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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

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

Applicants

FACTUM OF THE APPLICANTS
(Sanction Order)
(Returnable June 11, 2021)

June 8, 2021

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TABLE OF CONTENTS

PAGE

PART I—INTRODUCTION

1. The CannTrust Group brings this motion to sanction the second amended and restated plan of compromise, arrangement and reorganization of CannTrust Holdings Inc., CannTrust Inc. and Elmcliffe Investments Inc. (the "**CannTrust Plan Companies**") under the *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**") and the *Business Corporations Act* (Ontario) dated June 2, 2021 (the "**CCAA Plan**").[1]

2. The CCAA Plan is the only realistic route available that will allow the CannTrust Group to resolve over $500 million in Securities Claims and other claims asserted against them and emerge from these proceedings as a going concern. If the CCAA Plan is not implemented in a timely manner, the only realistic alternative would be the continuation of multi-party litigation in many jurisdictions and a cessation of operations and liquidation of the CannTrust Group which would result in significant negative consequences for the CannTrust Group's approximately 280 employees and other stakeholders.[2]

3. The purpose of the CCAA is to permit debtor companies such as the CannTrust Group to continue to carry on business and avoid the devastating social and economic consequences of liquidating their assets.[3] A plan under the CCAA is a compromise, it cannot be expected to be perfect.[4] It is expected that various rights and remedies will be sacrificed to achieve a

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[1] Capitalized terms used and not otherwise defined herein have the meanings given to them in the Affidavit of Greg Guyatt, sworn June 2, 2021 ("**Guyatt Affidavit**"), Motion Record of the Applicants (Sanction Order), dated June 2, 2021 ("**Motion Record**"), Tab 2.

[2] Guyatt Affidavit at para. 14, Motion Record, Tab 2.

[3] *Century Services Ltd., Re*, 2010 SCC 60 at para. 15 [***Century Services***].

[4] *Sammi Atlas Inc., Re*, 1998 CanLII 14900 (Gen. Div.) at para. 4 [***Sammi Atlas***].

reasonable compromise for all concerned that is viable in the circumstances faced by the debtor company.[5]

4. The CannTrust Group had two primary objectives when it commenced these proceedings (the "**CCAA Proceedings**"). First, to remediate and restructure its business operations. Second, to resolve more than $500 million of claims asserted against it in the multiple putative securities class actions and other actions that were brought against it and others across Canada and the United States (the "**Actions**").[6]

5. The CannTrust Group has achieved the first of these primary objectives. The facilities and employees of the CannTrust Group, which were largely idle for nearly a year as the CannTrust Group pursued the reinstatement of its cannabis licences following the Health Canada Audits in June and July 2019, have returned to production and the CannTrust Group has returned to the recreational and medical cannabis markets.[7]

6. The CannTrust Group brings this motion as the next key step in achieving the second of these primary objectives. Following extensive negotiations facilitated by the Hon. Dennis O'Connor, Q.C. (the "**Court-Appointed Mediator**"), the CannTrust Group reached an agreement with the representative plaintiffs and their counsel in the lead Actions in Canada and the United States regarding a framework for the settlement of all Securities Claims against CannTrust Holdings Inc. ("**CannTrust Holdings**") and various related claims, while

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[5] *Canadian Airlines Corp., Re*, 2000 ABQB 442 at paras. 178-179 [***Canadian Airlines***].
[6] Guyatt Affidavit at para. 4, Motion Record, Tab 2.
[7] Guyatt Affidavit at para. 5, Motion Record, Tab 2.

preserving the ability of other co-defendants in the Actions and Insurers to participate in and benefit from the settlement.[8]

7. The CCAA Plan implements this framework and addresses the other claims against the CannTrust Plan Companies.[9] Four of the six groups of co-defendants in the Actions that initially opposed the CCAA Plan have also chosen to participate in the framework by reaching settlements that will also be effected pursuant to the CCAA Plan (the "**Settling Defendants**").[10]

8. The CCAA Plan fairly balances the interests of all stakeholders:

(a) General Unsecured Creditors of the CannTrust Plan Companies will receive payments or distributions greater than or equal to their estimated recovery in a liquidation;

(b) Securities Claimants will receive distributions from the Securities Claimant Trust. In aggregate, the CannTrust Group and the Settling Defendants have agreed to contribute $83 million in cash and assign certain claims to the trust; and

(c) Co-Defendants in the Actions that have not reached settlements (the "**Non-Settling Defendants**") will benefit from a judgment reduction provision and other protections in the proposed CCAA Sanction Order that are intended to render the CCAA Plan economically neutral to them.

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[8] Guyatt Affidavit at para. 6, Motion Record, Tab 2.
[9] Guyatt Affidavit at para. 7, Motion Record, Tab 2.
[10] Guyatt Affidavit at para. 86, Motion Record, Tab 2.

