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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.

Applicants

FACTUM OF CCAA REPRESENTATIVE COUNSEL

(Meeting Order)
(Returnable 19 March 2021)

18 March 2021

STROSBERG SASSO SUTTS LLP
151 Bloor St West, Suite 602
Toronto, ON M5S 1S4

David R Wingfield (LSO #28710D)
dwingfield@strosbergco.com

Tel: (416) 432-1443
Fax: (866) 316-5308

HENEIN HUTCHISON LLP
235 King Street East, First Floor
Toronto, ON M5A 1J9

Marie Henein (LSO #33289T)
mhenein@hhllp.ca

Scott Hutchison (LSO #29912J)
shutchison@hhllp.ca

Tel: (416) 368-5000
Fax: (416) 368-6640

KALLOGHLIAN MYERS LLP
250 University Avenue, Suite 200
Toronto, ON M5H 3E5

Serge Kalloghlian (LSO#: 55557F)
serge@kalloghlianmyers.com

Tel: (647) 812-5615
Fax: (647) 243-6620

A DIMITRI LASCARIS LAW PROFESSIONAL CORPORATION
G101-360 Rue Saint-Jacques
Montreal, QC H2Y 1P5

A Dimitri Lascaris (LSO #50074A)
alexander.lascaris@gmail.com

Tel: (514) 941-5991
Fax: (519) 660-7845

WEISZ FELL KOUR LLP
5600-100 King St W,
Toronto, ON M5X 1C9

Steven Weisz (LSO #32102C)
sweisz@wfklaw.ca

Tel: 416.613.8281
Fax: 416.613.8290

CCAA Representative Counsel

To: The Service List

PART I ~ OVERVIEW

1. The parties opposing this motion ("Non-Settling Defendants") are defendants to misrepresentation claims under Parts XXIII and XXIII.1 of the Ontario *Securities Act.* Assuming the facts alleged in the Statement of Claim and Complaint filed in this Court and in the Southern District of New York by the Canadian and US Representative Counsel ("Representative Counsel"), respectively, are found to be true, then the Non-Settling Defendants are subject to substantial liability under the *Securities Act* to retail investors who purchased CannTrust's stock on the primary or secondary markets after these misrepresentations were made.

2. CannTrust's proposed CCAA Plan of Compromise and Arrangement ("Plan"), which Representative Counsel have agreed to support, provides substantial benefits to these investors while affording CannTrust the opportunity to restructure its affairs for the benefit of its innocent stakeholders and employees.

3. The Non-Settling Defendants are challenging CannTrust's right to put the Plan to a vote. Their opposition arises because the Plan will permit the shareholders to continue to seek damages from these defendants after CannTrust emerges from the CCAA. In effect, the Non-Settling Defendants are trying to undermine CannTrust's restructuring efforts to force these investors to make an improvident settlement with them at the risk of receiving little or nothing from CannTrust should it be liquidated and not restructured.

PART II ~ FACTS

4. It is now well-known that CannTrust produced and stored cannabis without the required licences from Health Canada.[1] CannTrust then sold stock to the public based on financial projections that were false and misleading because they were based on CannTrust's selling this cannabis when it could not lawfully do so.

5. CannTrust could not sell its stock to the public or continue as a publicly traded company without professional help. CannTrust needed its auditors to provide a clean audit opinion about its financial state. It needed underwriters to arrange for its stock to be sold to the public in Canada and the United States. It needed its directors to sign off on its financial statements and other public statements.

6. The "gatekeeper" professionals appear to have failed to perform the most basic due diligence about whether CannTrust was licensed to sell the volume of cannabis its financial statements and projections depended on. Some directors and officers had actual knowledge of the misconduct. All these professionals are subject to liability under the *Securities Act* or to CannTrust itself for CannTrust's misleading financial disclosure. They have all been sued in class actions commenced in Canada and in the United States of America by the Canadian and US Representative Counsel. They have all attempted to shift their liabilities onto CannTrust by using contracts of indemnity.

[1] Affidavit of Greg Guyatt, sworn 5 March 2021, para 4, Applicants' Motion Record, Tab 2.

7. To date, the court-ordered mediation process has not been successful in obtaining a consensual resolution of the claims made against these gatekeeper professionals, some of CannTrust's directors, and officers, or any related parties. Therefore, Representative Counsel will need to continue the litigation against them once CannTrust emerges from the CCAA.

