR Hambrecht & Co., LLC, Defendants: Jonathan I. Blackmail, LEAD ATTORNEY, Cleary Gottlieb Steen & Hamilton, LLP(NYC), New York, NY.

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For Patrick McNamara, Movant: Evan J Smith, LEAD ATTORNEY, Brodsky & Smith, L.L.C., Mineola, NY.

For The Markowski Group, Movant: Catherine A. Torell, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., New York, NY.

Judges: THOMAS P. GRIESA, United States District Judge.

Opinion by: THOMAS P. GRIESA

Opinion

[*344] Plaintiffs have filed a motion for approval of a proposed partial settlement of this class action. The notice of the proposed settlement has not been given to class members, nor has the hearing date been set. The reason for this is that the nonsettling defendants, Jeffries & Co., Inc. and WR Hambrecht + Co., LLC ("Underwriter Defendants") have objected to certain features of the proposed settlement. It was appropriate to deal with those objections before proceeding further.

By letter dated May 12, 2008 counsel for the Lead Plaintiff advised the court that all of the objections of the Underwriter Defendants had been resolved by agreement, except for one. Briefing has now been completed as to that one **[**3]** objection, which this opinion deals with.

The Underwriter Defendants are asserting a limited objection to a "bar order" contained in the proposed settlement agreement. The bar order is set forth in Section V, paragraph 4.5, of the Stipulation of Settlement, and provides

> The Final Judgment shall, as a condition for the Settlement, permanently bar, enjoin and restrain all of the Nonsettling Defendants in the Litigation, and any other person or entity later named as a defendant in the Litigation, from (I) commencing, prosecuting, or asserting any claim for contractual or other indemnity or contribution against the Released Persons (or any other claim against the Released Persons where the injury to the Nonsettling Defendants is the Nonsettling Defendants' actual or threatened liability to the Lead Plaintiff, on behalf of itself and/or the Class); and (ii) from commencing, prosecuting or asserting any claim against the Released Persons arising out of, related to, or **[*345]** reasonably flowing from the claims or allegations asserted by Lead Plaintiff, on behalf of itself and the Class, in the Complaint or the Litigation, whether arising under state, federal or foreign law as claims, cross-claims, **[**4]** counterclaims or third-party claims, whether asserted in the Complaint, in the Litigation, in this Court, in any federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States or elsewhere.

Section 9(a) of the Underwriting Agreement entered into by the Underwriter Defendants provides that the underwriters are to be indemnified for various kinds of liabilities and losses, including fees and expenses incurred in litigation. Although the proposed bar order does not expressly speak of indemnification for such fees and expenses, it is agreed that the bar order is broad enough to cover such indemnification.

It is only this indemnification - *i.e.,* for fees and expenses in litigation - which the Underwriter Defendants wish to save from the application of the bar order. And even here the Underwriter Defendants qualify this request. Their precise request is made in light of their interpretation of the applicable law regarding indemnification in cases such as the present one. They seek only to preserve their contractual right with respect to a successful defense of the present action.

A careful examination of the case law indicates **[**5]** that the Underwriter Defendants should be entitled to maintain their contractual right to the limited indemnification on the terms they set forth. The court concludes that the position of the Underwriter Defendants is entirely reasonable and lawful.

The court rules that the bar order in the proposed Settlement Agreement should be amended to provide that it does not apply to the Nonsettling Defendants' rights to seek contractual indemnification for attorneys' fees and other legal expenses incurred in the successful defense of this action.

SO ORDERED.

Dated: New York, New York

October 1, 2008

/s/ Thomas P. Griesa

THOMAS P. GRIESA

U.S.D.J.

End of Document

Compudyne Corp. v. Shane

United States District Court for the Southern District of New York

July 17, 2007, Decided; July 18, 2007, Filed

05 Civ. 4300 (RWS)

Reporter
2007 U.S. Dist. LEXIS 52285 *; 2007 WL 2106554

COMPUDYNE CORP., ET AL., Plaintiffs, - against - SHANE, ET AL., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part Compudyne Corp. v. Shane, 244 F.R.D. 282, 2007 U.S. Dist. LEXIS 60454 (S.D.N.Y., Aug. 14, 2007)

Prior History: Compudyne Corp. v. Shane, 453 F. Supp. 2d 807, 2006 U.S. Dist. LEXIS 71447 (S.D.N.Y., 2006)

Core Terms

non-settling, extinguish, defense costs, settlement, settlement agreement, contractual right, regulatory action, instant suit, indemnification, indemnity, reduction, barring, endorse, parties

Counsel: [*1] For CompuDyne Corporation, William Blair Mezzanine Capital Fund II, L.P., Plaintiffs: Jeffrey Alan Klafter, LEAD ATTORNEY, Klafter & Olsen LLP, White Plains, NY.