9. The CCAA Plan may not be perfect from the perspective of each stakeholder. It does not contain all of the provisions that each stakeholder would like, or that they may be entitled to if the CannTrust Group were solvent. The CannTrust Group has done what it can to address the concerns of stakeholders. The CCAA Plan reflects the overall compromise that the CannTrust Group has been able to achieve through extensive efforts facilitated by the Court-Appointed Mediator. The CCAA Plan is supported by a broad constituency of stakeholders including the General Unsecured Creditors and Securities Claimants, who voted overwhelmingly to approve the CCAA Plan, all of the different Settling Defendants, the DIP Lender, the Monitor (Ernst & Young Inc.) and the CRO (FTI Consulting Canada Inc.).

10. For the reasons set out below, this Court should sanction the CCAA Plan and grant the other ancillary relief sought in the CCAA Sanction Order to facilitate the implementation of the CCAA Plan.

PART II—THE FACTS[11]

(i) The CCAA Plan

11. The CCAA Plan will compromise and release all of the CannTrust Plan Companies' liabilities in connection with the Actions and certain other liabilities.[12] Generally, the CCAA Plan provides for the following classes of affected creditors and treatment of their claims:

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[11] The Guyatt Affidavit sets out in detail the facts concerning the CannTrust Group, the circumstances leading to the CCAA Proceedings, the restructuring of the CannTrust Group's business operations during the course of the CCAA Proceedings, and the extensive negotiations facilitated by the Court-Appointed Mediator that led to the settlements that are reflected in the RSA, the Additional RSAs, the Zola RSA and the CCAA Plan.

[12] Guyatt Affidavit at para. 11, Motion Record, Tab 2.

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

(b) General Unsecured Claims (Elmcliffe): the sole General Unsecured Creditor of Elmcliffe Investments Inc. ("**Elmcliffe**") will be paid in full pursuant to a payment arrangement agreed upon between Elmcliffe and that Creditor;

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

(d) Securities Claims: Securities Claimants with Proven Claims will receive distributions from the Securities Claimant Trust, to which: (i) CannTrust Holdings will make a Cash Contribution of $50 million; (ii) the Settling Defendants will make Cash Contributions of $33 million in aggregate; and (iii) the Settlement Parties will assign certain claims against the Non-Settling Defendants and Insurers.[13]

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

(a) Securities-Related Indemnity Claims: The CCAA Sanction Order will release all Securities-Related Indemnity Claims held by the two remaining Non-Settling Defendants, other than certain Defence Costs Indemnity Claims. However, the Non-Settling Defendants will benefit from a judgment reduction

[13] Guyatt Affidavit at paras. 102-110, Motion Record, Tab 2.

provision and other protections in the CCAA Sanction Order, as detailed further below; and

(b) Channelled Claims: All Channelled Claims will be channelled to and limited to recovery from the Securities Claimant Trust and, if applicable, from any Person who is not a Released Party.[14]

(ii) The Meetings

13. Meetings of the Affected Creditors were held on May 28, 2021. The CCAA Plan was overwhelmingly approved by each of the four classes of Affected Creditors as follows:

(a) **Opco GUC Class**: 92.0% by number and 84.8% by value;

(b) **Elmcliffe GUC Class**: 100% by number and 100% by value;

(c) **CannTrust Holdings GUC Class**: 75% by number and 95% by value; and

(d) **Securities Claimant Class**: 100% by number and 100% by value.[15]

PART III—ISSUES AND THE LAW

14. The issues on this motion, and the position of the CannTrust Group with respect to each, are:

(a) Should the Court sanction the CCAA Plan? ***Yes.***

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[14] Guyatt Affidavit at paras. 111-116, Motion Record, Tab 2.

[15] Guyatt Affidavit at paras. 153, Motion Record, Tab 2; Eleventh Report of the Monitor dated June 2, 2021 at paras. 32, 38, 45-47, 54 ("**Eleventh Report**").

(b) Should the Court approve the assignment of the Assigned Claims? ***Yes.***

(c) Should the Court grant the releases and injunctions sought? ***Yes.***

(d) Should the Court grant the ancillary relief sought? ***Yes.***

(e) Should the Court extend the Stay Period? ***Yes.***

(i) The CCAA Plan Should be Sanctioned

a. The Plan Sanction Test

15. The general requirements for court approval of a plan of compromise or arrangement under the CCAA are well established:

(a) there must be strict compliance with all statutory requirements;

(b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA and prior orders of the Court in the CCAA proceedings; and

(c) the plan must be fair and reasonable.[16]

b. Strict Compliance With Statutory Requirements

16. With respect to the first part of the test, factors that may be considered by the Court include whether: (i) the applicant comes within the definition of a "debtor company" under section 2 of the CCAA; (ii) the applicant has total claims against it in excess of $5 million;

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[16] *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 22 [***Lydian***]; *Canwest Global Communications Corp., Re*, 2010 ONSC 4209 at para. 21 [***Canwest Global***]; *Canadian Airlines* at para. 60.

