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

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

June 10, 2021

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PART I—INTRODUCTION

1. The CCAA Plan, like all plans of compromise or arrangement that are proposed under the CCAA, represents a compromise between the CannTrust Plan Companies and their stakeholders.[1] If the Court is satisfied that rights have been compromised or otherwise addressed in an attempt to balance interests and have the pain of the compromise equitably shared, then it should sanction the CCAA Plan as fair and reasonable.[2]

2. The CCAA Plan is broadly supported by a very large number and wide variety of different stakeholders with different interests. Each has agreed to make contributions and/or compromise their rights in a careful balancing of interests after months of negotiations and mediation to facilitate the restructuring of the CannTrust Plan Companies and the resolution of over $500 million in Securities Claims.

3. Specifically, the CCAA Plan has the support of:

(a) the 2,377 Securities Claimants that proved Securities Claims for voting purposes, who are giving up their right to pursue CannTrust Holdings, the Original Settlement Parties and the Settling Defendants for their damages in the Actions, which are asserted to be in excess of $500 million (these creditors voted 100% by number and 100% by value to approve the CCAA Plan);[3]

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[1] Capitalized terms used and not otherwise defined herein have the meanings given to them in the Factum of the Applicants (Sanction Order), dated June 8, 2021 ("**CannTrust Factum**") or, if not defined therein, 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] *Sammi Atlas Inc., Re*, 1998 CanLII 14900 (Gen. Div.) at para. 4.

[3] Guyatt Affidavit at paras. 149, 153, Motion Record, Tab 2.

(b) the 23 different Settling Defendants, who are in aggregate contributing \$33 million and their Assigned Claims to the Securities Claimant Trust;

(c) the 196 General Unsecured Creditors of CannTrust Opco who, as a class, agreed to compromise their Proven Claims in exchange for distributions that, in some cases, amount to only 17% of their Proven Claims (these creditors voted 92.0% by number and 84.8% by value to approve the CCAA Plan);[4] and

(d) the seven (7) directors and officers of the CannTrust Group that were Original Settlement Parties, who are contributing their Assigned Claims to the Securities Claimant Trust.

4. The CCAA Plan is also supported by the CannTrust Group's DIP Lender, the Monitor (Ernst & Young Inc.) and the CRO (FTI Consulting Canada Inc.).

5. Further, by facilitating the continuation of the CannTrust Group's business, the CCAA Plan will provide significant benefits to the CannTrust Group's approximately 280 employees, the consumers and medical patients that rely on its products, its suppliers and the communities of Vaughan and Fenwick, Ontario.[5]

6. The lone remaining opponents to the CCAA Plan are the two remaining Non-Settling Defendants (KPMG and Peter Aceto) and a single one of the CannTrust Group's ten D&O insurers (Newline Canada Insurance Limited ("**Newline**")). In contrast to the contributions and compromises that are being made by so many other stakeholders, these opposing parties

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[4] Guyatt Affidavit at paras. 46, 153, Motion Record, Tab 2.

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

assert that the CCAA Plan must not impact them at all and, in some cases, must actually *improve* their situation in order to be sanctioned by this Court.

7. In evaluating whether the CCAA Plan is fair and reasonable, it is useful to compare the position of the opposing parties in the absence of the CCAA Plan against their position if the CCAA Plan is implemented.[6] As demonstrated in the below chart, the *only* substantive impact of the CCAA Plan on these opposing parties is that they may have to defend the Assigned Claims against a different litigant:

Current Position	**Position Under CCAA Plan**
The value of the Non-Settling Defendants' contribution and indemnity claims, and thus the amount that their overall liability could be reduced on account of those claims, is limited to the amount that they could actually recover against CannTrust Holdings and the other Settlement Parties.	*The same result is achieved*. The Non-Settling Defendants' liability is reduced by the amount that they could have actually recovered against CannTrust Holdings and the other Settlement Parties on account of their contribution and indemnity claims.
KPMG is subject to a potential auditor's negligence claim that could be brought by CannTrust Holdings.	KPMG is subject to the *exact same claim* that would instead be brought by the Securities Claimant Trust.
Newline is subject to potential insurance claims that could be brought by the Settlement Parties.	Newline is subject to the *exact same claims* that would instead be brought by the Securities Claimant Trust.