For Hilary L. Shane, Defendant: Andrew Garry Gordon, LEAD ATTORNEY, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY; Joshua Samuel Sohn, DLA Piper US LLP (NY), New York, NY.

For First New York Securities, L.L.C., FNY Millenium Partners, L.P., FNY Capital Corp., Defendants: Arthur Harlod Aufses, III, Craig Louis Siegel, Ilyssa Birnbach Sena, Stephen Matthew Sinaiko, Kramer Levin Naftalis & Frankel, LLP, New York, NY.

For Friedman, Billings, Ramsey & Co., Inc., Movant: Matthew B. Andelman, Williams & Connolly LLP, Washington, DC.

Judges: ROBERT W. SWEET, U.S.D.J.

Opinion by: ROBERT W. SWEET

Opinion

MEMORANDUM OPINION

Sweet, D.J.,

First New York Securities, LLC ("FNY Securities"), FNY Millennium Partners, L.P., and FNY Capital Corp. (together, the "FNY Defendants"), having entered into a settlement agreement with CompuDyne Corp. ("CompuDyne") and William Blair Mezzanine Capital Fund II, L.P. (together, the "Plaintiffs"), have moved for entry of an order barring extinguishing contribution, indemnity and related claims against the FNY Defendants. For the [*2] reasons stated below, the motion will be granted.

Plaintiffs commenced this action against Defendant Hilary L. Shane ("Shane") and the FNY Defendants (together, "Defendants") on May 2, 2005. Plaintiffs allege that Shane, then affiliated with the FNY Defendants, engaged in manipulative trades of

CompuDyne common stock during the time that CompuDyne was pricing a private investment in public equity ("PIPE") transaction, thereby damaging Plaintiffs.

Without admitting any liability, the FNY Defendants reached a settlement agreement with Plaintiffs on April 17, 2007, whereby the FNY Defendants agreed to pay $ 300,000 to Plaintiffs, "in full satisfaction of any claims Plaintiffs may have against the FNY Defendants." (FNY Def. Mem., at 3). The agreement is expressly conditioned upon the entry by the Court of an order barring the non-settling parties from bringing claims for contribution or indemnity against the FNY Defendants arising out of this action. The proposed bar order ("Proposed Order"), which is annexed to the affidavit of Stephen M. Sinaiko as Exhibit 5, also contains a judgment reduction provision, which would reduce the any judgment obtained by Plaintiffs against the non-settling [*3] defendants by the greater of $ 300,000 or the amount corresponding to the percentage of responsibility of the FNY defendants as determined at trial. (Proposed Order, P H).

Shane has objected to the entry of the Proposed Order, claiming that it would impermissibly extinguish her contractual right to indemnification by FNY Securities. (Proposed Order P E). Specifically, Shane contends that FNY Securities is obligated to indemnify her for attorneys' fees and related expenses she has incurred in her defense of the instant suit as well as regulatory actions brought by the Securities and Exchange Commission ("SEC") and the National Association of Securities Dealers ("NASD").

"A court can endorse a settlement only if the compromise is fair, reasonable and adequate." *Gerber v. MTC Electronic Technologies Co., Ltd.,* 329 F.3d 297, 302 (2d Cir. 2003) (quoting *In re Masters Mates & Pilots Pension Plan & IRAP Litig.,* 957 F.2d 1020, 1026 (2d Cir. 1992)) (internal quotation marks omitted). Settlements and associated bar orders must also be fair to the non-settling parties whose rights are at stake. *See id.*

Shane has made clear in her papers and at oral argument that entry of a bar order would be acceptable [*4] so long as it does not extinguish her alleged right to seek defense costs for the regulatory actions and the instant suit. She simply argues that the language favored by the FNY Defendants for such an order would not preserve this supposed right.

Any settlement order the Court enters cannot bar independent claims for which the judgment reduction provision does not compensate Shane. *See id.* at 306-07. The *Gerber* court faced a similar objection to a bar order, and responding by modifying the order to "ensure that the only claims that are extinguished are the claims where the injury is the non-settling defendants' liability to the plaintiffs." *Id.* at 307.