(iii) the notice calling the meeting was sent in accordance with the orders of the Court; (iv) the creditors were properly classified; (v) creditor meetings were properly constituted; (vi) the voting was properly carried out; and (vii) the plan was approved by the requisite double majority.[17]

17. The CannTrust Plan Companies have complied with the procedural requirements of the CCAA, the Amended and Restated Initial Order, the Claims Procedure Order, the Meeting Order and all other Orders granted by the Court in these proceedings. In particular:

(a) at the time that the Initial Order was granted, this Court found that the CCAA applied to the CannTrust Group and that the CannTrust Group's liabilities exceeded the $5 million threshold under the CCAA;[18]

(b) notice of the Meetings was provided to Affected Creditors in accordance with the Meeting Order;[19]

(c) the classification of creditors was approved by this Court;[20]

(d) the Meetings were properly constituted, and voting on the CCAA Plan at the Meetings was properly carried out in accordance with the Meeting Order;[21] and

[17] *Lydian* at para. 24; *Canwest Global* at para. 15; *Canadian Airlines* at para. 62.

[18] Amended and Restated Initial Order dated April 9, 2020 at para. 3 ("**Amended and Restated Initial Order**"), Exhibit "B" to the Guyatt Affidavit, Motion Record, Tab 2B; Endorsement of Hainey J., dated March 31, 2020 at para. 10(a).

[19] Guyatt Affidavit at para. 141, Motion Record, Tab 2; Ninth Report of the Monitor dated April 22, 2021 at para. 48.

[20] Meeting Order dated April 16, 2021 at para. 10, Exhibit "R" to the Guyatt Affidavit, Motion Record, Tab 2R.

[21] Guyatt Affidavit at paras. 150-154, Motion Record, Tab 2; Eleventh Report at para. 29.

(e) the CCAA Plan was overwhelmingly approved at the Meetings, satisfying the required majorities set out in section 6 of the CCAA and the Meeting Order.[22]

18. In addition, the CCAA Plan complies with the statutory requirements set out in Sections 6(3), 6(5) and 6(6) of the CCAA, which provide that the Court may not sanction a plan of arrangement unless it contains certain specified provisions concerning Crown claims, employee claims and pension claims.[23] Such claims constitute CCAA Priority Payment Claims, which are Unaffected Claims under the CCAA Plan and will be paid in full.[24]

19. Further, in compliance with subsection 6(8) of the CCAA,[25] the only entity that is paying any equity claims against it, CannTrust Holdings, is paying all General Unsecured Claims against it in full.[26]

20. For the foregoing reasons, the statutory requirements for the sanction of the CCAA Plan under section 6 of the CCAA have been satisfied.

c. <u>No Matters Unauthorized</u>

21. In considering whether any unauthorized steps have been taken by the debtor company, the Court should rely on the reports of the Monitor as well as the materials filed by the parties and their stakeholders.[27]

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[22] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s. 6(1) ("**CCAA**"); Guyatt Affidavit at paras. 153, Motion Record, Tab 2; Eleventh Report at paras. 32, 38, 45-47, 54.

[23] CCAA, ss. 6(3), 6(5) and 6(6); *Canwest Global* at para. 16.

[24] CCAA Plan, ss. 1.1 "CCAA Priority Payment Claims", 2.3(c), 4.6(b), Motion Record, Tab 2A.

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

[26] CCAA Plan, 3.4(2)(c), Motion Record, Tab 2A.

[27] *Canwest Global* at para. 17; *Canadian Airlines* at para. 64.

22. Throughout the course of these proceedings, the CannTrust Group has acted in good faith and with due diligence and has complied with the requirements of the CCAA and the Orders of this Court.[28] The CannTrust Group has filed affidavits to keep this Court apprised of all material aspects of the restructuring. Also, the Monitor has provided regular reports, none of which have identified any non-compliance with the CCAA. The Stay Period has been extended on five occasions.[29] In each instance, the Court had to be satisfied that the CannTrust Group had acted, and was acting, in good faith and with due diligence.

23. For the foregoing reasons, the second requirement of the test relating to the sanctioning of the CCAA Plan has been satisfied.

d. The Plan is Fair and Reasonable

24. The final element of the test requires the Court to consider whether the CCAA Plan represents a fair and reasonable balancing of interests, in light of: (i) the relative degrees of prejudice that would flow from sanctioning or refusing to sanction the CCAA Plan; (ii) the other commercial alternatives available; and (iii) the context of the CCAA Proceedings.[30]

25. In reviewing the fairness and reasonableness of the CCAA Plan, the Court does not and should not require perfection.[31] As the Court stated in *Canadian Airlines*:

> In summary, in assessing whether a plan is fair and reasonable, courts have emphasized that perfection is not required... Rather, various rights and remedies must be sacrificed to varying degrees to result in a reasonable, viable compromise for all

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[28] Guyatt Affidavit at para. 15(d), Motion Record, Tab 2.

[29] Guyatt Affidavit at paras. 22, 184, Motion Record, Tab 2.

[30] *Lydian* at para. 29.