8. With respect to their contribution and indemnity claims, the Non-Settling Defendants assert that the CCAA Plan must *improve* their position by valuing their contribution and

[6] *Olympia & York Developments Ltd. v. Royal Trust Co.*, 1993 CarswellOnt 182 (Gen. Div.) at paras. 29-30.

indemnity claims as if CannTrust Holdings was able to satisfy them in full. As the Court of Appeal observed in *Endean v. St. Joseph's General Hospital*:

> The Pierringer Order, if so interpreted, would do more than maintain a level playing field for the hospital compared to its pre-Order position. The effect of the interpretation the hospital seeks is to put the hospital in a better position than it was in before the Pierringer Order. Before the Pierringer Order, the hospital was at risk, if found at fault to any degree, to pay all of the Hearsey appellants' damages without the ability to obtain indemnity from the manufacturer and distributor. This risk was on the hospital, regardless of the degrees of fault of the concurrent tortfeasors. As interpreted by the hospital, the Pierringer Order would free the hospital of that risk. <u>The hospital would be placed in as good a position as it would have been</u> had it claimed indemnity from the manufacturer and distributor and <u>had the manufacturer and distributor been creditworthy and able to pay indemnity, rather than being bankrupt. No reason why this should be the case was suggested.</u>[7]

9. With respect to the Assigned Claims, the nature of the claim and the scope of liability faced by KPMG and Newline will be the exact same. Any procedural issues that may be occasioned by litigating against the Securities Claimant Trust can surely be dealt with by the Court case managing those matters.

10. The Non-Settling Defendants and Newline are essentially arguing that the Court should decline to sanction the CCAA Plan and imperil: (i) the CannTrust Group's ability to emerge from these proceedings as a going concern; and (ii) the settlements that have been reached following extensive negotiations facilitated by the Hon. Dennis O'Connor Q.C. over the span of a full year, because they would prefer to litigate against the Settlement Parties instead of the Securities Claimant Trust.

11. If there is any prejudice to these few remaining opposing parties, it is far outweighed by the significant benefits that the CCAA Plan is expected to achieve. The approval of the

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[7] *Endean v. St. Joseph's General Hospital*, 2019 ONCA 181 at para. 57 [emphasis added].

CCAA Plan should not be held hostage by a few outlying individual stakeholders who have not settled and seek to improve their position based on the compromises and contributions of others. The CCAA Plan should be sanctioned by this Court.

PART II—REPLY

(i) The Non-Settling Defendants Were Not Entitled to Vote on the CCAA Plan

12. The Non-Settling Defendants argue that the classification of creditors was improper because the Non-Settling Defendants were not placed in the same class as the Securities Claimants and given a right to vote on the CCAA Plan. The Non-Settling Defendants were not entitled to vote on the CCAA Plan as:

(a) the CCAA Plan was proposed to Securities Claimants as affected creditors to address their Securities Claims, and therefore it properly classified them as their own class;

(b) even if the Non-Settling Defendants were placed in the Securities Claimant Class, they would not have had a right to vote as a result of the rule against double proofs; and

(c) the CCAA expressly restricts the right of creditors holding equity claims to vote on a CCAA plan.

a. <u>CCAA Plan Not Proposed to Non-Settling Defendants</u>

13. Section 4 of the CCAA provides that a debtor company may propose a compromise to "its unsecured creditors or any class of them" and the Court may direct a meeting of those

creditors.[8] The CCAA does not require the debtor company to propose a compromise to all of its unsecured creditors. By contrast, a proposal under the *Bankruptcy and Insolvency Act* "must be made to the creditors generally, either as a mass or separated into classes…"[9]

14. The Non-Settling Defendants are not included in a class to which the CCAA Plan is proposed. Accordingly, it was not necessary, or appropriate, to include them in a class with the Securities Claimants who are Affected Creditors under the CCAA Plan.[10]

b. Rule Against Double Proof

15. The "rule against double proof" provides that there cannot be two proofs of claim filed for the same debt, even though there may be two separate contracts or sources of liability in respect of that debt.[11] The rule against double proof extends to voting.[12] The effect of the rule is that the principal creditor may prove its claim, and the claim of the derivative creditor is disallowed.[13]

16. Claims for contribution and indemnity are derivative claims – the Securities Claimants are the principal creditor.[14] In the Actions, the Securities Claimants seek damages against CannTrust Holdings and the Non-Settling Defendants, among others, for their alleged losses related to misrepresentations by CannTrust Holdings in its public disclosure. The Securities-Related Indemnity Claims consist of potential claims over by the Non-Settling Defendants

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[8] *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, s. 4 ("**CCAA**").

