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 FACTUM OF KPMG LLP
(Re: Sanction Order)

June 9, 2021

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PART I – OVERVIEW

1. KPMG LLP ("**KPMG**") files this factum in opposition to the motion by CannTrust Holdings Inc., CannTrust Inc., CTI Holdings (Osoyoos) Inc. and Elmcliffe Investments Inc. (collectively, "**CannTrust**") for an order (the "**Sanction Order**") sanctioning a plan of compromise, arrangement and reorganization (as amended and restated from time to time, the "**Plan**").[1]

2. The Plan proposed by CannTrust is not a standard plan of arrangement whereby a company subject to *Companies' Creditors Arrangement Act* ("**CCAA**")[2] proceedings seeks to arrive at a compromise with its creditors to avoid an imminent liquidity crisis. Rather, CannTrust Holdings Inc., the parent company and public issuer, seeks to use the CCAA process to resolve its liability to its equity holders (the "**Securities Plaintiffs**") in multiple proposed class actions (collectively, the "**Securities Actions**"). The Plan is a class action settlement masquerading as a plan.

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[1] All capitalized terms not otherwise defined herein have the meanings given to them in the Plan.
[2] R.S.C. 1985, c. C-36, as amended (the **CCAA**").

3. The Plan cannot be sanctioned in its current form. First, creditors were improperly classified so that the outcome of the creditor vote would be predetermined by giving the Securities Plaintiffs a class of their own while entirely excluding similarly situated creditors, such as KPMG, from that class. The creditor vote is therefore not reflective of a true consensus of affected creditors. Second, the Plan is not fair and reasonable. The Plan impermissibly constrains or outright confiscates KPMG's legal rights as a non-debtor third party without justification and without any rational relationship to the underlying goal of the CCAA to facilitate the reorganization of a debtor company. In particular, the Plan interferes with the legitimate interests of KPMG because:

(a) the bar order terms, in an extreme departure from foundational principles, do not establish several liability for non-settling defendants;

(b) the Plan purports to assign claims arising from KPMG's audit engagement with CannTrust Holdings Inc. to a litigation trust (the "**Securities Claimant Trust**"). This purported assignment is impermissible in the absence of KPMG's consent. If approved, the Plan would have far reaching negative implications for the provision of audit services in Canada generally; and

(c) even if the claims were assignable to the Securities Claimant Trust, by installing the Securities Plaintiffs' class action lawyers (the "**Representatives**") as trustees of the Securities Claimant Trust to pursue the purportedly assigned claims against KPMG, the Plan purports to endorse a conflict of interest which will prejudice KPMG.

4. CannTrust's settlement with the Securities Plaintiffs need not proceed as a plan. The Plan contemplates the unsecured creditors of CannTrust Holdings Inc. receiving complete satisfaction of their claims. The settlement has been framed as a plan in an attempt to avoid the protections

afforded to non-settling defendants required in the settlement of multi-party litigation. In this way, the Plan is designed to grant the Securities Plaintiffs tactical, legal and financial advantages over KPMG and certain other non-settling defendants (the "**NSDs**").

5. These distortions of the NSDs' rights are contrary to the objectives of the CCAA. The CCAA is not intended to give a tactical advantage to one creditor group over another creditor group. The integrity of the CCAA process is compromised if it becomes a vehicle for collusion by which a debtor can agree to impose unwarranted and unfair terms on third parties.

PART II – SUMMARY OF FACTS

i. Background

6. CannTrust was a licensed producer of cannabis.[3] KPMG served as CannTrust's auditor prior to the commencement of CannTrust's CCAA proceeding (the "**CCAA Proceedings**").

7. On or around October 3, 2018, CannTrust began producing cannabis in rooms in its facility in Niagara that did not have the required licenses.[4] CannTrust personnel concealed these operations, including by allegedly installing artificial walls to hide the cannabis being illegally grown in the unlicensed rooms.[5]

8. These regulatory breaches were concealed from external parties, including Health Canada and KPMG, until July 2019. Only then, following Health Canada's regulatory audits of CannTrust's facilities (the "**Health Canada Audits**"), did Health Canada discover that CannTrust

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[3] Affidavit of Greg Guyatt sworn June 2, 2021 ("**Guyatt June 2 Affidavit**") at para 16.
[4] CannTrust Press Release entitled "CannTrust Statement Regarding Health Canada", July 8, 2019.
[5] Affidavit of Serge Kalloghlian sworn June 2, 2021 (the "**Kalloghlian Affidavit**"), Exhibit "A", Fresh as Amended Statement of Claim dated March 11, 2020 at paras 7, 81, 173; and Exhibit "F", CannTrust v KMPG LLP Draft Statement of Claim at para 22.

was growing and storing cannabis contrary to applicable laws.[6] Health Canada partially suspended CannTrust's cannabis licenses and the Securities Actions were commenced.[7]

9. Effective August 18, 2019, KPMG withdrew its audit reports in connection with CannTrust's financial statements. CannTrust has publicly acknowledged that KPMG was not aware of the information uncovered in the Health Canada Audits when it issued its audit reports, and that KPMG relied on misrepresentations made by former CannTrust personnel.[8]

ii. The Securities Actions

10. In the Securities Actions, the Securities Plaintiffs allege, among other things, that CannTrust Holdings Inc. made misrepresentations in its disclosures to investors related to the findings of the Health Canada Audits.[9] The allegations against KPMG are essentially:

(a) statutory misrepresentation affecting the secondary market pursuant to Part XXIII.1 of the Ontario *Securities Act* and similar provisions in other jurisdictions;

(b) statutory misrepresentation affecting the primary market pursuant to Part XIII of the Ontario *Securities Act*, and similar provisions in other jurisdictions; and

(c) common law misrepresentation.[10]

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[6] Guyatt June 2 Affidavit at para 16.
[7] Guyatt June 2 Affidavit at para 17.
[8] Affidavit of Maria Farache sworn March 17, 2021 ("**Farache Affidavit**"), Exhibit "E".
[9] Affidavit of Greg Guyatt sworn March 31, 2020 at para 129; Farache Affidavit, Exhibit "D" – Statement of Claim at para 3(c).
[10] Farache Affidavit, Exhibit "D", – Statement of Claim at para 3.

None of the allegations in the Securities Actions have been proven and no liability is admitted by KPMG. KPMG intends to vigorously defend against the Securities Actions. The aggregate damages alleged in the Securities Actions are approximately $510 million.[11]

iii. The CCAA Proceeding, The RSA and the Plan

11. CannTrust commenced the CCAA Proceedings on March 31, 2020. On January 19, 2021, CannTrust, the Securities Plaintiffs, and the Representatives entered into a Restructuring Support Agreement (the "**RSA**") reflecting a partial settlement of the Securities Actions to the exclusion of the NSDs.[12] Many issues of importance to the NSDs were not addressed at all or were addressed in language so confusing and convoluted that the NSDs could not understand them.

12. On January 27, 2021, counsel to KPMG wrote to counsel for CannTrust to express its concerns regarding the RSA.[13] While discussions took place, they did not result in any amendments to the RSA.

13. On March 5, 2021, the Applicants revealed the Plan for the first time. The Plan creates four classes of creditors – three comprised of general unsecured creditors of each Applicant entity, and one comprised entirely of the Securities Plaintiffs in the Securities Actions.[14] The NSDs were not permitted to vote on the Plan in respect of their contribution and indemnity claims, despite such claims being similarly situated equity claims to those of the Securities Plaintiffs.

14. Even though the NSDs were prevented from voting on it, the Plan still affected their rights. The version of the Plan served on March 5, 2021 purported to release CannTrust from all Securities

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[11] Kalloghlian Affidavit at para 34.
[12] Guyatt June 2 Affidavit, Exhibit "J" – Restructuring Support Agreement, January 19, 2021.
[13] Farache Affidavit, Exhibit "A".
[14] Supplementary Affidavit of Greg Guyatt sworn March 13, 2021 ("**Guyatt March 13 Affidavit**"), Exhibit "A" – CCAA Plan, at section 3.2.

Related Indemnity Claims[15] and to assign all claims of CannTrust against any NSDs to the Securities Claimant Trust (the "**Assigned Claims**"). This assignment appeared to include CannTrust's claims for contribution and indemnity in connection with the Securities Actions – the very same type of claims that KPMG and other NSDs would be barred from pursuing against CannTrust and certain other defendants in the Securities Actions (the "**Settling Defendants**").[16] The Plan purported to leave the NSDs on the hook for any unpaid portion of CannTrust's liability.