Here, the FNY Defendants no such textual modification is necessary because the Proposed Order's operative language mimics the order endorsed in *Gerber.* The *Gerber* court found that the order it crafted would preserve "independent" claims "relating to the cost of defense arising out of a breached contractual or fiduciary relationship" between the settling and non-settling defendants. *Id.* at 306. Accordingly, to the extent that Shane has a contractual right to seek indemnification from FNY Securities for her defense costs in this or other [*5] actions relating to the CompuDyne PIPE, nothing in the Proposed Order shall be construed to extinguish that right.

It is so ordered.

New York, NY

July 17, 2007

ROBERT W. SWEET

U.S.D.J.

End of Document

Rescue!

The Companies' Creditors Arrangement Act

Janis P. Sarra, B.A., M.A., LL.B., LL.M., S.J.D.

University of British Columbia Faculty of Law and
Peter Wall Institute for Advanced Studies

Second edition

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The court will typically endorse a process that specifies who will chair the creditors' meeting; that claims must be admitted to be eligible to vote; and that specifies how votes are to be recorded or tallied in the event that disputed claims could possibly affect its later consideration of whether or not to approve the plan.

Once the court orders a vote on a proposed plan, creditors are to vote by class in their consideration of whether to accept the plan. As noted earlier, a majority in number representing two-thirds in value of claims in each class, present or represented at the meeting, must support the plan before the court will consider sanctioning the plan of compromise or arrangement.

Creditors cannot be bound by the *CCAA* plan if they were not given an opportunity to vote on it.[83] The court will also not consider a plan where it has not been considered and voted on by creditors.[84] Even if a creditor does not attend the meeting to vote on the plan, if the creditor received notice and the opportunity to vote, the creditor will be bound to the plan and will receive any benefits accruing to the class of creditors under which it was classified if the requisite approvals and court sanction occur.[85]

Where a proposed plan under the *CCAA* was not, in the opinion of the court, workable or practical, and secured creditors were not prepared to accept it, the Court refused to permit the plan to be filed and lifted the stay in order to permit the secured creditors to appoint a receiver to realize on the assets.[86] Similarly, the courts have found that where it is obvious that a *CCAA* plan cannot succeed, the court may rescind the stay so that an application for bankruptcy can be filed and a trustee in bankruptcy administer the estate.[87]

In *Re Crystallex International Corp.,* the Ontario Superior Court of Justice dismissed the motion of noteholders to have a vote on their plan.[88] Justice Newbould concluded that ordering a meeting of creditors to vote on the noteholders' plan of arrangement was not appropriate at that time, as the plan contained a number of provisions that were contrary to the terms of the interim financing facility; the noteholders had sprung their plan on the debtor and the other stakeholders only a few days before the motion; it was not a situation in which the creditors could say that all avenues for resolution with the debtor had been exhausted and that

83 *Menegon v. Philip Services Corp.* (1999), 11 C.B.R. (4th) 262 (Ont. S.C.J. [Commercial List]); *Re Doman Industries Ltd.* (2003), 41 C.B.R. (4th) 29 (B.C.S.C. [In Chambers]).

84 *Cable Satisfaction International Inc. v. Richter & Associés inc.* (2004), 48 C.B.R. (4th) 205 (Que. S.C.).

85 *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C.S.C.), leave to appeal refused 1995 CarswellBC 77 (B.C.C.A.).

86 *Re Fracmaster Ltd.* (1999), 11 C.B.R. (4th) 204 (Alta. Q.B.), affirmed *Royal Bank v. Fracmaster Ltd.* (1999), 11 C.B.R. (4th) 230 (Alta. C.A.).

87 *Re United Maritime Fishermen Co-op.* (1988), 68 C.B.R. (N.S.) 170 (N.B.Q.B.), reversed on other grounds (1988), 69 C.B.R. (N.S.) 161 (N.B.C.A.).

88 *Re Crystallex International Corp.*, 2013 CarswellOnt 3043, 2013 ONSC 823 (Ont. S.C.J. [Commercial List]).

HMANALY N§43
Houlden & Morawetz Analysis N§43

Bankruptcy and Insolvency Law of Canada, 4th Edition

COMPANIES' CREDITORS ARRANGEMENT ACT

Section 6
L.W. Houlden and Geoffrey B. Morawetz

N§43 — Meeting of Creditors to Consider the Plan

N§43 — Meeting of Creditors to Consider the Plan

See s. 6

In a Nova Scotia *CCAA* proceeding, the court considered a request for preliminary approval of a plan of arrangement prepared by debtor for the purposes of presenting the plan to the company's creditors. MacAdam J. held that in view of the relatively low threshold to be met by the debtor company in seeking court approval to have a plan of arrangement submitted to creditors for a vote, he was satisfied the plan should proceed and the creditors should determine whether or not they accept the plan: *Re Federal Gypsum Co.* (2007), 2007 CarswellNS 630, 40 C.B.R. (5th) 39 (N.S. S.C.XDecember 14, 2007).