[9] *Bankruptcy and Insolvency Act*, RSC 1985, c.B-3, s. 50(1.2).

[10] *Philip Services Corp., Re*, 1999 CarswellOnt 4673 (Gen. Div.) at paras. 17-18.

[11] *Olympia & York Developments Ltd., Re*, 1998 CarswellOnt 4552 (Gen. Div.) at para. 23; *Aslan, Re*, 2013 ONSC 4112 at para. 15, var'd on other grounds, *Aslan, Re*, 2014 ONCA 245 at para. 16 [***Aslan ONCA***].

[12] *Quintette Coal Ltd. (Re) (Trustee of)*, 1991 CanLII 303 (BC SC) at para. 35.

[13] *Aslan ONCA* at para. 17.

[14] *Ontario New Home Warranty Program v. Chevron Chemical Company*, 1999 CanLII 15098 at para. 52.

against CannTrust Holdings for contribution and indemnity in respect of the same damages that are claimed against CannTrust Holdings by the Securities Claimants.

17. The Securities Claimants proved Securities Claims with a value in excess of $509 million for voting purposes pursuant to the Meeting Order.[15] If the Non-Settling Defendants had been placed in the Securities Claimant Class, any Securities-Related Indemnity Claim that they may have attempted to prove for their liability related to the Actions would have been duplicative of the claims filed by Securities Claimants and would have been disallowed due to the rule against double proofs.

c. <u>Equity Claims Not Entitled to Vote</u>

18. Section 22.1 of the CCAA makes the classification and voting of equity claims subject to court discretion. In that regard, it provides that creditors having equity claims may not, as members of that class, vote at any meeting unless the court orders otherwise.[16] The starting point is that equity claims do not have a vote, regardless of whether the plan may be affecting their rights or not. The Non-Settling Defendants accept that their Securities-Related Indemnity Claims are equity claims and, thus, presumptively not entitled to vote.[17] There was no free-standing statutory right to vote that was denied by the Meeting Order.

19. In this case, where the Securities Claimants are the principal creditor and the Non-Settling Defendants have derivative Securities-Related Indemnity Claims that were precluded from voting due to rule against double proof, it was appropriate for the Court to approve the

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[15] Guyatt Affidavit at para. 149, Motion Record, Tab 2.

[16] CCAA, s. 22.1.

[17] Responding Factum of KPMG LLP (Re: Sanction Order), dated June 9, 2021 at para. 29 ("**KPMG Factum**").

class of Securities Claimants put forward by the CannTrust Group.

(ii) Newline Was Not Entitled to Vote on the CCAA Plan

20. Newline is not a creditor of the CannTrust Group – it is an insurer of the directors and officers of the CannTrust Group. Since it is not a creditor, it has no right to vote in any circumstance.[18]

(iii) The Judgment Reduction Provision is Appropriate

21. The Non-Settling Defendants assert that the Judgment Reduction provision contained in the CCAA Plan is unprecedented and inappropriate, despite the fact that it is economically neutral to them. They unconvincingly seek to distinguish functionally identical relief that was recently granted in the CCAA proceedings of *Aquadis International Inc.* ("***Aquadis***")[19] and cite Judgment Reduction provisions that were imposed in different circumstances.

a. *Aquadis* is Not Distinguishable

22. The Non-Settling Defendants assert that due to differences between the common law and the *Civil Code of Quebec* (the "**CCQ**"), it is not possible for the liability of a non-settling defendant to be limited to its several liability in Quebec. However, there is in fact no functional distinction in the proportionate settlement agreements that are typically (that is, in the context of settling defendants that are presumptively solvent) granted in the common law provinces and Quebec.

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[18] CCAA, s. 4.

[19] *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.

23. The legal basis for judgment reduction provisions in proportionate settlement agreements in Quebec is the release from solidarity, set out in Article 1531 of the CCQ which reads:

> Where, through the act or omission of the creditor, a solidary debtor is deprived of a security or of a right which he could have set up by subrogation, he is released to the extent of the value of the security or right of which he is deprived.[20]

24. As in the common law, the purpose of judgment reduction provisions is to reduce the liability of the settling defendant by the value of the right that is being lost – specifically the value of their claim for contribution and indemnity against a settling defendant that is subject to joint and several (or solidary in civil law parlance) liability.