15. Prior to the motion for the Meetings Order, CannTrust amended the Plan to add a convoluted judgment reduction mechanism (the "**Judgment Reduction Terms**").[17] KPMG was not consulted on the wording or the substance of any of the amendments. The Judgment Reduction Terms are inadequate and do not resolve the concerns of KPMG and other NSDs about remaining liable for the wrongdoing of Settling Defendants while the Settling Defendants extricate themselves from all liability.

16. The Plan was also amended to include a clear release of any contribution and indemnity claims that CannTrust may have against the NSDs. This constructive amendment was reflected in section 7.3(3) of the Plan.[18]

iv. Meetings Order and Subsequent Events

17. The amendments to the Plan did not fully address KPMG's concerns, but recognizing incremental progress and having been assured that CannTrust would meaningfully engage with it to address its outstanding concerns, KPMG withdrew its objection to the issuance of the Meetings

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[15] Affidavit of Greg Guyatt sworn March 5, 2021 ("**Guyatt March 5 Affidavit**"), Exhibit "A", Plan of Compromise, Arrangement and Reorganization of CannTrust Holdings Inc., CannTrust Inc. and Elmcliffe Investments Inc., definition of "Released Securities-Related Claims" ("**CCAA Plan**"), section 7.3.
[16] Guyatt March 5 Affidavit, Exhibit "A", CCAA Plan., definition of "Assigned Claims" and section 4.1.
[17] Guyatt March 13 Affidavit, Exhibit "B" – Blackline of CCAA Plan at section 7.3(2).
[18] Guyatt March 13 Affidavit, Exhibit "B" – Blackline of CCAA Plan at section 7.3(3).

Order. This was done in an effort to provide CannTrust and the Securities Plaintiffs with an opportunity to rectify the numerous issues posed by the Plan. KPMG reserved all rights and arguments with respect to opposing the Plan until the Sanction Hearing through a Reservation of Rights Order granted by the Court together with the Meeting Order on April 16, 2021.[19] The Reservation of Rights Order provides:

> 2. **THIS COURT ORDERS** that the Meeting Order <u>and any approval of the CCAA Plan at the Meetings</u> are without prejudice to all arguments that have or could have been raised by stakeholders regarding the proposed CCAA Plan or Sanction Order…and that all such arguments are expressly preserved and may be subsequently advanced at a motion properly brought in advance thereof, <u>at the Sanction Hearing</u>, or at the Court's discretion, at another appropriate juncture [*emphasis added*].

18. On April 22, 2021, the Representatives wrote to KPMG's counsel requesting that KPMG execute a tolling and standstill agreement tolling CannTrust's claims against KPMG. The letter noted that the Representatives were seeking such an agreement on the basis that the Plan contemplated "the assignment to the Securities Claimant Trust of the Assigned Claims, including [CannTrust's claims] against KPMG …".[20]

19. On April 23, 2021, KPMG's counsel wrote to the Representatives requesting, among other things, details as to the specific nature of the claims against KPMG that the Securities Plaintiffs sought to be tolled.[21] On May 3, 2021, the Representatives provided KPMG's counsel with a draft Statement of Claim on behalf of CannTrust against KPMG seeking damages for negligent misrepresentation, negligent performance of a service and breach of contract in relation to the KPMG engagement (the "**Draft Claim**").[22]

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[19] Order and Endorsement of Justice Hainey dated April 16, 2021.
[20] Kalloghlian Affidavit, Exhibit "G", Letter dated April 22, 2021.
[21] Kalloghlian Affidavit, Exhibit "G", Letter dated April 23, 2021.
[22] Kalloghlian Affidavit, Exhibit "G", Letter dated May 3, 2021.

20. On June 2, 2021, after the Plan was approved by creditors on May 28, 2021, and after counsel to KPMG communicated its position that the Draft Claim is barred by section 7.3(3) of the Plan, [23] the Plan was amended to walk back the several liability protections that had been previously added for the benefit of NSDs in section 7.3(3). Following these amendments, the "Assigned Claims" expressly included CannTrust's claims in "contract and tort <u>against KPMG</u>" [emphasis added]. In turn, section 7.3(3) of the Plan was amended to expressly exclude all Assigned Claims from the release of "claims for contribution, indemnity or other claims over" by Settling Defendants against NSDs. As any claim that CannTrust could bring against KPMG can be expected to be pursued in contract or tort, this change effectively renders the benefit of Section 7.3(3) to KPMG moot. The change is nonsensical, prejudicial to KPMG and reflective of the cavalier manner in which KPMG's interests have been addressed in the opaque negotiation process between CannTrust and the Securities Plaintiffs.

v. Assignment of Theoretical Claim by CannTrust Against KPMG is Not Integral to the Plan

21. Notwithstanding that the claims in the Draft Claim are claims over and therefore should be barred by the terms of the Plan,[24] the Securities Plaintiffs appear intent on asserting that these claims must be assigned to and pursued by the Securities Claimant Trust and that such assignment was a critical consideration underlying the RSA.[25]

22. Nothing turns on the Securities Claimants' view that a theoretical claim by CannTrust against KPMG is of value. Their view is not relevant to the reasonableness of the Plan or the

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[23] Affidavit of Nancy Thompson sworn June 4, 2021 ("**Thompson Affidavit**"), Exhibit "E", Letter dated April 23, 2021.

[24] Guyatt June 2 Affidavit, Exhibit "A", Second Amended and Restated Plan of Compromise, Arrangement and Reorganization of CannTrust Holdings Inc., CannTrust Inc. and Elmcliffe Investments Inc. ("**Second Amended and Restated CCAA Plan**"), section 7.3(3).

[25] Kalloghlian Affidavit at paras 38, 42, 53, 55, and 56.

appropriateness of the assignment provisions therein. In any event, there are good reasons to question how critical the purported assignment of the Draft Claim was to the negotiation of the RSA and whether the Securities Plaintiffs would truly forgo the proverbial "bird in hand" represented by $83 million in settlement funds and cooperation terms, if assignment of CannTrust's alleged claims against KPMG were not provided for in the Plan.

23. At the time the RSA was negotiated, the Representatives were aware that CannTrust had already considered and rejected the idea of pursuing a claim against KPMG.[26] In August 2019, one of the Representatives wrote to CannTrust requesting that it pursue a derivative claim against KPMG and certain of CannTrust's directors and officers on behalf of CannTrust's shareholders.[27] In August and September 2019, CannTrust's counsel responded that a Special Committee, with the assistance of professional advisors including McCarthy Tetrault, had investigated the allegations against KPMG and concluded, based in part on the lack of merit to the allegations against KPMG, that it was not in CannTrust's best interest to proceed with such a claim.[28] KPMG continued as CannTrust's auditor for nearly two more years until April 2021, when KPMG and CannTrust reached a mutual decision to part ways.[29]

24. CannTrust has, to date, been in a superior position to evaluate KPMG's conduct than the Representatives, who – according to CannTrust – did not base their assessment of the merits of a direct claim against KPMG on any information or insight provided by CannTrust.[30] Neither

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[26] Supplementary Responding Motion Record of KPMG LLP dated June 9, 2021, Tab 2, Transcript of Cross-examination of Serge Kalloghlian taken June 7, 2021 ("**Kalloghlian Transcript**") at q 89, p 22-23.
[27] Thompson Affidavit, Exhibit "C" – Correspondence between McCarthy Tétrault LLP and Strosberg Sasso Sutts LLP.
[28] Thompson Affidavit, Exhibit "C" – Correspondence between McCarthy Tétrault LLP and Strosberg Sasso Sutts LLP.
[29] Supplementary Responding Motion Record of KPMG LLP dated June 9, 2021, Tab 3, Transcript of Cross-examination of Greg Guyatt taken June 7, 2021 ("**Guyatt Transcript**") at qq 29-30, p 10.
[30] Guyatt Transcript at qq 84-86, pp 26-27; Kalloghlian Transcript at q 120, p 30.

CannTrust nor the Representatives have presented any evidence on this motion that the claims advanced in the Draft Claim are a meaningful settlement "asset". The Represetnatives refused – on the purported basis of privilege – to answer cross-examination questions on the Securities Claimants' position on this motion regarding the centrality of the assignment despite squarely raising it in their affidavit.[31] Of course, parties are prohibited from putting purportedly privileged matters at issue in an affidavit and then refusing questions on those matters on cross-examination.[32] The Court should draw an adverse inference from the Representatives' obfuscation on this issue.

PART III – ISSUES AND THE LAW

25. The issue on this motion is whether the Sanction Order should be granted. It should not. The Plan in its current form is not fair or reasonable and does not satisfy the requirements for sanction.

i. The Test for Sanction

26. Prior to sanctioning a plan under the CCAA, the court must be satisfied in respect of three criteria:

(a) there must be 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 be done which is not authorized by the CCAA; and

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[31] Kalloghlian Transcript at qq 150-151, p 38. See also transcript excerpts at Appendix "E".
[32] See the leading case of *Thomson v Thomson*, [1948] OWN 137, 1948 CarswellOnt 132 (HC) at para 6. The Court in this case held that to allow otherwise would put the examining party at an unfair disadvantage, the affidavit lending its support to the one party but protected from test of cross-examination by the other party: see para 4.