[31] *Sammi Atlas* at para. 4; *Canadian Airlines* at para. 178; *Lutheran Church Canada (Re)*, 2016 ABQB 419 at para. 62.

> concerned. The court is required to view the "big picture" of the plan and assess its impact as a whole…
>
> Fairness and reasonableness are not abstract notions, but must be measured against the available commercial alternatives. The triggering of the statute, namely insolvency, recognizes a fundamental flaw within the company. In these imperfect circumstances there can never be a perfect plan, but rather only one that is supportable.[32]

26. The Court's discretion should be informed by the objectives of the CCAA, namely to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, employees and in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation.[33]

27. Courts have also been guided by the following additional considerations in deciding whether a plan of compromise or arrangement fairly balances the interests of all stakeholders and is fair and reasonable: (i) whether the claims were properly classified and whether the requisite majority of creditors approved the plan; (ii) what creditors would receive on a liquidation or bankruptcy compared to the plan; (iii) available alternatives to the plan and bankruptcy; (iv) oppression of the rights of creditors; (v) unfairness to shareholders; and (vi) the public interest.[34]

28. Each of these factors supports the approval of the CCAA Plan by this Court. In particular:

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[32] *Canadian Airlines* at paras. 178-179.

[33] *Canadian Airlines* at para. 95; *Canwest Global* at para. 20.

[34] *Canadian Airlines* at para. 96; *Canwest Global* at para. 21.

(a) ***Classification of Creditors***: The classification of Affected Creditors was appropriate in the circumstances. General Unsecured Creditors were classified by debtor company (CannTrust Opco, Elmcliffe and CannTrust Holdings) and have been offered distinct treatment, so it was appropriate for them to be placed in separate classes. Since Securities Claims rank after General Unsecured Claims against CannTrust Holdings and were offered distinct treatment, they were placed in a separate class. This classification was approved pursuant to the Meeting Order;[35]

(b) ***Creditor Approval:*** The CCAA Plan was overwhelmingly approved by each class of Affected Creditors at the Meetings;[36]

(c) ***Greater Recovery than Bankruptcy*:** The Affected Creditors are generally expected to receive a recovery under the CCAA Plan greater than or equal to their estimated recovery in a liquidation and certainly in a more timely manner, specifically:

    (i) General Unsecured Creditors of CannTrust Opco will be entitled to distributions from the GUC Distribution Pool, whereas in a liquidation scenario it is estimated that they would receive nothing;

    (ii) General Unsecured Creditors of CannTrust Holdings and Elmcliffe will be paid in full, as they would be in a liquidation scenario; and

[35] Guyatt Affidavit at paras. 98-101, Motion Record, Tab 2; Meeting Order at para. 10, Motion Record, Tab 2R.
[36] Guyatt Affidavit at para. 153, Motion Record, Tab 2; Eleventh Report at paras. 32, 38, 45-47, 54.

(iii) Securities Claimants with Proven Claims will receive distributions from the Securities Claimant Trust. CannTrust Holdings and the Settling Defendants have agreed to contribute $83 million in cash along with the Assigned Claims to the trust. Absent the CCAA Plan and a resolution to the litigation, and considering the eroding cash position of the CannTrust Group, the timing and quantum of any distributions to the holders of equity claims in a liquidation scenario is highly uncertain.[37]

(iv) ***The Plan is in the Public Interest***: The CCAA Plan will allow the CannTrust Group to emerge from the CCAA Proceedings, which will benefit the CannTrust Group's approximately 280 employees, the consumers and medical patients that rely on its products, its suppliers and the communities in which it operates.[38] Approval of the CCAA Plan thus serves the public interest and the broader purpose of the CCAA.

e. <u>The Non-Settling Defendants</u>

29. The CCAA Plan includes the following provisions that were added to address certain concerns raised by Non-Settling Defendants:

(a) a judgment reduction provision pursuant to which the amount of any judgment obtained by a Securities Claimant against a Non-Settling Defendant would be reduced by the amount that the Non-Settling Defendant would have recovered

[37] Guyatt Affidavit at para. 157(c), Motion Record, Tab 2; Eleventh Report at para. 126.
[38] Guyatt Affidavit at para. 14, Motion Record, Tab 2.

against a Released Party on account of any Securities-Related Indemnity Claim if such claim had not been released, allocated between Non-Settling Defendants on a *pro rata* basis;

(b) any contribution and indemnity claim that the Settlement Parties may have against Non-Settlement Parties will be barred;

(c) procedural protections in favour of the Non-Settling Defendants with respect to their access to documents and witnesses; and

(d) any Defence Costs Indemnity Claim held by a Non-Settling Defendant will be an Unaffected Claim and will not be compromised under the CCAA Plan.[39]

30. The CannTrust Group expects that the Non-Settling Defendants will argue that, in order for the CCAA Plan to be sanctioned, the Securities-Related Claims that may be brought against the Non-Settling Defendants in the Actions must be limited to the Non-Settling Defendant's several liability (the "**Judgment Reduction**").

