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

RESPONDING MOTION RECORD OF NEWLINE CANADA INSURANCE LIMITED

(Sanction Order – Returnable June 11, 2021)

June 4, 2021

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Newline Insurance Canada Limited

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AFFIDAVIT OF A. BENSON FORREST

I, A. Benson Forrest, of the Town of Aurora, in the Regional Municipality of York, MAKE OATH AND SAY AS FOLLOWS:

1. I am a partner in the firm Papazian Heisey Myers, solicitors for Newline Canada Insurance Limited. I have knowledge of the matters hereinafter deposed to, except as otherwise noted.

The Newline Policy and the Underlying Insurance

2. Effective February 25, 2019, a Side A DIC Directors' and Officers' Liability Insurance Policy bearing policy number CAN19941801A, was issued by Newline Syndicate 1218 at Lloyds, bound and effected through Lloyds' Approved Coverholder Newline Canada Insurance Limited (the "Newline Policy").

3. Side A DIC Directors' and Officers' Coverage relates to claims against directors and officers not indemnified by their corporation. Both Eric Paul and Paul Aceto are an "Insured Person" under the Newline Policy, which is defined to include duly elected directors and duly appointed officers of CannTrust Holdings Inc. ("CannTrust"). As a Directors' and Officers' liability insurance policy, the Newline Policy does not provide coverage for claims against the corporation, CannTrust, itself.

4. There is an underlying tower of six ABC insurers, with an aggregate of $45,000,000 USD of insurance. The underlying ABC insurers have issued policies which provide side A, B, and C coverage. In addition to the Side A coverage earlier described, Side B coverage is corporate reimbursement coverage for costs incurred in indemnifying directors and officers, and Side C coverage is entity coverage, for claims made against the corporation itself.

5. The Newline Policy provides a $5,000,000 USD aggregate limit of liability, inclusive of costs and expenses, and excess of $50,000,000 USD of underlying insurance and subject to a $5,000,000 retention by CannTrust ($45,000,000 USD of the underlying insurance is from the ABC insurers, and $5,000,000 is from the primary DIC insurer).

The Underlying Actions

6. Along with CannTrust and others, Messrs. Paul and Aceto are named as defendants in various US and Canadian securities-related civil actions (the "Underlying Actions"), which gave rise to the herein proceeding.

7. Neither Newline, nor any other insurer, is named as a defendant in the Underlying Actions.

Newline Policy Provisions

8. Without limitation, the Newline Policy includes, inter alia, the following provisions (bold in original Newline Policy, bolded italics added for emphasis):

> **IV. GENERAL CONDITIONS**
> …
> **(F) Assistance and Co-operation of Insured Person(s) and Company and Subrogation Rights of Insurer**
>
> (1) The **Insured Person(s)** and the **Company** agree to provide the **Insurer** with all information, assistance and co-operation that the **Insurer** may reasonably request and *agree that they will do nothing which in any way increases the **Insurer's** exposure under this Policy or in any way prejudices the **Insurer's** potential or actual rights of recovery against any party, including the **Company** or any **Outside Entity***, after a **Claim** is first made against the **Insured Person(s)**.
>
> (2) In the event of any payment under this Policy, *the **Insurer** shall be subrogated to all of the potential or actual rights of recovery of the **Insured Person(s)**. The **Insured Person(s)** shall execute all papers required and will do everything necessary to secure such rights including, but not limited to, the execution of such documents as are necessary to enable the **Insurer** to effectively bring a suit in their name and will provide all other assistance and co-operation which the **Insurer** may*

> *reasonably require. The **Insurer** does not waive, compromise or release any of its rights to recover **Loss** paid under this Policy from the issuers of any other insurance under which coverage may be owed or from any person or entity from which an **Insured Person** is entitled to indemnification or advancement, including the **Company** and any **Outside Entity**.*
> …
> **(K) No Action Against the Insurer and No Assignment**
>
> (1) Nothing contained in this Policy shall give any person or entity the right to join the Insurer as a party to any Claim against the Insured Person(s) to determine their liability, nor may the Insured Person(s) implead or join the Insurer in any such Claim.
>
> (2) *Assignment of the interest of any Insured Person under this Policy shall not bind the Insurer unless its consent is endorsed hereon*.

Provisions of the Second Amended and Restated CCAA Plan

Releases of Settling Insurers

9. Articles 7.2 and 7.3 of the Second Amended and Restated Plan of Compromise, Arrangement and Reorganization of CannTrust Holdings Inc., CannTrust Inc. and Elmcliffe Investments Inc. (the "Plan") relate to releases and injunctions in favour of "Released Parties". The releases and injunctions apply to "Released Claims", which is defined in the Plan to include the "Released CannTrust Claims" and "Released Securities-Related Claims". Further, if an insurer settles, they are deemed to be a "Released Party", by virtue of being included as an "Additional Settlement Party".