(c) the plan must be fair and reasonable.[33]

27. The Plan does not satisfy the second criterion because of the improper classification of creditors and does not satisfy the third criterion because of its disregard for KPMG's rights as a third party for no purpose rationally related to the objectives of the CCAA.

ii. Improper Classification of Creditors

28. The principal concern of the Court in considering the second criterion is whether the classes of creditors were properly established.[34] The improper classification of creditors under the Plan makes it apparent that the Plan cannot be sanctioned.

29. Both the Securities Plaintiffs and KPMG have equity claims against CannTrust under the CCAA. The claims of the Securities Plaintiffs are claims for monetary loss resulting from the ownership or sale of an equity interest in CannTrust, within the definition of "equity claim" under the CCAA.[35] KPMG's claim for contribution and indemnity in the Securities Action is, like the Securities Plaintiffs' claims, an equity claim under the CCAA.[36]

30. The Plan and Meeting Order placed the Securities Plaintiffs in a class of their own for voting purposes. In contrast, KPMG and the other NSDs were not permitted to vote their claims for contribution and indemnity on the Plan.[37]

31. The CCAA provides that creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise.[38] The CCAA does not

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[33] *Canadian Airlines Corp. Re*, 2000 ABQB 442 (**"*Canadian Airlines*"**) at para 60, aff'd 2001 ABCA 9, leave to appeal ref'd [2001] SCCA No 60.
[34] *Northland Properties Ltd., Re*, 1988 CarswellBC 558 at para 86, aff'd 1989 CarswellBC 334.
[35] CCAA, section 2.
[36] *Sino-Forest Corporation (Re)*, 2012 ONCA 816.
[37] Thompson Affidavit, Exhibit "G", Email from Monitor to Blakes regarding adjudication of KPMG claim.
[38] CCAA, section 22.1.

contemplate some equity claims being permitted to vote and recover a distribution, while other *pari passu* equity claimants do not vote and receive no distribution. Like claims should be treated alike.[39]

32. CannTrust has manufactured the result of the creditor vote such that one group of equity claimants—the Securities Plaintiffs—was given a vote in a class unto itself, while the other—the NSDs—was excluded from participating in creditor democracy. This Court has previously held that the purpose of the CCAA cannot be accomplished if one group of claimants is given an unwarranted advantage over another.[40]

33. In most cases, creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan and that the plan is economically feasible.[41] However, if dissenting creditors are denied the opportunity to vote on a plan, it is a foregone conclusion that the plan will pass the creditor vote. In this case, the creditor vote creates no presumption of fairness or reasonableness. The result of the creditor vote cannot be considered reflective of a true consensus of affected creditors where similarly situated creditors are excluded.

34. Approval of the Plan by the unsecured creditors of CannTrust is, additionally, not relevant to determining whether the portions of the Plan affecting KPMG are fair and reasonable. The unsecured creditors' only interest is in the compromise or satisfaction of their own claims against CannTrust; they are indifferent towards the outcome of the Securities Actions.

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[39] CCAA, section 22; *Re Nortel Networks Corporation et al.*, 2014 ONSC 4777 at para 12, aff'd 2015 ONCA 681, leave to appeal ref'd 42 C.B.R. (6th) 3; *Indalex Limited (Re)*, 2009 CanLII 39487 at para 16.
[40] *Menegon v Philip Services Corp.*, 1999 CanLII 15004 (ON SC) ("***Philip Services***") at para 29.
[41] *Canadian Airlines* at para 97.

35. The NSDs raised the improper classification of creditors prior to the motion for the Meeting Order. The vote was allowed to proceed as an accommodation by the NSDs on the understanding that the Reservation of Rights Order would preserve all arguments for the Sanction Hearing and that the NSD's position on this point would not be prejudiced by the creditor vote. In these circumstances, even if this Court were to conclude that the improper classification was not fatal, the Plan must be considered on its own merits and the vote cannot be dispositive of the fairness and reasonableness of the Plan.

iii. The Plan is not Fair and Reasonable

36. In considering whether a plan is fair and reasonable, this Court is guided by the purpose of the CCAA: to facilitate the reorganization of a debtor company.[42] The Court is tasked with determining whether the plan fairly balances the interests of all stakeholders.[43]

37. The purpose of the CCAA does not include changing the relationship among creditors in ways that do not directly involve the company.[44] While there are circumstances where third party rights may be affected in furtherance of the goals of the CCAA, in balancing the interests of stakeholders, the Court has an obligation to ensure that third party rights are minimally affected and that any such interference is necessary to carry out the purpose of the CCAA.[45] The Plan affects the rights of KPMG and the Securities Plaintiffs relative to one another. Both are third parties to the CCAA proceeding. The Securities Plaintiffs are provided with strategic and financial advantages in future litigation that they would not have but for the Plan. As a result, the Plan is

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[42] *Canadian Airlines* at para 94.
[43] *Canadian Airlines* at para 3.
[44] *Stelco Inc., Re*, 2005 CanLII 41379 (ON SC) at para 7; *Pacific Coastal Airlines Ltd. v Air Canada*, 2001 BCSC 1721 at para 24.
[45] *Gauntlet Energy Corp., Re*, 2003 ABQB 718 at para 67.

prejudicial and inconsistent with the purpose of the CCAA such that it cannot be sanctioned.

The Plan does not incorporate adequate Bar Order terms

38. The Judgment Reduction Terms are fundamentally flawed. A properly constructed bar order (or *Pierringer* arrangement) is necessary to facilitate partial settlements between plaintiffs and some defendants in multi-party litigation, and has certain standard core features as set out in Appendix "A" hereto.[46] Principal among these features is the release of claims over that NSDs may have against settling defendants.[47] Absent such a release, settling defendants would not have the finality that they seek in reaching a settlement with plaintiffs.

39. Of equal importance is that, in exchange for this release of their rights to "claim over", NSDs are subject to several and not joint and several liability. In other words, NSDs are liable only for the proportion of any damages caused by their own fault, and not for the proportion of any damages caused by the fault of a settling defendant.[48] It would be inequitable to prohibit an NSD from claiming over against a settling defendant, while continuing to expose the NSD to joint liability for the liability of the fully released settling defendant. Such asymmetry is inherently and obviously unfair.

40. Further, in reaching a settlement, plaintiffs are best positioned to assess the merits of their case, the proportionate fault of the settling defendants, and the value they place on getting settlement funds in hand relative to the future uncertainties associated with litigation. The plaintiffs must also assess the collectability and recoverability of any judgment (or settlement amount) based

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[46] These were outlined by the Court of Appeal for Ontario in *Endean v St. Joseph's General Hospital*, 2019 ONCA 181 at para 52 ("***Endean***"). See also: *Sable Offshore Energy Inc. v Ameron International Corp* 2013 SCC 37 at paras 6, 23-26; *Gendron v Doug C. Thompson Ltd. (Thompson Fuels)*, 2019 ONCA 293 at para 97.
[47] *Ontario New Home Warranty Program v Chevron Chemical Co*., [1999] OJ No 2245 (ON SC) ("***Chevron***") at paras 51-56.
[48] *Chevron* at para 55.

on information available to them about the settling defendants. Accordingly, by operation of a proper bar order, the risk of an inadequate settlement is borne *by the plaintiff*, the party best able to evaluate the merits of the settlement and weigh the factors that go into the determination of when to settle and how much to settle for.[49] Notably, if a plaintiff settles with a settling defendant for *more* than that defendant's proper share of liability, the plaintiff keeps the differential. This dynamic is illustrated at Appendix "B".

41. The flaw in the Judgment Reduction Terms is that they do not sever liability. Instead, they allocate the risk that the plaintiff has settled for less than the settling defendants' proper share of liability to NSDs who are not privy to the settlement. The Judgement Reduction Terms provide, confusingly, that any judgment against an NSD will be reduced by what such NSD could have recovered in a claim over asserted by such NSD against CannTrust at a moment in time before the Effective Time (i.e. a time when CannTrust is still insolvent) rather than at the time in the future when judgment against the NSD is hypothetically granted.[50] The Judgment Reduction Terms improperly seek to assess recoverability at a point in time when CannTrust is insolvent, rather than when an NSD would actually seek to recover an indemnity from CannTrust, years in the future when CannTrust has emerged from insolvency proceedings and may be an entirely credit-worthy and successful corporation.