31. The necessity and appropriateness of a full Judgment Reduction must be evaluated in the context of the CCAA Proceedings of the CannTrust Plan Companies rather than merely a traditional class action settlement and considering the interests that a Judgment Reduction provision seeks to balance.

32. Recoverability is at the very heart of the rationale for Judgment Reduction provisions. The purpose of a Judgment Reduction provision is "to effectively put the non-settling

[39] Guyatt Affidavit at para. 113, Motion Record, Tab 2.

defendant in the same economic position as if it paid the plaintiff in full and recovered any indemnity from the settling defendant."[40] It does this by requiring the plaintiff to reduce its recovery from the non-settling defendant "by the amount the non-settling defendant would have been able to recover from the settling defendant as indemnity."[41]

33. If the settling defendant is solvent, this will be the amount of the settling defendant's proportionate share of the plaintiff's damages – thus the plaintiff agrees to limit its claim against the non-settling defendants to their several liability.[42] If the settling defendant is insolvent, the non-settling defendant will not be able to recover on its indemnity in full (or at all) and the plaintiff's claim against the non-settling defendant is not required to be limited accordingly.[43] Granting a full Judgment Reduction in those circumstances would put the non-settling defendant in a better position than it was in before the settlement.[44] It may also put them in a better position than other settling defendants, who logically would have taken into account the insolvency of the central defendant when agreeing to the amount of their contributions relative to their several liability.

34. The Judgment Reduction contemplated by the CCAA Plan and CCAA Sanction Order would reduce the amount of the judgments that can be obtained collectively against the Non-Settling Defendants by (i) the $50 million to be contributed by the CannTrust Plan Companies to the Securities Claimant Trust, and (ii) the amount that the Non-Settling Defendants would

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[40] *Endean v. St. Joseph's General Hospital*, 2019 ONCA 181 at para. 53 [***Endean***].

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

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

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

[44] *Endean* at para. 57.

have actually recovered against a Released Party but for the release of the Non-Settling Defendants' contribution and indemnity claims.[45]

35. A functionally identical Judgment Reduction provision was recently granted in the CCAA proceedings of *Aquadis International Inc.*, with leave to appeal being denied by the Quebec Court of Appeal.[46] In that case, Aquadis sold defective faucets to a number of Canadian retailers. The monitor commenced proceedings on behalf of Aquadis' creditors against the manufacturer and distributor of the faucets, insurers and certain other parties. The Monitor reached settlements with certain of the insurers.

36. To make these settlements economically neutral to non-settling parties, the order approving the settlement contained a Judgment Reduction provision that any claim brought against the non-settling parties would be reduced by: (i) a proportionate amount of the settlement proceeds paid by the settling defendants; and (ii) the amount that the non-settling party <u>could have in fact recovered</u> against the settling defendants had the liability of the settling defendants not been discharged.[47]

37. The Court dismissed the objections of the non-settling parties and held that the Judgment Reduction provision based on recoverability was appropriate and created an outcome that was "economically neutral" for the non-settling parties.[48]

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[45] CCAA Plan, ss. 7.3(2) and 8.2(j), Motion Record, Tab 2A.

[46] *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2018 QCCS 2945 [***Aquadis***], leave to appeal denied: *Arrangement relatif à 9323-7055 Québec inc.*, 2018 QCCA 1345.

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

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

38. The Judgment Reduction provision based on recoverability renders the CCAA Plan economically neutral to the Non-Settling Defendants. The CCAA Plan does not have to *improve* the position of a Non-Settling Defendant to be fair and reasonable.

(ii) It is Appropriate to Approve the Assignment of the Assigned Claims

a. <u>A Claim is Assignable if Assignee Has a Commercial Interest in Enforcement</u>

39. As a general rule, causes of action in tort and contract are not assignable.[49] However, this general rule does not apply where the assignee has a property interest or legitimate commercial interest in the enforcement of the claim.[50] The term "commercial interest" means a financial interest. It need not arise from commercial dealings in the narrow sense.[51] In determining whether this exception is established, the Court should look at the totality of the transaction.[52] Further, in the context of a CCAA proceeding, the Court should also be mindful of the remedial purpose of the CCAA and the broad power given to the Court under section 11 to make any order it considers appropriate in the circumstances to facilitate that purpose.[53]

40. Courts have found that the assignee had a commercial interest in the assigned cause of action and the exception was established in the following circumstances, among others:

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[49] *Fredrickson v. I.C.B.C.*, 1986 CanLII 1066 (BCCA) at para. 23, reasons adopted by the Supreme Court of Canada in 1988 CanLII 38 (SCC) [***Fredrickson***].

[50] *Fredrickson* at para. 26; *Gentra Canada Investments Inc. v. Lipson*, 2011 ONCA 331 at para. 21 [***Gentra***].

[51] *Fredrickson* at para. 37; *Gentra* at para. 26.

[52] *Fredrickson* at para. 37; *Gentra* at para. 26.