10. By letter dated May 12, 2021, our firm wrote to CannTrust's counsel and others regarding the then proposed Plan. The letter set out provisions of the Plan to which Newline was opposed, which, in general terms, would grant a full policy release to any insurer that had settled, regardless of paying less than their respective policy limits and regardless of being underlying insurance to Newline. Now produced and shown to me and marked as Exhibit "A" to this my Affidavit is a true copy of the May 12, 2021 letter.

11. The letter stated, inter alia, that:

> It is Newline's position that the inclusion of settling insurers as released parties – with the full benefit of the Plan's release as injunction provisions – is prejudicial to the DIC insurers and non-settling D&Os.
>
> Moreover, it is inappropriate to provide such a release and bar afforded to any insurer to settle in the CCAA context. This would completely ignore and circumvent the contractual and common

> law rights and remedies of other affected insurers. Respectfully, it is an overreaching approach that is self-serving and does not comport with any justifiable rationale.

12. In the letter, Newline requested that the proposed Plan be amended to remove settling insurers from the definition of "Additional Settlement Party" as well as Article 7.1 (and any other corresponding revisions). I note that Newline is not afforded an opportunity to vote on the Plan.

13. I am advised by Barry B. Papazian, counsel at our firm with carriage of this file, and do verily believe, that he did not receive a response to the May 12, 2021 letter. Further, I have reviewed the current proposed Plan, as circulated on June 2, 2021, and note that it has not been amended to remove settling insurers from the definition of "Additional Settlement Party".

Assignment* of *Claims to the Securities Claimant Trust

14. The Plan contemplates the assignment of claims from settling parties – which would include Mr. Paul and Mr. Aceto (in the event that Mr. Aceto settles) – to the Securities Claimant Trust. As earlier cited, the Newline Policy has a "No Assignment" Clause, which reads: "*Assignment of the interest of any Insured Person under this Policy shall not bind the Insurer unless its consent is endorsed hereon*."

15. At the herein Sanction Hearing, an Order is being sought that: *"…all of the rights and obligations of CannTrust Holdings and each Settlement Party to and in respect of the Assigned Claims shall be assigned to and assumed by the Securities Claimant Trust and such assignment is valid and binding upon the applicable Non-Settlement Parties in respect of such Assigned Claims* ***notwithstanding any restriction or prohibition contained in any insurance policy****,…"*(bold added).

SWORN OR AFFIRMED remotely by video conference by A. Benson Forrest stated as being located in the Town of Aurora, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on June 4, 2021, in accordance with O. Reg 431/20

Michael Krygier-Baum

MICHAEL KRYGIER-BAUM (LSO#: 64108V)
Commissioner for Taking Affidavits

A. Benson Forrest

A. BENSON FORREST

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Proceeding commenced at TORONTO

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Solicitors for Newline Canada Insurance Limited

This is Exhibit "A" referred to in
the Affidavit of A. Benson Forrest
sworn before me this 4th day
of June, 2021

Michael Krygier-Baum

………………………………………………………………
A Commissioner for Taking Affidavits

Papazian | Heisey | Myers Barristers & Solicitors

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A.B. Forrest
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S. Levine

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** Certified by the Law Society as a Specialist in Civil Litigation*

May 12, 2021

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Dear Counsel:

Re: *Re CannTrust Holdings Inc.*, CV-20-00638930-00CL

We are counsel for the excess DIC Insurer Newline Insurance Canada Limited (Lloyd's) with regard to the proposed amended draft Plan of Compromise, Arrangement and Reorganization of CannTrust Holdings Inc., CannTrust Inc. and Elmcliffe Investments Inc. (the "Plan").

In reviewing the Plan's proposed language, it is apparent that it seeks very broad injunctions which would, inter-alia:

(1) bar non-settling insurers from suing and/or seeking indemnity from settling insurers;

(2) bar non-settling D&O's from suing and/or seeking indemnity from CannTrust; and

(3) bar insurers who indemnify non-settling D&O's from suing and/or seeking indemnity from CannTrust.

<u>The Objectionable Plan Language</u>

Articles 7.2 and 7.3 of the Plan relate to releases and injunctions in favour of "Released Parties". The releases and injunctions apply to "Released Claims", which is defined in the Plan to include the "Released CannTrust Claims" and "Released Securities-Related Claims". Further, if an insurer settles, they are deemed to be a "Released Party", by virtue of being included as an "Additional Settlement Party" (all as defined in the Plan).