42. This approach burdens the court with the task of peering back through the years to a moment in time before the Effective Date to speculate what KPMG could have theoretically recovered from CannTrust, had its extinguished claim over still somehow existed. This assessment

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[49] *Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc. (IMV Projects Inc.)*, 2018 ABCA 305 at para 137.

[50] Guyatt June 2 Affidavit, Exhibit "A" – Second Amended and Restated CCAA Plan at s. 7.3(2).

is based on speculative economics, not on the law. Further, the many factors that go into determining what would have been recoverable from CannTrust at the relevant time are factors that KPMG does not and cannot control. KPMG controls its own conduct and has no hesitation in being responsible for it. It should not be burdened by the misconduct of a settling party.

43. There is a simple, practical and reasonable alternative: adopt the approach to bar orders consistently used by CCAA and class action courts in partial settlements. In the Sears Canada CCAA proceedings, the bar order stated simply:

> **THIS COURT ORDERS** that the Plaintiffs' recovery from the Non-Settling Defendants and with which any Former Director is judicially determined to be jointly and severally liable shall be limited to only that proportion of damages attributable to the liability of the Non-Settling Defendants, as finally determined in the Actions [*emphasis added*].[51]

44. This simple, straightforward, and uncontroversial approached was also used in the Cash Store Financial Services Inc., Sino-Forest Corproation, and Hollinger Inc. CCAA proceedings.[52] The approach proposed by the Applicants is unprecedented, prejudicial, convoluted and wholly unnecessary.

45. The problems with the approach set out in the Plan are compounded by the June 2, 2021 revisions to the Plan discussed above, which appear to be an attempt to allow the claims set out in the Draft Claim to be assigned to the Securities Claimant Trust irrespective of whether or not they are claims over.[53] KPMG was induced not to object to the Meeting Order, in meaningful part, on

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[51] See: In the Matter of a Plan of Compromise or Arrangement of Sears Canada Inc., Order (Approval Order) dated August 25, 2020 (CV-17-1184600CL) ("**Sears Order**") at para 13.
[52]See: In the Matter of the Plan of Compromise or Arrangement of 1511419 Ontario Inc. (Formerly Known as the Cash Store Financial Services Inc.) et al. dated October 6, 2015 at para 7.6; In the Matter of a Plan of Compromise and Arrangement of Sino-Forest Corporation, Order dated March 20, 2013 ("**Sino-Forest Order**") at para 13; *Hollinger Inc., Re*, 2012 ONSC 5107.
[53] In order to ensure that NSD's liability is truly "several", the essential terms of a bar order set out at Appendix "A" hereto also require that a settling defendant agree not to seek contribution and indemnity from a non-settling defendant.

the basis of the Applicants' assurances regarding the sanctity of section 7.3(3) of the Plan and the scope of claims barred by its operation. After having procured KPMG's cooperation at the hearing for the Meeting Order, the Applicants now seek to unilaterally neuter that provision by way of an eleventh-hour, post-creditor meeting amendment that has no precedent and sharply differs from the approach approved by this Court in the CCAA and class actions context.[54]. This is the same "bait and switch" approach that was rejected by Morawetz RSJ (as he then was) in *Re Target Canada* as being contrary to the building blocks approach to CCAA proceedings. The building blocks approach contemplates incremental progress based on a series of interconnected assurances, promises and agreements which should not be re-traded once the benefits of those assurances, promises and agreements are obtained.[55]

46. CannTrust and the Securities Claimants have been afforded multiple opportunities to identify a single bar order granted by a Canadian court which contains language similar to the one they propose but have failed to do so. The Monitor is also unaware of any such precedents.[56] The authorities cited by CannTrust fail to justify the departure from conventional language in the Judgement Reduction Terms.

47. The bar order in *Arrangement relatif à 9323-7055 Quebec inc. (Aquadis International Inc.),*[57] cited by the Applicants, does make reference to recoverability but was a settlement entered into in an entirely different legislative regime under the Civil Code of Quebec ("**CCQ**"). Article 1531 of the CCQ, which governed the specific product liability claims at issue places full responsibility for a defective product on each party in the chain of distribution and sale, as well as

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[54] See Sears Order at para 11; Sino-Forest Order at para 13.
[55] *Target Canada Co. (Re)*, 2016 ONSC 316 at para 81.
[56] Supplementary Affidavit of Nancy Thompson sworn June 9, 2021, Exhibit "B" – Letter from the Monitor to Blakes.
[57] 2018 QCCS 294. (*"**Aquadis**"*).

the manufacturer (solidary liability), meaning no "several" liability can be stipulated in the manner typical in a bar order in common law provinces. The Quebec court, in referencing *Hollinger*, seems to approve of severing the liability of non-settling defendants but noted that the applicable legislative scheme in Quebec prevents such an approach. Additionally, Aquadis International Inc. ceased business in 2015 and did not intend to emerge from the CCAA proceedings as a going concern.[58]

48. CannTrust has also relies on *Endean*. However, *Endean* provides no reason to depart from conventional bar order language here. In *Endean*, the trial judge reduced the non-settling defendant's liability by apportioning a percentage of liability to entities who were bankrupt and had not been sued. The Ontario Court of Appeal held that liability should be allocated only as between the defendants and that interpreting the bar order to apply to bankrupt non-defendants was not appropriate. Overall, the Ontario Court of Appeal in *Endean* affirms the underlying policy goals sought to be achieved by traditional bar orders, as articulated in this factum above.[59]

49. In summary, the Court did not permit the plaintiffs in either *Aquadis* or *Endean* to choose, for their own strategic benefit, the moment in time when "recoverability" should be assessed, as CannTrust and the Securities Plaintiffs propose to do here. CannTrust intends to emerge from these CCAA proceedings as a profitable, going-concern entity. By the time KPMG would potentially seek to enforce its right of indemnity, CannTrust will, by its own account, be a profitable, going-concern entity.[60] The Securities Plaintiffs should not be permitted to pick and choose the time at

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[58] Rapport du Contrôleur Concernant le Plan De Transaction et D'Arrangement dated April 30, 2019.
[59] *Endean* at paras 53-55.
[60] See Appendix "D" for relevant excerpts from the June 7, 2021 cross-examination of Greg Guyatt on this issue.

which recoverability is assessed to maximize their return and shift the risk of a poor settlement to the NSDs.

Improper Assignment of Claims

50. Additionally, the Plan cannot be sanctioned because it purports to distort rights and obligations as between non-debtor entities with no apparent justification or connection to the objectives of the CCAA.

51. Article 8.2(t) of the Plan purports to assign CannTrust's potential direct claims against KPMG arising from KPMG's audit engagement (the "**CannTrust Claim**") to the Securities Litigation Trust, which assigned claims are to be pursued by the Representatives as trustees of the Trust. CannTrust asks this Court to pre-emptively determine that the CannTrust Claim is assignable, when in fact such an assignment would be champertous, coercive and impermissible under the CCAA.

Champerty and Maintenance

52. Claims for breach of contract or professional negligence are generally not assignable to third parties given concerns that such assignments are champertous or savour of maintenance.[61] The Supreme Court of Canada outlined an exception to this prohibition where the assignee has a "sufficient pre-existing interest in the assignment of the claim to negate any taint of champerty or maintenance", which includes a "legitimate commercial interest" in the assignment.[62]

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[61] Maintenance has been defined by the SCC as "officious intermeddling with a lawsuit which in no way belongs to one", while champerty is "a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit.": *9354-9186 Québec inc. v Callidus Capital Corp,* 2020 SCC 10 ("***Callidus Capital Corp***") at para 94, citing Klar's *Remedies in Tort* and *McIntyre Estate*.
[62] *Fredrikson v Insurance Corp of British Columbia*, [1986] BCJ No 366 (*"**Fredrikson**"*), reasons adopted in [1988] 1 SCR 1089 at at paras 26 and 46.