[53] *Century Services* at paras. 59, 70-71.

(a) the assignment of a claim by a defendant against their insurer for coverage with respect to damages suffered by a plaintiff, to that plaintiff;[54]

(b) the assignment of a claim by a corporation related to harm suffered by the corporation, to its shareholders or another vehicle for the benefit of its shareholders;[55]

(c) the assignment of claims to creditors or a trust for the benefit of creditors;[56] and

(d) the assignment of a claim by an insolvent person to an acquirer of its assets.[57]

41. In *Caisse Populaire Vanier Ltee v. Bales*, a bankrupt failed to pay certain promissory notes owing to the plaintiff. The plaintiff requested that the bankruptcy trustee assign a solicitor's negligence claim that the bankrupt may have had against his lawyer for advice given in connection with the promissory notes. The Court held that the plaintiff had a commercial interest in the claim as he was attempting to recoup losses that the defendant was unable to pay, which were related to the negligent advice provided by the solicitor.[58]

42. The Supreme Court of Canada has made it clear that, although a personal services contract may not be assignable, the assignment of a cause of action for damages based on a

[54] *Fredrickson* at para. 42; *Societa Italiana Assicurazioni Trasporti v. Canadian Marine Underwriters Ltd.*, 1994 CarswellOnt 803 (Gen. Div.) at paras. 45-47.

[55] *Plastyle Inc. v. CKF Inc.*, 1992 CarswellOnt 153 (Gen. Div.) at paras. 20-21 [***Plastyle***]; *Coulter v. E.L. Huckerby & Associates Inc.*, 1998 CarswellOnt 849 (Gen. Div.) at para. 140; *Uniserve International Products Inc. v. Alberta Treasury Branches*, 2003 ABQB 475 at para. 48.

[56] In the Matter of Sino-Forest Corporation (Court File No. CV-12-9667-00CL), Plan Sanction Order issued December 10, 2012 at para. 22 ("**Sino-Forest Sanction Order**"); *Caisse Populaire Vanier Ltee v. Bales*, 1991 CarswellOnt 173 (Gen. Div.) [***Bales***].

[57] *Gentra* at para. 36; *1773907 Alberta Ltd v Davidson*, 2015 ABCA 150 at paras. 38-41.

[58] *Bales* at para. 48.

breach of that contract is permitted if the legitimate commercial interest exception is established.[59]

b. Securities Claimant Trust Has a Commercial Interest in the Assigned Claims

43. The CCAA Plan and CCAA Sanction Order provide for the assignment of the Assigned Claims to the Securities Claimant Trust.[60] The Assigned Claims include: (i) claims against Insurers; and (ii) an auditor negligence claim that the CannTrust Group may have against its former auditor, KPMG LLP ("**KPMG**").[61]

44. The Securities Claimant Trust is being established for the benefit of Securities Claimants which are current or former shareholders of CannTrust Holdings that suffered losses related to misrepresentations in its financial statements.[62] The Securities Claimants have a legitimate commercial interest in each of these two categories of assigned claims:

(a) Insurance Claims: The Securities Claimants have brought the Actions against CannTrust Holdings and its directors and officers, who may have claims against the Insurers for any liability that they are subject to.[63] As noted above, courts have held that plaintiffs have a legitimate commercial interest in a claim by the defendant against their insurer for coverage with respect to damages suffered by the plaintiff.[64]

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[59] *Fredrickson* at para. 48.

[60] CCAA Plan, ss. 3.5(2)(b), 8.2(s), Motion Record, Tab 2A; Draft Sanction Order at para. 30, Motion Record, Tab 3.

[61] Guyatt Affidavit at paras. 64-65, 108(b).

[62] Guyatt Affidavit at para. 101.

[63] Affidavit of Serge Kalloghlian, sworn June 2, 2021 ("**Kalloghlian Affidavit**") at para. 43, Motion Record of the CCAA Representatives, dated June 2, 2021 ("**CCAA Representatives Motion Record**"), Tab 1.

[64] See para. 41(a) above.

(b) Claim Against KPMG: The CCAA Representatives believe that CannTrust Holdings has a potential claim against KPMG for breach of contract and negligence in the performance of audit services to CannTrust Holdings.[65] As noted above, courts have held that shareholders and creditors have a legitimate commercial interest in a claim for harm suffered to the corporation or person.[66]

45. The Actions brought by the Securities Claimants assert damages in excess of $500 million. The CannTrust Group and the Settling Defendants have agreed to make Cash Contributions of $83 million to the Securities Claimant Trust – which is significantly less than their alleged losses. The assignment of the Assigned Claims is part of the overall consideration being paid by CannTrust Holdings and the Settlement Parties to Securities Claimants to resolve the Actions against them. Accordingly, this is not a case where the assignment of the Assigned Claims gives the Securities Claimants a potential for profit. It is an attempt to minimize their losses, which has generally been held to be valid.[67]

46. Accordingly, it is appropriate for the Court to approve the assignment of the Assigned Claims to the Securities Claimant Trust.