The court can appoint some person to act as chair of the meeting and direct that he or she shall supervise the counting of the votes: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.).

If creditors have been classified into different classes, they must not be permitted to vote as one group; they must vote as separate classes. A majority in number, holding two-thirds in value of each class, present or represented at the meeting, must approve before the court can sanction the plan: *Re Wellington Bldg. Corp.,* 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626 (S.C.).

Creditors of a debtor company under the *CCAA* cannot be bound by the provisions of a plan if they have not been given the opportunity to vote on it: *Menegon v. Philip Services Corp.* (1999), 1999 CarswellOnt 3240, 11 C.B.R. (4th) 262, 39 C.P.C. (4th) 287, [1990] O.J. No. 4080 (Ont. S.C.J.); *Re Doman Industries Ltd.* (2003), 41 C.B.R. (4th) 29, 2003 CarswellBC 538, 2003 BCSC 376, 14 B.C.L.R. (4th) 153 (B.C. S.C. [In Chambers]). An agreement among creditors to subordinate the rights of some to the claims of others does not take away the right of the subordinated creditors to vote: *Re Air Canada* (2004), 2004 CarswellOnt 1842, 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]).

It is not two-thirds in value of the total claims of each class of creditors that must approve, only two-thirds in value of each class of creditors pres-ent or represented at the meeting. If a creditor does not choose to attend the meeting, either in person or by proxy, it does not affect the vote: *Re Bilton Bros. Ltd.,* 21 C.B.R. 79, [1939] O.W.N. 397, [1939] 4 D.L.R. 223 (S.C.). The majority in number is calculated by counting the heads of those present or represented at the meeting: *Re Windsor Home Furniture Co.* (1954), 34 C.B.R. 53 (Ont. S.C.).

It is best that separate meetings be held of each class of creditors, and the Act appears to contemplate that this procedure is to be followed.

However, it would seem that the holding of a joint meeting is not fatal, providing that care is taken to ensure that the various classes of creditors vote separately: *Re Langley's Ltd.,* [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.). In *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175, the court ordered that separate meetings of creditors be held and that a general meeting of all creditors should be held after the separate meetings.

The fact that a creditor does not attend the meeting of the class in which it falls does not prevent the creditor from sharing in any benefit members of that class may obtain from the plan: *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110, 99 B.C.L.R. (2d) 73, [1995] 2 W.W.R. 404, 1994 CarswellBC 620 (S.C.).

Section 6 permits voting by proxy but the statute does not give any form for the proxy. The holders of proxies, unless restricted by the terms of the document, can vote for any alteration or modification of the plan, and if the chairperson of the meeting does not permit them to vote on such alteration or modification, it is a serious irregularity: *Re Langley's Ltd.,* [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.).

By providing that all those present in person or by proxy shall have the right to vote, s. 6 prohibits a vote by show of hands: *Re Langley's Ltd., supra.* If all creditors of a particular class are in favour of the plan, there seems no reason, however, why the creditors cannot vote by show of hands with the proxy votes being separately recorded.

The form of proxy in a vote on a plan should not attempt to steer the vote of the creditor; it should leave it to the creditor to fill in the blanks: *Re Dorman Long & Co.*, [1934] 1 Ch. 635, 78 Sol. Jo 12. The proxy form can name persons who will be present at the meeting and who will vote the proxy, but it must be made clear to the creditor that he, she or it can strike out the proposed names and appoint some other person if so desired: *Re Dorman Long & Co., supra.* Proxies, if properly completed, can be voted at the meeting whether lodged before the meeting or after it has commenced: *Re Dorman Long & Co., supra.*

Although late proxies are undesirable, a proxy that is received prior to the counting of ballots can be properly accepted by the chairperson of the meeting: *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245, 6 B.L.R. (2d) 116, 90 D.L.R. (4th) 175, 110 N.S.R. (2d) 246 (*sub nom. Keddy Motor Inns Ltd., Re (No. 4)*), 299 A.P.R. 246, 1992 CarswellNS 46 (C.A.). The chairperson should count ballots promptly after they have been cast, the results should be announced and the meeting should then be adjourned: *Re Keddy Motors Inns Ltd., supra.*

The court has a discretion to decide who should be considered as a creditor for the purpose of the head count in voting on a plan. Where a trust deed provided that beneficial owners could become registered owners of unsecured debentures and assume all rights and obligations under the trust deed, the court held that votes should only be cast by the registered holders; however, because of confusion in the material sent to beneficial owners, the court extended the definition of the persons who could validly vote on the plan: *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 24, 2000 CarswellAlta 728 (Alta. Q.B.).