53. A legitimate commercial interest cannot be established where the "assignment is made for the purpose of obtaining more than what the assignee is legally entitled to" or where the assignee already has an existing claim against the third party.[63] It will also be difficult to establish a legitimate commercial interest where the assignor and assignee's interests are opposed at the time of the assignment.[64]

54. The Securities Plaintiffs have elected to advance claims against KPMG in common law negligence and primary and secondary market claims under the Ontario *Securities Act* that are subject to at least two significant constraints. First, the duty of care that the Securities Plaintiffs would be required to establish in advancing their common law negligence claims has been considered and rejected by Canadian appellate courts in the specific context of auditors' negligence claims, which provides a complete answer to these claims.[65] Second, the Securities Plaintiffs' primary and secondary market claims under the Ontario *Securities Act* are subject to statutory limitations on recoverable damages.[66]

55. CannTrust's potential claims against KPMG in breach of contract and negligence set out in the Draft Claim are not subject to the same constraints, as auditors engaged in a statutory audit may owe a direct duty to their client, and there are no statutory liability caps. These distinctions make it clear that the Securities Plaintiffs have sought the assignment of the claims set out in the Draft Claim as an "end run" around the constraints on their claims in the Securities Actions. On its face, this is a clear example of maintenance in the form of an assignment "made for the purpose

[63] *Fredrikson* at paras 34 and 37.
[64] *Fredrikson* at paras 39-40.
[65] *Hercules Managements Ltd. v Ernst & Young*, [1997] 2 SCR 165; *Deloitte & Touche v Livent Inc. (Receiver of)*, 2017 SCC 63. See also *Whitehouse v BDO Canada LLP*, 2021 ONSC 2454.
[66] KPMG's liability in respect of the Securities' Plaintiffs' primary market claims is joint and several under 130(8) of the Ontario *Securities Act*, while the Ontario Plaintiffs' secondary market liability claim is capped at $1 million under section 138.1.

of obtaining more than what the assignee is legally entitled to".[67] Further, as CannTrust is maintaining a residual interest in the claim,[68] the Securities Plaintiffs and CannTrust will "[share] in the profits of the litigation"; another indication that the proposed assignment would be champertous.[69] None of the cases cited by CannTrust in its factum involved a challenge to an assignment on the basis that the assignee already had a potential or existing cause of action against the third party or was otherwise seeking more than its existing legal entitlement. This distinguishes the present case from those in which an assignee is merely seeking to minimize its losses through an assignment.

56. For clarity, it is KPMG's position that any purported claim against it by CannTrust is devoid of merit, whether asserted directly by CannTrust or by the Securities Claimants standing in CannTrust's shoes. Authorizing the assignment of the CannTrust Claim to the Securities Claimant Trust through article 8.2(s) of the Plan, however, would set a dangerous precedent allowing shareholder plaintiffs to weaponize the CCAA process to thwart the recognized limitations of their direct common law and statutory claims against auditors. Sanctioning such conduct could significantly increase auditors' fees in Canada without advancing any of the underlying goals of the CCAA.

Prejudicial appointment of Securities Plaintiffs' Counsel as Litigation Trustee

57. Even if the CannTrust Claim were assignable to the Securities Claimant Trust, the appointment of the Representatives as Litigation Trustee and counsel to the Securities Claimant Trust creates an unresolvable conflict, impugning both this Court's gatekeeper role in approving

[67] *Fredrikson* at para 37.
[68] CannTrust is entitled to start to be repaid its $50 million settlement payment if the Securities Claimant Trust recovers more than $250 million: Kalloghian Transcript, qq 134-135, pp 34-35; Guyatt Transcript, qq 137-139, pp 40-41.
[69] *McIntyre Estate v Ontario (Attorney General)* (2002), 61 OR (3d) 257 (CA) at para 26.

significant steps in litigation and KPMG's rights as a third party.

58. The establishment of a litigation trust for the benefit of a CCAA debtor's stakeholders typically involves the appointment of a neutral third party as trustee, who in turn retains independent litigation counsel.[70] Where litigation advanced by a trust proceeds together with overlapping class actions against the same parties, the appointment of a neutral third party as trustee protects against problematic conflicts of interest.[71]

59. The Representatives have indicated their intention to install themselves as Trustees and then hire themselves to prosecute the litigation, including the Assigned Claims.[72] It is unclear how the Representatives can objectively balance their obligations to the Securities Plaintiffs in the Securities Actions with their obligations to the Trust in respect of the Assigned Claims. This inherent conflict is compounded by the fact that the Securities Plaintiffs seek to act as both Trustee and counsel to the Trustee, such that they would both "give" and "receive" instructions in relation to the prosecution of the Assigned Claims.[73] The Plan does not address how conflicts arising from the same law firms effectively acting as counsel and client in respect of the Securities Claimant Trust would be resolved in the interests of CannTrust's stakeholders. These issues are particularly concerning given the Plan's silence on how Securities Plaintiff's counsel are to be compensated in respect of any successful prosecution of the Assigned Claims, and whether there are material differences from their fee arrangement in the Securities Actions.[74] It is also unclear how

[70] See: Cash Store Plan at para 10; Labourer's Pension Fund et. al. v Sino Forest Corporation et. al. (Litigation Trust Agreement).
[71] See this Court's discussion in *Vaeth v North American Palladium Ltd.*, 2016 ONSC 5015 at paras 65-78; See *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v Sino-Forest Corp*, 2015 ONSC 4004, as an example of a prior case in the CCAA context where class plaintiffs' counsel and counsel to the Trustee sought the Court's direction as to the resolution of their competing interests in regard to claims advanced by the litigation trust.
[72] Kalloghlian Transcript at qq 136-139, p 35.
[73] Kalloghlian Transcript at qq 136-139, p 35.
[74] Kalloghlian Transcript at qq 142-143, pp 35-36.

obligations to CannTrust, who would also be a beneficiary of the Securities Claimant Trust owing to its residual $50 million interest, will be addressed.

60. Installing the Representatives as Trustee is also directly prejudicial to KPMG's legal rights in the Securities Actions and the terms and conditions governing the KPMG engagement.[75] KPMG is not obligated to submit to discovery in the Securities Actions before they are certified as class proceedings and leave to proceed is obtained under Part XXIII.1 of the *Securities Act*. As Trustee, the Representatives could pursue early discovery against KPMG in respect of the CannTrust Claim and use the information so obtained in furtherance of the leave and certification motions in the Securities Actions. Allowing the Representatives to serve as Trustee would effectively deny KPMG the right to confidential arbitration set out in the terms and conditions governing the KPMG engagement.

PART IV – CONCLUSION

61. The Plan in its current form unjustifiably distorts and appropriates KPMG's rights as an NSD. KPMG has attempted to negotiate with both the Representatives and CannTrust, but its attempts have fallen on deaf ears. The Court will decline to sanction a Plan where it is rushed and where critical negotiations ought to continue.[76]

62. This Court has previously recognized the consequences that a bilateral settlement between plaintiffs and an insolvent debtor can have on the rights and interests of a third party and that it is

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[75] Thompson Affidavit, Exhibit "A" – KPMG Engagement Letter dated March 22, 2019 and Exhibit "B" – KPMG Terms & Conditions for Assurance Engagements, art. 10. The Terms and Conditions applicable to the KPMG engagement require that any dispute between the parties arising under the retainer be submitted to binding arbitration under the Arbitration Rules of the ADR Institute of Canada. Those Rules require that the arbitration be confidential between the parties; see also ADR Institute of Canada, ADRIC Arbitration Rules, version 2 (effective December 1 2016), r. 4.18.

[76] *Re Crystallex International Corporation*, 2013 ONSC 823 ("***Crystallex***").

not appropriate for such consequences to be levied on third parties who have no say in the CCAA proceedings.[77] In such circumstances, this Court has sent the insolvent debtor and plaintiffs back to the negotiating table to seek out a proper settlement that does not ignore the interests of non-settling defendants.[78] The need for a timely resolution is not, on its own, justification for depriving stakeholders of their rights.[79] It is clear that the Plan has not been drafted with due regard to all applicable stakeholders.[80]

63. In any event, there is no urgency to the Plan. CannTrust, by its own admission, is a healthy company, having "made a successful return to the recreational and medical cannabis markets," resulting in revenue generation and a "stronger, more efficient business."[81] On cross-examination, Mr. Guyatt admitted that liquidation is not the only option available to the company, should the Plan fail.[82] The Securities Actions are stayed and CannTrust has few secured or unsecured creditors which CannTrust has the funds to pay. The Monitor does not suggest that any liquidation is imminent.[83]

64. There is a reasonable alternative available to CannTrust and the Securities Plaintiffs. All aspects of the Plan can proceed other than those aspects that are unduly prejudicial. With (i) the incorporation of a proper bar order including a bar of all claims over of Settling Defendants against NSDs, (ii) the removal of the coercive assignment provision; and (iii) the appointment of a neutral third party trustee to the Securities Claimant Trust, the Plan can be sanctioned. The Securities

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[77] *Philip Services* at paras 30, 37.
[78] *Philip Services* at para 57.
[79] *Philip Services* at para 52.
[80] *Crystallex* at para 9.
[81] Affidavit of Greg Guyatt sworn January 20, 2021 at paras 30 and 41.
[82] Transcript of Cross-examination of Greg Guyatt taken March 17, 2021 at q 341, p 102.
[83] Thompson June 9 Affidavit, Exhibit "B" – Letter from the Monitor to Blakes.