(iii) The Releases are Appropriate

47. It is well established that courts have the jurisdiction to sanction plans of compromise or arrangement under the CCAA containing third party releases.[68] Courts will generally

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[65] Kalloghlian Affidavit at paras. 39-41, CCAA Representatives Motion Record, Tab 1.

[66] See para. 41(b) and 41(c) above.

[67] *Plastyle* at para. 20.

[68] *Pacific Exploration & Production Corporation (Re)*, 2016 ONSC 5429 at para. 23 [***Pacific Exploration***]; *Lydian* at para. 53.

approve such third party releases where the releases are rationally tied to the resolution of the debtor's claims and will benefit creditors generally.[69]

48. In applying this test, the Court should consider the following factors:

(a) whether the parties to be released from claims are necessary to the restructuring;

(b) whether the claims released are rationally connected to the purpose of the CCAA Plan and necessary for it to succeed;

(c) whether the CCAA Plan would fail without the releases;

(d) whether the third parties being released contributed in a tangible and realistic way to the CCAA Plan;

(e) whether the releases benefit the debtors as well as the creditors generally;

(f) whether the creditors who voted on the CCAA Plan had knowledge of the nature and effect of the releases; and

(g) whether the releases are fair and reasonable and not overly broad.[70]

[69] *Pacific Exploration* at para. 23; *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587 at para. 70.

[70] *Pacific Exploration* at para. 23; *Lydian* at para. 54.

49. The releases in favour of the Released Parties were negotiated as part of the overall framework of the compromises in the CCAA Plan and are a necessary element of the restructuring of the CannTrust Group to be implemented pursuant to the CCAA Plan.[71]

50. Each of the third parties being released contributed in a tangible and realistic way to the CCAA Plan, specifically:

(a) the current and former directors and officers of the CannTrust Group that are Original Settlement Parties contributed to the settlement of the Securities Claims by agreeing to assign any Assigned Claims that they may have against the Insurers to the Securities Claimant Trust;

(b) the Settling Defendants agreed to make aggregate Cash Contributions of $33 million to the Securities Claimant Trust and to assign certain Assigned Claims that they may have against the Non-Settling Defendants and Insurers; and

(c) the current directors and officers of the CannTrust Group, the Monitor and the CRO have each played an integral role in these very involved and complex restructuring proceedings and provided guidance and stability throughout.[72]

51. The release of the Securities Claims to the extent provided for in the CCAA Plan is necessary for the CCAA Plan to be implemented, otherwise the CannTrust Group would likely cease operations and its assets would be liquidated.[73] The releases of the Securities-Related Claims against the Non-Settling Defendants are necessary for the settlements with the

[71] Guyatt Affidavit at para. 157(d)(iv), Motion Record, Tab 2.
[72] Guyatt Affidavit at para. 157(d)(iii), Motion Record, Tab 2.
[73] Guyatt Affidavit at para. 157(d)(v), Motion Record, Tab 2.

Settling Defendants to be implemented.[74] CCAA courts have granted releases to third parties that are co-defendants in litigation against the debtor company in order to implement a global settlement of the claims against the debtor company and the co-defendants based on the latter's contributions to the settlement.[75]

52. The releases were disclosed to the Affected Creditors.[76] The Affected Creditors voted overwhelmingly in favour of the CCAA Plan containing those releases.[77] The releases in favour of the Released Parties are not overly broad and contain the necessary and appropriate carve-outs.[78]

53. For the foregoing reasons, the releases provided by the CCAA Plan are fair, reasonable and rationally connected to the overall purpose of the CCAA Plan, and should be approved by this Court.

(iv) The Ancillary Relief Sought in the CCAA Sanction Order is Appropriate

54. The broad scope of powers provided under section 11 of the CCAA allow a Court to make "any order that it considers appropriate in the circumstances", including an order that continues to apply after the CCAA proceedings have concluded.[79]

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[74] Guyatt Affidavit at para. 157(d)(vi), Motion Record, Tab 2.

[75] Sino-Forest Sanction Order at paras. 40-41, Schedule "A" at ss. 11.1 and 11.2; Amended Plan of Compromise and Arrangement – Montreal Maine & Atlantic Canada Co., June 8, 2015 at s. 5.1 and Schedule "A" – List of Released Parties.

[76] Guyatt Affidavit at para. 157(d)(viii), Motion Record, Tab 2.

[77] Guyatt Affidavit at para. 153, Motion Record, Tab 2.

[78] Guyatt Affidavit at para. 157(d)(ix), Motion Record, Tab 2.