It is proper to provide in the order calling a meeting of creditors to consider a plan that claims of creditors will be valued at the amount recorded in the debtor's books with a comeback clause to permit creditors to seek relief. If creditors whose claims are shown as zero value do not use the comeback facility or seek relief under s. 12(2)(a)(iii), the court will not consider objections of such creditors to the amount at which their claims have been valued for the purposes of voting: *Re Quality Dino Entertainment Ltd.* (1998), 3 C.B.R. (4th) 314, 1998 CarswellOnt 399 (Ont. Gen. Div.).

Where an issue of bonds was held by a subsidiary of the debtor company, the court held that the subsidiary could not vote on the plan, since it would be equivalent to permitting the debtor to vote in favour of its own reorganization: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 166, 31 B.C.L.R. (2d) 35 (S.C.); see also *Re Hellenic Trust Ltd.,* [1975] 3 All E.R. 382, 119 Sol. Jo. 845, [1976] 1 W.L.R. 123 (S.C.).

Where, in order to obtain a creditor's vote in favour of the plan, some benefit has been given to the creditor, such as a personal guarantee, the benefit will be unenforceable. Where a plan of compromise or arrangement is offered to creditors, all creditors of a particular class must receive the same treatment: *Sadler Mfg. Co. v. Golt,* 35 C.B.R. 67, [1955] Que. S.C. 69 (S.C.). In *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175, Trainor J. of the British Columbia Supreme Court in an *obiter dictum* stated that a secret, clandestine arrangement would defeat the proceedings, but *quaere,* if it does not only render the benefit unenforceable; and see E§80, *ante,* "Secret Agreements With Creditors".

All affected constituencies must be considered, including secured, preferred and unsecured creditors, employees, landlords, shareholders and the public generally. Where a plan is supported by the other stakeholders and the monitor, and is a product of the business judgment of the board, it was open to the judge to conclude that the plan was not doomed to fail and that the process should continue: *Re Stelco Inc.* (2005), 2005 CarswellOnt 6283, 15 C.B.R. (5th) 288 (Ont. C.A.), affirming (2005), 2005 CarswellOnt 5023, 15 C.B.R. (5th) 279 (Ont. S.C.J. [Commercial List]).

The court considered a request for preliminary approval of a plan of arrangement prepared by the debtor for the purposes of presenting the plan to the company's creditors; the court held that in view of the relatively low threshold to be met by the debtor company in seeking court approval to have a plan of arrangement submitted to creditors for a vote, it was satisfied the plan should proceed and the creditors should determine whether or not they accept the plan: *Re Federal Gypsum Co.* (2007), 2007 CarswellNS 630, 2007 NSSC 384, 40 C.B.R. (5th) 39 (N.S. S.C.) (December 14, 2007). For a discussion of classes of creditors in this case, see: N§41 "Classifying Creditors".

The British Columbia Supreme Court held that it is appropriate to exercise its jurisdiction and sanction a delay of the calling of a creditors' meeting to approve a debtor company's plan of compromise or arrangement where it is necessary to ensure that there is enough time to allow for the sale and replacement of the key operating assets of the debtor company in accordance with the plan; and the claim of a secured creditor to such assets would become the claim of an unsecured creditor for the shortfall created after the sale. The court also held that, while it would be inappropriate to require that a secured creditor vote as an unsecured creditor if the balance owing by the debtor company remained partially secured, there is no reason why a secured creditor should not be required to vote as an unsecured creditor for its unsecured claim once that amount is determined. The court noted that there is nothing in the *CCAA* that considers when a creditors' meeting is to be called other than s. 4 of the *CCAA,* which provides that a meeting of the creditors or class of creditors of a company can be ordered in such manner as the court directs: *Re Hawkair Aviation Services Ltd.* (2006), 2006 CarswellBC 1637, 2006 BCSC 1006, 23 C.B.R. (5th) 215 (B.C. S.C. [In Chambers]).

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 INVESTMENT INC.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

FACTUM AND BOOK OF AUTHORITIES
(MEETING ORDER MOTION
RETURNABLE APRIL 16, 2021)

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