Claimants can receive the full $83 million settlement amount and continue to pursue KPMG in the Securities Actions.

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

Andrea Laing/Linc Rogers/Ryan Morris/Caitlin McIntyre

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Lawyers for KPMG LLP

SCHEDULE "A"

LIST OF AUTHORITIES

Cases	
1.	*843504 Alberta Ltd., Re*, 2003 ABQB 1015
2.	*9354-9186 Québec inc. v Callidus Capital Corp*, 2020 SCC 10
3.	*Arrangement relatif à 9323-7055 Quebec inc. (Aquadis International Inc.)*, 2018 QCCS 294
4.	*Canadian Airlines Corp. Re*, 2000 ABQB 442, aff'd 2001 ABCA 9, leave to appeal ref'd [2001] SCCA No 60.
5.	*Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc. (IMV Projects Inc.)*, 2018 ABCA 305
6.	*Chetty v Burlingham Associates Inc*., [1995] 125 Sask R 249
7.	*Crystallex International Corp., Re*, 2013 ONSC 823
8.	*Deloitte & Touche v Livent Inc. (Receiver of)*, 2017 SCC 63
9.	*Endean v St. Joseph's General Hospital*, 2019 ONCA 181
10.	*Ford Credit Canada Ltd v Welcome Ford Sales Ltd*., 2011 ABCA 158
11.	*Gauntlet Energy Corp., Re*, 2003 ABQB 718
12.	*Gendron v Doug C. Thompson Ltd. (Thompson Fuels)*, 2019 ONCA 293
13.	*Hercules Managements Ltd. v Ernst & Young*, [1997] 2 SCR 165
14.	*Hollinger Inc., Re*, 2012 ONSC 5107
15.	In the Matter of the Plan of Compromise or Arrangement of 1511419 Ontario Inc. (Formerly Known as the Cash Store Financial Services Inc.) et al. dated October 6, 2015 at para 7.6
16.	In the Matter of a Plan of Compromise or Arrangement of Sears Canada Inc., Order (Approval Order) dated August 25, 2020 (CV-17-1184600CL)
17.	In the Matter of a Plan of Compromise and Arrangement of Sino-Forest Corporation, Order dated March 20, 2013.
18.	*Indalex Limited (Re)*, 2009 CanLII 39487
19.	*Insurance Corporation of British Columbia v Fredrikson*, [1988] 1 SCR 1089
20.	*Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v Sino-Forest Corp*, 2015 ONSC 4004

Cases	
21.	Labourer's Pension Fund et. al. v Sino Forest Corporation et. al., Order (Directors Settlement Approval) dated Wednesday November 16, 2016
22.	*McIntyre Estate v Ontario (Attorney General) (2002), 61 OR (3d) 257*
23.	*Menegon v Philip Services Corp.*, 1999 CanLII 15004
24.	*Northland Properties Ltd., Re*, 1988 CarswellBC 558, aff'd 1989 CarswellBC 334
25.	*Ontario New Home Warranty Program v Chevron Chemical Co.*, [1999] OJ No 2245
26.	*Pacific Coastal Airlines Ltd. v Air Canada*, 2001 BCSC 1721
27.	Rapport du Contrôleur Concernant le Plan De Transaction et D'Arrangement dated April 30, 2019
28.	*Re Nortel Networks Corporation et al.*, 2014 ONSC 4777, aff'd 2015 ONCA 681, leave to appeal ref'd 42 C.B.R. (6th) 3
29.	*Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37
30.	*Sino-Forest Corporation (Re)*, 2012 ONSC 7050
31.	*Sino-Forest Corporation (Re)*, 2012 ONCA 816
32.	*Stelco Inc., Re*, 2005 CanLII 41379 (ON SC)
33.	*Target Canada Co. (Re)*, 2016 ONSC 316
34.	*Thomson v Thomson*, [1948] OWN 137, 1948 CarswellOnt 132 (HC)
35.	*Vaeth v North American Palladium Ltd.*, 2016 ONSC 5015
36.	*Whitehouse v BDO Canada LLP, 2021 ONSC 2454*

SCHEDULE "B"

TEXT OF RELEVANT STATUTES AND REGULATIONS

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

Section 2, definition of "equity claim":

equity claim means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (réclamation relative à des capitaux propres)

Section 6

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.

Section 22:

Company may establish classes

22 (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Factors

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

> (a) the nature of the debts, liabilities or obligations giving rise to their claims;
>
> (b) the nature and rank of any security in respect of their claims;
>
> (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
>
> (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

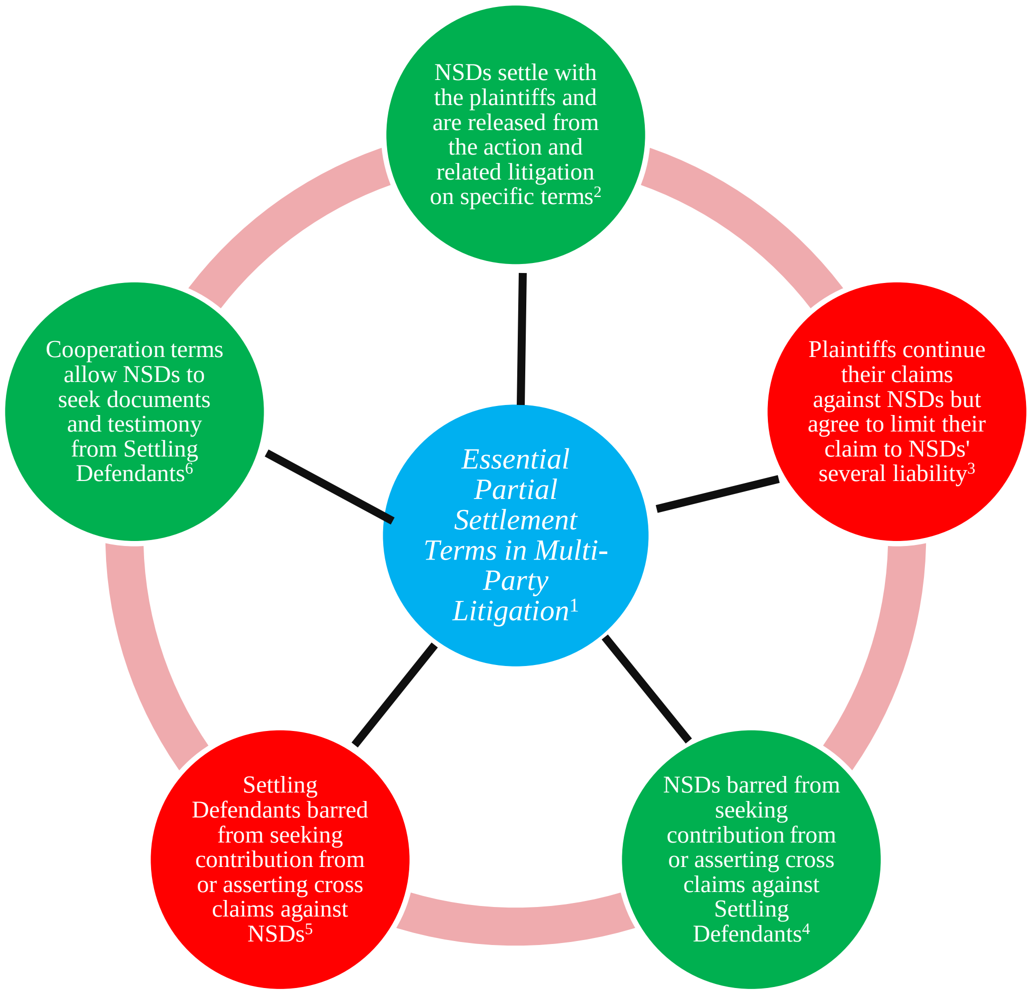
Section 22.1

Class — creditors having equity claims

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

APPENDIX "A"

Essential Components of Partial Settlements in Multi-Party Litigation



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[1] As set out in *Endean* at para 52.

[2] Addressed through Sections 7.2, 7.3 and 8.2 of the amended Plan.

[3] <u>Not addressed in the amended Plan</u>. Section 7.3(2) of the amended Plan only states that the Non-Settling Defendants' ongoing liability to a Securities Claimant or the Securities Claimant Trust will be reduced by any amount that the Court "determines <u>would have been recovered</u> by such Non-Settlement Party or other Person pursuant to a Securities-Related Indemnity Claim held by it against a Released Party …" Conventional bar orders do not and should not take irrelevant questions of recoverability into account.