[79] CCAA, s. 11; *Crystallex (Re)*, 2012 ONCA 404 at para. 68.

a. AGM Extension

55. This Court previously ordered that the time for CannTrust Holdings to call an annual general meeting of its shareholders would be extended until a date no later than 120 days after the expiry or termination of the Stay Period (the "**AGM Extension**").[80] It is appropriate to order that, for greater certainty, the AGM Extension will continue in full force and effect after the Effective Time in accordance with its terms.[81]

b. Securities Relief

56. It is appropriate to order that the securities relief granted in the Amended and Restated Initial Order will continue after the Effective Time for the duration of the AGM Extension.[82] This will provide ongoing protection for the directors and officers of the CannTrust Group for a limited period of time. Continuing the securities relief will not prejudice any stakeholder of the CannTrust Group as (i) the common shares of the CannTrust Group have been cease traded and delisted, and (ii) securities regulators and stock exchanges will remain free to take any steps within their discretion.[83]

(v) Stay Extension

57. The CannTrust Group is seeking an extension of the Stay Period from June 30, 2021 to

[80] Guyatt Affidavit at para. 166, Motion Record, Tab 2; Order (AGM Extension), dated September 16, 2020 at para. 3, Exhibit "U" to the Guyatt Affidavit, Motion Record, Tab 2U.

[81] Guyatt Affidavit at para. 166, Motion Record, Tab 2; Draft Sanction Order at para. 33(d), Motion Record, Tab 3.

[82] Amended and Restated Initial Order at paras. 63-64, Motion Record, Tab 2B; Draft Sanction Order at para. 33(b), Motion Record, Tab 3.

[83] Guyatt Affidavit at para. 171, Motion Record, Tab 2.

the earlier of: (i) the Effective Time; and (ii) September 3, 2021.[84]

58. The requested stay extension is necessary to allow the CannTrust Group to carry out the steps necessary to satisfy the Plan Implementation Conditions.[85] The CannTrust Group has acted, and continues to act in good faith and with due diligence.[86] The CannTrust Group will have sufficient liquidity to fund their operations through the maximum length of the proposed extension of the Stay Period.[87]

59. Accordingly, it is appropriate to extend the Stay Period as requested.[88]

PART IV—ORDER REQUESTED

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of June, 2021.

McCarthy Tétrault LLP

Lawyers for the Applicants

[84] Draft Sanction Order at para. 33(a), Motion Record, Tab 3.
[85] Guyatt Affidavit at para. 185, Motion Record, Tab 2.
[86] Guyatt Affidavit at para. 187, Motion Record, Tab 2.
[87] Supplement to the Eleventh Report of the Monitor, dated June 4, 2021 at para. 21.
[88] CCAA, s. 11.02(2); *U.S. Steel Canada Inc., Re*, 2016 ONSC 3106 at para. 2.

SCHEDULE "A"
LIST OF AUTHORITIES

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

2. *Sammi Atlas Inc., Re*, 1998 CanLII 14900 (Gen. Div.)

3. *Canadian Airlines Corp., Re*, 2000 ABQB 442

4. *Lydian International Limited (Re)*, 2020 ONSC 4006

5. *Canwest Global Communications Corp., Re*, 2010 ONSC 4209

6. *Lutheran Church Canada (Re)*, 2016 ABQB 419

7. *Endean v. St. Joseph's General Hospital*, 2019 ONCA 181

8. *The Owners of Strata Plan KAS3204 v Navigator Development Corporation*, 2020 BCSC 1954

9. *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2018 QCCS 2945, leave to appeal denied: *Arrangement relatif à 9323-7055 Québec inc.*, 2018 QCCA 1345

10. *Fredrickson v. I.C.B.C.*, 1986 CanLII 1066 (BCCA), reasons adopted in 1988 CanLII 38 (SCC)

11. *Gentra Canada Investments Inc. v. Lipson*, 2011 ONCA 331

12. *Societa Italiana Assicurazioni Trasporti v. Canadian Marine Underwriters Ltd.*, 1994 CarswellOnt 803 (Gen. Div.)

13. *Plastyle Inc. v. CKF Inc.*, 1992 CarswellOnt 153 (Gen. Div.)

14. *Coulter v. E.L. Huckerby & Associates Inc.*, 1998 CarswellOnt 849 (Gen. Div.)

15. *Uniserve International Products Inc. v. Alberta Treasury Branches*, 2003 ABQB 475

16. In the Matter of Sino-Forest Corporation (Court File No. CV-12-9667-00CL), Plan Sanction Order issued December 10, 2012

17. *1773907 Alberta Ltd v Davidson*, 2015 ABCA 150

18. *Caisse Populaire Vanier Ltee v. Bales*, 1991 CarswellOnt 173 (Gen. Div.)

19. *Pacific Exploration & Production Corporation (Re)*, 2016 ONSC 5429

20. *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587

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

22. *Crystallex (Re)*, 2012 ONCA 404

23. *U.S. Steel Canada Inc., Re*, 2016 ONSC 3106

SCHEDULE "B"
RELEVANT STATUTES

***Companies' Creditors Arrangement Act*, RSC 1985, c C-36**

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; …

Restriction — certain Crown claims

6 (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 — employees, etc.

6 (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 (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).

Payment — equity claims

6 (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.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Stays, etc. — other than initial application

11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

11.02 (3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNTRUST HOLDINGS INC. ET AL.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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