Articles 7.2 and 7.3 of the Plan provide:

> 7.2 **Plan Releases**
> At the Effective Time, the Released Parties will be fully, finally, irrevocably and forever released and discharged from all Released Claims in accordance with this CCAA Plan and to the extent provided in the CCAA Sanction Order.
>
> 7.3 **Injunctions**
> (1) From and after the Effective Time, all Persons are permanently and forever barred, estopped, stayed and enjoined: (i) with respect to any and all Released Claims from commencing, conducting, continuing or making in any manner, directly or indirectly, any action, suit, claim, demand or other proceeding of any nature or kind whatsoever (including any proceeding in a judicial, arbitral, administrative or other forum) against any of the Released Parties; (ii) with respect to any and all Released Claims from enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against any of the Released Parties or their property… (underline added)

"Released CannTrust Claims" is defined as:

> (A) any and all Claims and (B) any and all other demands, claims (including claims for contribution or indemnity…), actions, causes of action, … and recoveries on account of any liability, obligation, demand or cause of action of whatever nature (including for, alleged oppression, misrepresentation, wrongful conduct, fraud or breach of fiduciary duty by any Released CannTrust Party) that any Affected Creditor or other Person has or may be entitled to assert against any of the Released CannTrust Parties,….. (underline added)

Further, "Released Securities-Related Claims" is defined as:

> (A) any and all Securities Claims and Securities-Related Claims against any of the Released Parties, (B) any and all Securities-Related Indemnity Claims against any of the Released Parties, and (C) any and all other demands, claims (including claims for contribution or indemnity), actions, causes of action, … and recoveries on account of any liability, obligation, demand or cause of action of whatever nature (including for, alleged oppression, misrepresentation, wrongful conduct, fraud or breach of fiduciary duty by any Settlement Party) that any Securities Claimant or Co-Defendant has or may be entitled to assert against any of the Released Parties, …(underline added)

In turn, "Securities-Related Indemnity Claims" is defined as:

> "any claim of any Person that has been or could be asserted against a Settlement Party (whether pursuant to an agreement, under applicable law or otherwise) for indemnity, advancement, contribution, reimbursement, set-off or otherwise, arising from or in connection with any Securities Claim or Securities-Related Claim asserted or that could be asserted against such Person or arising from or in connection with any other claim asserted or that could be asserted against such Person by any other Person that is not a Settlement Party in relation to a Securities-Related Matter, including, for greater certainty, a Defence Costs Indemnity Claim.

Newline's Position and Request for Plan Revision

On April 6, 2021, counsel for the DIC insurer, Arch, had a discussion with the Monitor's counsel, and raised the issue of the Plan's proposed language which would include settling insurers as released parties (and the injunctions applying to proceedings against settling insurers).

After subsequently following up with the Monitor's counsel, on the eve of the April 16, 2021 hearing, the DIC insurers were advised that the inclusion of settling insurers as released parties was likely intentional.

Regardless of the intentionality of including settling insurers as released parties, Newline hereby requests that the Plan be amended to remove settling insurers from the definition of "Additional Settlement Party" as well as Article 7.1 of the Plan (and any other corresponding revisions).

It is Newline's position that the inclusion of settling insurers as released parties – with the full benefit of the Plan's release as injunction provisions – is prejudicial to the DIC insurers and non-settling D&Os.

Moreover, it is inappropriate to provide such a release and bar afforded to any insurer to settle in the CCAA context. This would completely ignore and circumvent the contractual and common law rights and remedies of other affected insurers. Respectfully, it is an overreaching approach that is self-serving and does not comport with any justifiable rationale.

All of the arguments made by the opposing respondents to the Plan are equally, if not more, applicable to the DIC insurers. The DIC insurers are not being provided an opportunity to vote on the Plan, despite the prejudicial effect that the Plan – if approved as currently drafted – would have on our client and other insurers.

In our submission, nullifying the contractual and common law rights of any Insurer is remote and removed from bona fide Plan purposes. The Insurers are not a party to the litigation. The proposed Plan seeks to justify and even reward the potentially unilateral decisions to not indemnify, or not do so fully.

It is Newline's position that by effectively granting certain insurers a full policy release despite potentially settling below their limits and without the consent of D&Os and other Insurers affected, the proposed Plan would absolve such Insurer of its obligation to pay out policy limits without fair adjudication of rights of contribution and indemnity.

We respectfully request that the Plan be revised to exclude settling insurers from the definition of "Released Party".

Yours truly,

Barry Papazian

Barry B. Papazian

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