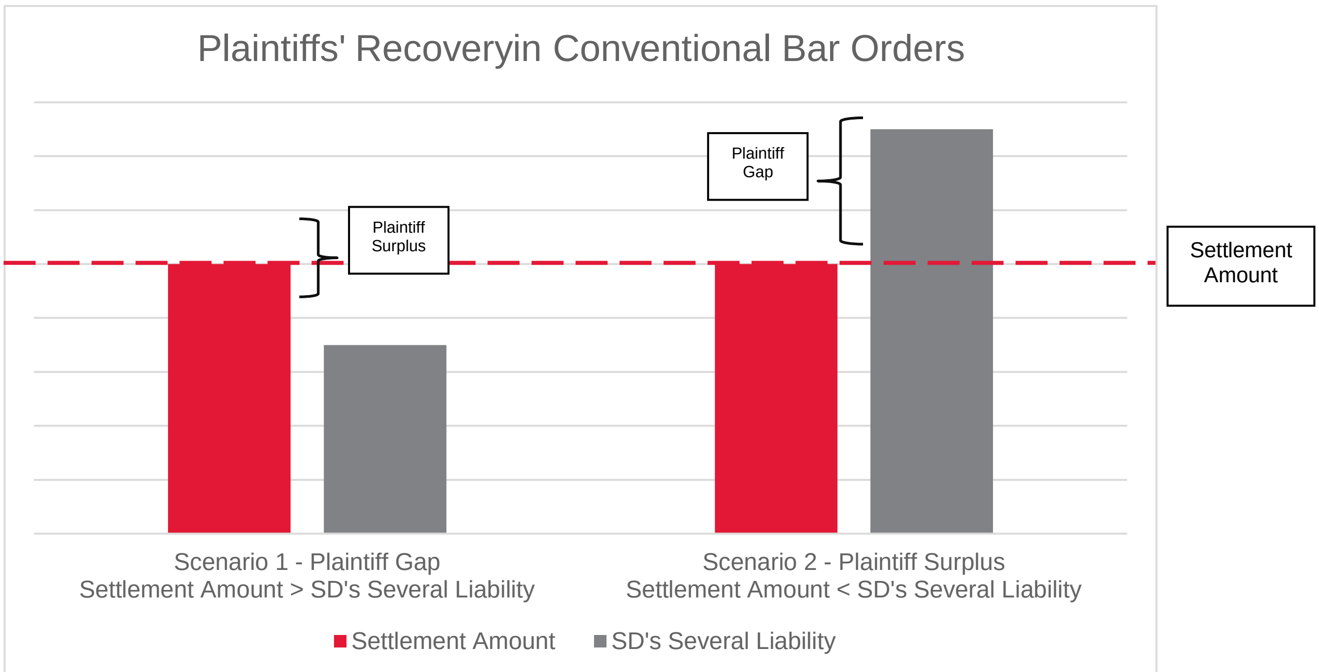
[4] Addressed through Section 7.3(1) and 8.2(i) of the Plan.

[5] Not addressed in the amended Plan. The June 2, 2021 amendments appear to walk back the several liability protections afforded to NSDs by expressly including CannTrust's claims in "contract and tort against KPMG" as part of the definition of Assigned Claims, and in turn excluding all Assigned Claims from the prohibition on "claims for contribution, indemnity or other claims over" by settling defendants against NSDs under Section 7.3(3) and 8.2(k) of the amended Plan.

[6] Addressed through Section 8.2 of the amended Plan.

APPENDIX “B”

Illustration of Plaintiff Recovery in Context of Conventional Bar Orders



APPENDIX "C"

Judgment Reduction Terms (Second Amended and Restated CCAA Plan)

7.3 Injunctions

(1) From and after the Effective Time, to the extent provided in the CCAA Sanction Order, all Persons will be permanently and forever barred, estopped, stayed and enjoined from: (i) 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 with respect to any and all Released Claims; (ii) 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 with respect to any and all Released Claims; (iii) commencing, conducting, continuing or making against any other Person 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) that relates to a Released Claim if such other Person makes a claim or might reasonably be expected to make a claim, in any manner or forum, including by way of contribution or indemnity or other relief, against one or more of the Released Parties, unless such claim of such other Person is itself a Released Claim; (iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any Encumbrance of any kind against the Released Parties or their property with respect to any and all Released Claims; and (v) taking any actions to interfere with the implementation or consummation of the CCAA Plan with respect to any and all Released Claims.

(2) From and after the Effective Time, to the extent provided in the CCAA Sanction Order, any judgment or other award obtained by a Securities Claimant or the Securities Claimant Trust in respect of any Securities-Related Claim against a Non-Settlement Party or other Person that is not a Released Party shall be reduced by the amount, if any, that the court or other tribunal adjudicating the Securities-Related Claim determines would have been recovered by such Non-Settlement Party or other Person pursuant to a Securities-Related Indemnity Claim held by it against a Released Party in respect of such Securities-Related Claim but for the release of such Securities-Related Indemnity Claim pursuant to the CCAA Plan or the CCAA Sanction Order, determined as of the moment before the Effective Time and, for greater certainty, taking into account (i) the Cash Contribution to be made by CannTrust Holdings to the Securities Claimant Trust and (ii) all other Securities-Related Indemnity Claims of other Non-Settlement Parties or other Persons participating in any recovery on a pro rata basis.

(3) From and after the Effective Time, to the extent provided in the CCAA Sanction Order, all claims for contribution, indemnity or other claims over that relate to the Released Claims or the Channelled Claims, which were or could have been brought by a Settlement Party in the Actions or otherwise against a Co-Defendant that is a Non-Settlement Party, excluding for greater certainty all Assigned Claims, will be permanently and forever barred, estopped, stayed and enjoined.

(4) From and after the Effective Time, to the extent provided in the CCAA Sanction Order, all Persons will be permanently and forever barred, estopped, stayed and enjoined from: (i) 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 Released Parties with respect to any and all Channelled Claims; (ii) 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 with respect to any and all Channelled Claims; (iii) commencing, conducting, continuing or making against any other Person 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) that relates to a Channelled Claim if such Person makes a claim or might reasonably be expected to make a claim, in any manner or forum, including by way of contribution or indemnity or other relief, against one or more of the Released Parties, unless such claim of such other Person is itself a Released Claim; (iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any Encumbrance of any kind against any of the Released Parties with respect to any and all Channelled Claims; and (v) taking any actions to interfere with the implementation or consummation of the CCAA Plan with respect to any and all Channelled Claims, provided that nothing in the applicable provision of the CCAA Sanction Order will prevent a Person with an Insured Securities Claim or Insured Securities-Related Claim from making a claim against a Settlement Party to establish liability (but without recovery from it or its property) solely to the extent necessary to enable the Securities Claimant Trust to enforce Assigned Claims against Insurers who are not Settlement Parties.

APPENDIX "D"

Transcript Evidence re: Viability of Applicants' Business in Scenario where Plan is not Sanctioned

Excerpts from Cross-Examination of Greg Guyatt taken June 7, 2021

CannTrust Holdings Inc. creditors are being paid out 100%.

87. Q. Okay, thank you. Greg, is it fair to say that unsecured creditors of CannTrust Holdings are being paid out in full?

    A. No. Well, sorry, CannTrust Holdings, yes.

88. Q. So, CannTrust Holdings has the funds to make those payments?

    A. Yes, it does.

The liability CannTrust Holdings is seeking to resolve through the CCAA process is that represented by the Securities Actions. However, CannTrust Holdings isn't asking the CCAA Court to forgive this liability, it is seeking to approve a payment to the plaintiffs to settle the Actions for $50 million.

89. Q. So, when we're talking about CannTrust Holdings, the liability it is seeking to resolve through the CCAA process is its liability in the securities class actions?

    A. Yes.

90. Q. But CannTrust isn't asking the court to excuse it from the liability exposure represented by the class proceedings. It has agreed to pay 50 million dollars to settle them, correct?

    A. Correct.

The amount of financing CannTrust requires to return to profitability is less than half of the amount it is paying to settle the Securities Class Actions. CannTrust could choose instead to fight the litigation with the $27.5 million in cash it would preserve if the Plan is not sanctioned.

91. Q. Going forward, assuming the second amended and restated plan is sanctioned, and the plan is implemented, do you believe that CannTrust will eventually become profitable?

    A. Yes, I do.

92. Q. However, I understand that in the short term, until it reaches a profitable state, CannTrust requires financing assistance?

    A. That's correct, and we have obtained financing for that purpose.

93. Q. And speaking of that financing work, that is a DIP and exit loan, to use the terminology used by my CCAA partners. And that DIP and exit loan is in the form of a credit facility for 22.5 million dollars, correct?

    A. Correct.

94. Q. And I understand it's for a term of 12 months, but can be renewed on certain terms for an additional 12 months?

A. That's correct.

95. Q. And this DIP and exit loan is designed to provide funding during the restructuring period covered by the CCAA plan, and to provide working capital upon emergence from CCAA, is that correct?