25. In Quebec, it is possible and indeed typical for proportionate settlement agreements involving settling defendants that are presumptively solvent to contain provisions that limit the non-settling defendants' exposure to their several liability. For example, in *B2B Trust c. Samson & Associés* ("***B2B Trust***"), the Quebec Court of Appeal applied a proportionate settlement agreement containing the following full Judgment Reduction provision:

> It is further understood and agreed that Plaintiff and Class Members expressly renounce and waive the benefit of solidarity (or, as the case may be, in solidum obligation) against the Settling Parties or any other person, including the Non-Settling Parties, in respect of the acts and/or omissions and/or facts reproached to the Setling Parties in the Class Action Proceedings and it is understood that by the effect of the judgment of the Court approving the present Settlement Agreement, the Plaintiff or any Class Members will not claim, in any manner whatsoever, from the Non-Settling Parties who are not a party to the present Settlement Agreement, a claim for payment, indemnity and/or contribution and/or any other claim inclusive of, but not limited to, a claim for compensatory, punitive and/or recursory damages, allegedly caused by, or

[20] *Civil Code of Québec*, CQLR c CCQ-1991, art. 1531 [emphasis added].

attributed to Settling Parties.[21]

26. In *Aquadis*, it was open to the Court to require that the liability of the non-settling defendants be limited to their several liability as in *B2B Trust*. The Court instead approved a Judgment Reduction provision based on recoverability over the objection of the non-settling defendants, stating as follows:

> In the Court's view, section 8 works much like the proportionate share agreement… because the Monitor is effectively agreeing to indemnify the non-settling party for any portion of the damages that a court may determine he could have effectively recovered from a settling party.
>
> …
>
> The notion that releases granted in a CCAA proceeding must be "economically neutral" for non-settling parties is respected by section 8. If the non-settling party's subrogation right is without value, the release changes nothing. If the non-settling party shows that his lost right had value, his liability will be reduced accordingly.[22]

27. *Aquadis* cannot be distinguished by pointing to differences in the common law and the CCQ – there are none. It is directly on point.

28. Even if the Judgment Reduction provision based on recoverability was unprecedented, and it is not, the comments of Justice Blair in *Canadian Red Cross Society* are apposite:

> It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.[23]

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[21] *B2B Trust c. Samson & Associés*, 2016 QCCA 1569 at para. 3.

[22] *Aquadis* at paras. 49, 53.

[23] *Canadian Red Cross Society, Re*, 1998 CanLII 14907 (ON SC) at para. 45.

b. Judgment Reduction Provisions for Solvent Settling Defendants

29. The Non-Settling Defendants have referred the Court to several Judgment Reduction provisions granted in settlements related to CCAA proceedings, however in the majority of these cases the settling defendants were not the debtor company – they were defendants that were presumptively solvent. In *Labourer's Pension Fund v. Sino Forest Corporation* and in *Sears Canada Inc., Re*, the settling defendants were certain directors.[24] In *Hollinger Inc., Re*, the settling defendants were Torys LLP and KPMG LLP.[25]

30. It is to be expected that, in the context of presumptively solvent settling defendants that are able to pay the contribution and indemnity claims of the non-settling defendants, that the liability of the non-settling defendants is limited to their several liability to ensure that the settlement is economically neutral to them. This is not necessary or appropriate in the context of an insolvent settling defendant such as CannTrust Holdings.

c. Appropriate for Quantum of Judgment Reduction to be Evaluated as of Effective Time

31. The CCAA Plan provides that the quantum of the Judgment Reduction, being the amount that the Non-Settling Defendants could have recovered on account of the Securities-Related Indemnity Claims that are being released pursuant to the CCAA Plan, will be evaluated as of the moment before the Effective Time. The Non-Settling Defendants argue that the quantum of the Judgment Reduction should be evaluated as of some future date when

[24] *Labourer's Pension Fund v. Sino Forest Corporation*, Order (Director Settlement Approval) dated November 16, 2016, Court File No. CV-11-431153-00CP; *Sears Canada Inc., Re*, Order (Approval Order) dated August 25, 2020, Court File No. CV-17-11846-00CL.

[25] *Hollinger Inc., Re*, 2012 ONSC 5107.

the Non-Settling Defendants would have been seeking to enforce those Securities-Related Indemnity Claims.

32. In evaluating the value of an interest to determine whether it is being treated fairly under a CCAA plan, the Court considers the current value of that interest independent of the CCAA plan.[26]

33. It is appropriate for the Judgment Reduction to be valued as of the moment before the Effective Time as any additional value that would be available to satisfy the Securities-Related Indemnity Claims after the Effective Time is contingent on the CCAA Plan being implemented. It is inappropriate for the Non-Settling Defendants to object to the CCAA Plan and then assert that the benefit of it being implemented should accrue to them.