8. Representative Counsel have agreed to support CannTrust's Plan essentially in exchange for a significant payment by CannTrust to a litigation trust for the benefit of its injured shareholders, CannTrust and its settling directors assigning their respective insurance claims, and other terms permitting these shareholders to continue their litigation against the Non-Settling Defendants. CannTrust is paying the litigation trust all the money it can afford to part with and still successfully restructure its affairs under the Plan.

9. The Plan provides a mechanism for the Non-Settling Defendants to benefit from the releases and other provisions in the Plan by making the same contributions as CannTrust has made – a cash contribution and an assignment of claims. Representative Counsel is prepared to continue the discussions that have occurred with each of the Non-Settling Defendants on a potential resolution of the claims against them. These discussions have been ongoing over the past ten months since the mediation process was commenced, and there is nearly two months until the sanction hearing for these discussions to continue. Representative Counsel is optimistic that it will be able to reach settlements with at least some of the Non-Settling Defendants during this period.

10. To ensure the success of CannTrust's Plan, Representative Counsel have compromised in at least two ways. First, the amount of money that CannTrust will pay to the litigation trust is a small fraction of the damages caused to the shareholders – less than 10% by some measures. Second, Representative Counsel have agreed to reduce the amount of their clients' entitlement to

damages from future litigation against the Non-Settling Defendants to ensure that they are not prejudiced by CannTrust's Plan.

11. But these concessions are not enough for the Non-Settling Defendants. They want more. What they want, it appears, is to add to CannTrust's financial obligations the amounts they might have to pay to the shareholders for the damages they themselves caused even though CannTrust cannot pay anymore than it has agreed to pay on account of its liabilities. [2]

12. Then they wish to use this amount to vote against CannTrust's Plan and potentially force a liquidation. All of this is to give the Non-Settling Defendants leverage to help them walk away from their liabilities to the shareholders they damaged by forcing these shareholders to take what ever they can get from CannTrust and little or nothing from them, or to risk getting nothing at all from CannTrust in a bankruptcy.

PART III ~ ISSUE

13. There is a single procedural issue on this motion: Should this Court grant CannTrust's motion for a meeting order?

---

[2] Affidavit of Greg Guyatt, sworn 5 March 2021, para 11, Applicants' Motion Record, Tab 2.

PART IV ~ SUBMISSIONS

14. CannTrust has filed submissions that explain why there is no unfairness to the proposed meeting, and no impairment to the Non-Settling Defendants' voting rights at that meeting, given that they have none. Representative Counsel support and rely on these submissions but also wish to make some additional submissions that have a bearing on the rights of the classes the Representative Counsel represent.

15. There is a public policy dimension to the CCAA process. Accordingly, it is well-accepted that courts exercising the broad remedial powers inherent in the CCAA sometimes must weigh the broader public interest as a factor in determining whether to allow a particular action, such as the meeting order in this case.[3]

16. On this point, the Court of Appeal in *Metcalfe & Mansfield Alternative Investments II Corp*[4] accepted that:

> *[T]he Act was designed to serve a "broad constituency of investors, creditors and employees". Because of that "broad constituency" the court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.*

17. The public interest is a strong factor in this restructuring because the restructuring is in part designed to achieve a public interest goal under the *Securities Act*, as well as the remedial purposes

---

[3] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at [60] ("…courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed.").

[4] *Metcalfe & Mansfield Alternative Investments II Corp, (Re)*, 2008 ONCA 587 at [52], leave to appeal to SCC refused, 32765 (19 September 2008).

of the CCAA.[5] CannTrust's insolvency, the civil liability under the *Securities Act* of the Non-Settling Defendants, and their other liabilities, are caused by their individual and collective failures to ensure that the public received truthful and accurate information about whether CannTrust was licensed to sell the cannabis its business depended on selling.

18. The civil liability provisions in the *Securities Act* for misrepresentations in financial filings were enacted after a decade of consultation and reflect the legislature's intention that – together with regulatory oversight – civil actions are to be used as an "important way of obtaining compliance with the corporate obligation for ongoing, accurate disclosure."[6]

19. Part XXIII (Liability for Misrepresentation in a Prospectus) and Part XXIII.1 (Liability for Secondary Market Disclosure) of the *Securities Act* are remedial legislation with the twin goals of (a) facilitating and enhancing access to justice for investors, and (b) deterring corporate misconduct and negligence.[7] The drafters concluded that these goals would be most effectively achieved through the *Class Proceedings Act*,[8] itself remedial legislation with the goals of access to justice and behaviour modification of wrongdoers.

---

[5] *Century Services*, *supra* at [59].