A. Yes.

96. Q. Would it be fair to describe the DIP and exit loan as an essential bridge that will facilitate the CannTrust Group emerging from the CCAA proceedings and continuing to operate?

A. In my view, yes.

97. Q. And presumably, you believe that that loan, the DIP and exit loan, is sufficient to support the company's financing needs as it restructures and gets itself back to a cash flow positive state?

A. Yes.

98. Q. In other words, you agree with me that 22.5 million dollars should be enough not only to get the company through CCAA, but to provide the working capital it needs to eventually become cash flow positive?

A. That's our assumption today, yes.

99. Q. And you say in your affidavit in support of a plan sanction, at paragraph 14, that, "...If the CCAA is not implemented in a timely manner, the only realistic alternative would be a liquidation of the assets of the CannTrust plan companies..."Correct?

A. Yes, correct.

100. Q. And CannTrust has agreed to pay 50 million dollars to settle investor claims on behalf of itself and certain directors and officers?

A. Correct.

101. Q. But you would agree with me that if you didn't need to pay that 50 million dollars, CannTrust would have that money to invest in the business?

A. Yes, but there would still be litigation outstanding, so I'm not sure I understand the question exactly.

102. Q. It's a simple question. If you didn't have to pay the 50 million dollars to the plaintiffs, you could use that to invest in the business?

A. On a temporary basis, yes.

103. Q. And this is just simple math, but 50 million dollars is more than twice the amount you've stated the company needs to return to profitability? You would have 22.5 million and another 27.5 million to fight or settle litigation as you saw fit?

A. Yes.

The Securities Class Actions are at an early stage and do not pose an immediate threat.

105. Q. Would it be fair to say that the litigation is at a relatively early stage?

MR. D'SOUZA: Well, I'll answer that as well. It's at a relatively early stage, yes.

106. Q. There have been no discoveries or documentary productions?

A. No.

In the absence of sanction, the Company would retain its rights to pursue its insurers. It has a $45 million ABC tower of directors and officers' liability insurance and a $20 million side A DIC tower. The Company acknowledges that in the absence of plan sanction it would have a claim against its insurers.

113. Q. Further, I understand there is a 45 million dollar tower of Side ABC directors and officers liability coverage, is that correct?

A. Yes.

121. MS. LAING: And would you agree with me that if this plan were not sanctioned, and the settlement is not approved, that CannTrust and its directors and officers would still have a claim against the insurers for those amounts?

MR. D'SOUZA: They would still be covered, yes.

Coverage has been denied to the Company and two individual defendants under the ABC tower, but has not been denied to the individuals under the Side A DIC tower.

122. MS. LAING: And I understand there is an additional layer of 20 million dollar excess Side A DIC coverage, which is being made available to Mr. Aceto and Mr. Paul?

MR. D'SOUZA: Yes, and perhaps others, but to our knowledge, only those two.

123. MS. LAING: They're being covered under the Side A DIC layer because they have been refused indemnification coverage under the 45 million dollar Side ABC tower, is that correct?

MR. D'SOUZA: That's our understanding.

124. Q. So, if this plan wasn't sanctioned, there would be coverage under the 45 million dollar tower, for the directors and officers under than Mr. Aceto and Mr. Paul, correct?

A. I believe so.

125. Q. And there would be coverage for Mr. Aceto and Mr. Paul under the 20 million dollar Side A DIC tower, correct?

A. I believe so.

128. MS. LAING: But my understanding is that with respect to the directors and officers, other than Mr. Aceto and Mr. Paul who are covered elsewhere, there has been no denial of coverage, correct?

MR. D'SOUZA: There has been a reservation of rights, but no denial of coverage.

APPENDIX "E"

Transcript Evidence re: Value or Importance to the Plan of "Independent Claim" by CannTrust against KPMG

Excerpts from Cross-Examination of Serge Kalloghian taken June 7, 2021

CannTrust did not provide Securities Claimants' counsel with Documents to substantiate a potential independent claim against KPMG by CannTrust

118. Q. I would like to focus on the last sentence of your response in that 12:19 e-mail. You write,

"...No documents responsive to your request were exchanged with CannTrust that are by themselves not subject to the mediation order or applicable privilege, and CannTrust provided no such documents that were created before the mediation order..."

So, what you mean there is that CannTrust did not provide any documents relating to a potential claim against KPMG that were created before the date of the mediation order? Have I got that right?

A. Yes

119. Q. And the date of the mediation order was May 8th of 2020? I'm basing that on paragraph 25 of your affidavit.

A. Yes.

120. Q. So, CannTrust didn't provide any documents created before May 8th, 2020 to representative counsel suggesting that a claim against KPMG has potentially significant value?

MR. WINGFIELD: There were no documents, so we're not going to talk about the absence of information in this examination.

121. Q. And so any value that representative counsel is placing on a potential claim against KPMG is based on its own conclusions and not by analysis from CannTrust, I take it?

MR. WINGFIELD: That would be privileged, subject to paragraph 11 of the mediation order.

Excerpts from Cross-Examination of Greg Guyatt taken June 7, 2021

CannTrust did not provide Securities Claimants' counsel with Documents to substantiate a potential independent claim against KPMG by CannTrust

84. Q. So, based on what Mr. Kalloghlian told me about this potential claim by CannTrust against KPMG and what you just told me about the exchange of documents, if any, not including anything that CannTrust had prepared prior to May 8th, 2020, is it fair to say that any value the plaintiffs are placing on a claim by CannTrust against KPMG is a value that they have developed themselves?

MR. D'SOUZA: Yes, I mean, as a factual matter, the company has provided no facts or analyses to assist them in their theory of any potential claim the company might have against KPMG.

85. MS. LAING: Thank you, Mr. D'Souza, and it's absolutely fine for you to answer these questions. But just to clarify, so you would agree with me that whatever value the representative counsel are placing on this potential claim by CannTrust against KPMG, that's not something that is supported by representations that CannTrust has made?

MR. D'SOUZA: I'm struggling with the question there, Ms. Laing, only because they may have a theory of the case relying on representations in public disclosure documents, but I don't think that was your intention. Certainly...

86. MS. LAING: No, that wasn't.

MR. D'SOUZA: So, the company has not provided them anything, you know, privately, that we believe has assisted them in coming up with the theory of, you know, their case, or valuing damages, or assessing the merits of that case.

Excerpts from Cross-Examination of Serge Kalloghian taken June 7, 2021

Securities Claimants' counsel refused questions on the value and importance of a potential independent claim against KPMG by CannTrust to the Plan

108. Q. So, at paragraph 42 of your affidavit, you say that the value of the claim, and this being the potential claim that CannTrust might have against KPMG, is well in excess of 270 million dollars?

A. It says, "...We estimate potential damages in the proposed action to be well in excess of 27 million..." With reference to the damages analysis from Livent.

109. Q. And your estimate of 270 million you say was arrived at in consultation with representative counsel's expert?

A. Yes.

110. Q. And was that expert Dr. Serona?

A. Yes.

111. Q. It was a different expert?

A. Yes.

112. Q. And that expert's work is not in evidence in this motion?

MR. WINGFIELD: Privileged.

113. MR. MORRIS: That expert's work is not in evidence in this motion?

MR. WINGFIELD: It is subject to litigation privilege.

114. MR. MORRIS: So, the answer to my question is no, it's not in evidence in this motion?

MR. WINGFIELD: That's correct, it's subject to litigation privilege.

121. Q. And so any value that representative counsel is placing on a potential claim against KPMG is based on its own conclusions and not by analysis from CannTrust, I take it?

MR. WINGFIELD: That would be privileged, subject to paragraph 11 of the mediation order.

MR. MORRIS: I think privilege and mediation order are two different things, but we have your position.

MR. WINGFIELD: There is a confidentiality protocol that applies to the mediation order, and there is also a privilege that would apply independently of the confidentiality protocol.

159. Q. All right, I just have one more question before I turn things over to Mr. Krygier-Baum. I just want to go back to paragraph 42 of your affidavit, where you estimate the damages of the claim to be in excess of 270 million dollars. And I had asked earlier about expert work that you had done on this, and there was a privilege claim made. I just want to confirm that you are not prepared to produce the expert work you've had done at this juncture?

A. What was the question?

160. MR. MORRIS: Sorry, you're not prepared to produce the expert work you've had done in respect of the paragraph 42 estimate?

MR. WINGFIELD: Correct.

161. MR. MORRIS: And that's on the basis of privilege?

MR. WINGFIELD: Correct.

162. MR. MORRIS: All right. Those are my questions.

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

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.

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

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