34. Conducting this valuation as of moment before the Effective Time is not complicated. For example, in the course of its liquidation analysis, the Monitor has estimated that there may be net proceeds available for distribution to equity claimants of CannTrust Holdings of between approximately $75.7 million and $93.8 million as of May 31, 2021 (which includes the $50 million settlement payment).[27] Courts make determinations of value in all sorts of situations and are well equipped to do so.

35. In *Aquadis*, the non-settling defendants argued, as the Non-Settling Defendants do here, that it would be difficult for them to prove the value of the indemnity that they would have been able to recover from the settling defendants. The Court held that this was not a

[26] *Stelco Inc., Re*, 2006 CarswellOnt 406 (SCJ) at para. 16.
[27] Tenth Report of the Monitor dated May 21, 2021 at para. 91(c).

sufficient basis to refuse to grant the Judgment Reduction provision on the basis of recoverability.[28]

(iv) Assignment of the Assigned Claims is Not a Contractual Amendment

36. Newline asserts that this Court cannot approve the assignment of the Assigned Claims to the Securities Claimant Trust because of a provision in the applicable policy that requires its consent to that assignment.

37. First, the Settlement Parties are only seeking to assign causes of action that they may have against Newline related to the policy, not the policy itself. A copy of the Newline policy is not before the Court on this motion. The Newline policy purportedly requires Newline's consent for the "assignment of the interest of any Insured Person under this Policy."[29] It is far from clear that this encompasses the assignment of a mere cause of action.

38. Second, and in any event, the CCAA provides this Court with very broad discretion to sanction the indefinite, or even permanent, stay of contractual rights where the exigencies of the particular reorganization require it.[30] The CCAA also expressly permits this Court to assign the rights and obligations of the debtor company under an agreement.[31] CCAA courts frequently approve the assignment of agreements despite the existence of consent rights.[32]

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[28] *Aquadis* at paras. 51-55.

[29] Affidavit of A. Benson Forrest sworn June 4, 2021 at para. 8, Responding Motion Record of Newline Canada Insurance Limited (Sanction Order), dated June 4, 2021.

[30] *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, 2003 BCCA 344 at para. 37; *Armbro Enterprises Inc., Re*, 1993 CarswellOnt 241 at para. 13.

[31] CCAA, s. 11.3.

[32] See e.g. *Hayes Forest Services Ltd., Re*, 2009 BCSC 1169 at para. 31.

39. In *Doman Industries Ltd., Re*, relied upon by Newline, the Court held that it did have jurisdiction to grant a permanent stay of contractual rights related to events of default prior to or during the CCAA proceedings.[33] The Court held that it did not have jurisdiction to stay contractual rights that would only come into existence after the implementation of the CCAA plan.[34] The assignment of the Assigned Claims will occur upon implementation of the CCAA Plan, not afterwards, so it is within this Court's jurisdiction to grant.

(v) Assignment of the Assigned Claims is Not Champerty or Maintenance

40. The Non-Settling Defendants and Newline rely on the archaic legal doctrines of champerty and maintenance, which were developed "with a view to prohibiting particular practices that were prevalent in English medieval society,"[35] to argue that the assignment of the Assigned Claims to the Securities Claimant Trust is not permissible.

41. In *McIntyre Estate v. Ontario (Attorney General)*, relied upon the Non-Settling Defendants, the Ontario Court of Appeal defined these terms as follows:

(a) Maintenance: "[T]hose who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse."[36]

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[33] *Doman Industries Ltd., Re,* 2003 BCSC 376 at para. 17.

[34] *Doman* at paras. 24-25.

[35] *McIntyre Estate v. Ontario (Attorney General)*, 2002 CanLII 45046 (ON CA) at para. 19 [***McIntyre***].

[36] *McIntyre* at para. 26.

(b) Champerty: "[A]n egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation."[37]

42. For an assignment to constitute maintenance, the assignee must be obtaining the assignment for an improper motive.[38] Pursuing a cause of action to limit one's overall losses, as the Securities Claimants are seeking to do, is not an improper motive.[39]

43. The Supreme Court of Canada has made it clear that maintenance and champerty do not exist where the assignee has a legitimate commercial interest in the enforcement of the claim.[40] The Non-Settling Defendants and Newline do not appear to disagree with the fact that the Securities Claimant Trust has a legitimate commercial interest in the Assigned Claims.[41] Instead, they seek to set up supposed exceptions where a legitimate commercial interest cannot be found.