[6] *Green v Canadian Imperial Bank of Commerce*, [2014 ONCA 90](#) at [35].

[7] *Ibid*.

[8] *Ibid* at [38].

20. Only limited defences are available to underwriters, directors and selling shareholders (all of which are Non-Settling Defendants here) under these parts of the *Securities Act* for misrepresentations made to either primary or secondary market purchasers.[9]

21. It would, therefore, be contrary to the public interest to deny the persons harmed by CannTrust the right to vote in support of a Plan which accomplishes the public policy goals of the *Securities Act* and to preference the private goals of the Non-Settling Defendants to "veto" CannTrust's restructuring efforts to help them avoid their liabilities to the investing public. This is particularly unfair where the harmed investors, through Representative Counsel, have agreed to a judgment reduction against the Non-Settling Defendants such that the Non-Settling Defendants are no worse off from an indemnification perspective for Equity Claims.

PART V ~ ORDER SOUGHT

22. Representative Counsel request that the Court grant CannTrust's motion for a meeting order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

CCAA Representative Counsel

---

[9] See the "reasonable investigation" defences at *Securities Act*, RSO 1990, c S.5, s 130(5) and s 138.4(6). This defence is not available to a selling securityholder in a public share offering.

SCHEDULE "A"
LIST OF AUTHORITIES

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

2. *Metcalfe & Mansfield Alternative Investments II Corp, (Re)*, 2008 ONCA 587, leave to appeal to SCC refused, 32765 (19 September 2008)

3. *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90

SCHEDULE "B"
RELEVANT STATUTES

***Securities Act*, RSO 1990, c S.5**

s 130(5)

Idem (Defence) **–** No person or company, other than the issuer or selling security holder, is liable under subsection (1) with respect to any part of the prospectus or the amendment to the prospectus not purporting to be made on the authority of an expert and not purporting to be a copy of or an extract from a report, opinion or statement of an expert unless he, she or it,

> (a) failed to conduct such reasonable investigation as to provide reasonable grounds for a belief that there had been no misrepresentation; or
>
> (b) believed there had been a misrepresentation.

s 138.4(6)

Reasonable investigation **-** A person or company is not liable in an action under section 138.3 in relation to,

> (a) a misrepresentation if that person or company proves that,
>
> > (i) before the release of the document or the making of the public oral statement containing the misrepresentation, the person or company conducted or caused to be conducted a reasonable investigation, and
> >
> > (ii) at the time of the release of the document or the making of the public oral statement, the person or company had no reasonable grounds to believe that the document or public oral statement contained the misrepresentation; or
>
> (b) a failure to make timely disclosure if that person or company proves that,
>
> > (i) before the failure to make timely disclosure first occurred, the person or company conducted or caused to be conducted a reasonable investigation, and
> >
> > (ii) the person or company had no reasonable grounds to believe that the failure to make timely disclosure would occur.

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-20-00638930-0CL

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

FACTUM OF CCAA REPRESENTATIVE COUNSEL
(Meeting Order)
(Returnable 19 March 2021)

STROSBERG SASSO SUTTS LLP
1561 Ouellette Avenue
Windsor, ON N8X 1K5
David R. Wingfield (LSO #28710D)
dwingfield@strosbergco.com
Tel: (416) 432-1443
Fax: (866) 316-5308

HENEIN HUTCHISON LLP
235 King Street East, First Floor
Toronto, ON M5A 1J9
Marie Henein (LSO #33289T)
mhenein@hhllp.ca
Scott Hutchison (LSO #29912J)
shutchison@hhllp.ca
Tel: (416) 368-5000
Fax: (416) 368-6640

WEISZ FELL KOUR LLP
5600-100 King St W,
Toronto, ON M5X 1C9
Steven Weisz (LSO #32102C)
sweisz@wfklaw.ca
Tel: 416.613.8281
Fax: 416.613.8290

KALLOGHLIAN MYERS LLP
Suite 200, 150 King St. W
Toronto, ON M5H 1J9
Serge Kalloghlian (LSO# 55557F)
serge@kalloghlianmyers.com
Tel: (647) 812 5615
Fax: (647) 243 6620

A DIMITRI LASCARIS LAW PROFESSIONAL CORPORATION
G101-360 Rue Saint-Jacques
Montreal, QC H2Y 1P5
A. Dimitri Lascaris (LSO#50074A)
alexander.lascaris@gmail.com
Tel: (514) 941-5991
Fax: (519) 660-7845

Lawyers for the CCAA Representative Counsel