44. The following are the supposed exceptions, and the reasons why they do not exist or do not apply in the case at bar:

Supposed Exception	**Response**
There cannot be the prospect that the assignee will obtain a profit.[42]	The Courts have held that "the potential for profit does not invalidate the assignment unless the assignee is a stranger who has no legitimate business interest in the transaction."[43]

[37] *McIntyre* at para. 26.

[38] *McIntyre* at para. 34.

[39] *Plastyle Inc. v. CKF Inc.*, 1992 CarswellOnt 153 (Gen. Div.) at para. 20.

[40] *Fredrickson v. I.C.B.C.*, 1986 CanLII 1066 (BCCA) at para. 26, reasons adopted by the Supreme Court of Canada in 1988 CanLII 38 (SCC) [***Fredrickson***].

[41] CannTrust Factum at para. 44.

[42] KPMG Factum at para. 53.

[43] *Ingle v. ACA Assurance*, 2005 CanLII 39682 (ON SC) at para. 17.

Supposed Exception	Response
The assignor and assignee may not share in the profits of the litigation.[44]	The Securities Claimant Trust and CannTrust Holdings are not sharing in the profits of the litigation. At best, and only if the total recovery by the Securities Claimant Trust exceeds $250 million, CannTrust Holdings can recover part of the $50 million settlement funds that it paid. There is no circumstance in which CannTrust Holdings can recover more than $50 million and thereby make a profit on the transaction.
An assignee cannot have an existing claim against the third party.[45]	The Courts have approved the assignment of a claim by a defendant against a third party to the plaintiff.[46]
An assignor and assignee's interests cannot be opposed at the time of assignment.[47]	In *Caisse Populaire Vanier Ltee v. Bales*, a creditor of the bankrupt (and thus adverse in interest in the same manner as the Securities Claimants are to CannTrust Holdings) obtained the assignment of a solicitor's negligence claim that the bankrupt may have had.[48]
An insurance claim cannot be assigned prior to judgment.[49]	In *Bow Valley Resource Services Ltd. v. Kansa General Insurance Co.*, a pre-judgment claim by a defendant against its insurer was assigned to the plaintiffs as part of a settlement of the defendants' liability.[50]

[44] KPMG Factum at para. 55.

[45] KPMG Factum at para. 53.

[46] *Fredrickson*, *Bow Valley Resource Services Ltd. v. Kansa General Insurance Co.*, 1991 CarswellBC 714 (SC) at paras. 23-29 [***Bow Valley***], leave to appeal ref'd *Bow Valley Resource Services Ltd. v. Kansa General Insurance Co.*, 1991 CarswellBC 715 (CA) at para. 5.

[47] KPMG Factum at para. 53.

[48] *Caisse Populaire Vanier Ltee v. Bales*, 1991 CarswellOnt 173 (Gen. Div.) at para. 48.

[49] Factum of Newline Canada Insurance Limited (Sanction Order), dated June 9, 2021 at paras. 39-42.

[50] *Bow Valley* at paras. 23-29.

46. The assignment of the Assigned Claims does not fall within the doctrines of champerty and maintenance. The Assigned Claims are a crucial part of the compensation that the CannTrust Group and the other Settlement Parties are giving in order to resolve $500 million in Securities Claims.[51] Accordingly, the assignment of the Assigned Claims is necessary and appropriate and should be approved by this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of June, 2021.

McCarthy Tétrault LLP

Lawyers for the Applicants

51 Affidavit of Serge Kalloghlian, sworn June 2, 2021 ("**Kalloghlian Affidavit**") at para. 56, Motion Record of the CCAA Representatives, dated June 2, 2021, Tab 1.

SCHEDULE "A"
LIST OF AUTHORITIES

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

2. *Olympia & York Developments Ltd. v. Royal Trust Co.*, 1993 CarswellOnt 182 (Gen. Div.)

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

4. *Philip Services Corp., Re*, 1999 CarswellOnt 4673 (Gen. Div.)

5. *Olympia & York Developments Ltd., Re*, 1998 CarswellOnt 4552

6. *Aslan, Re*, 2013 ONSC 4112 at para. 15, var'd on other grounds, *Aslan, Re*, 2014 ONCA 245

7. *Quintette Coal Ltd. (Re) (Trustee of)*, 1991 CanLII 303 (BC SC)

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

9. *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.

10. *B2B Trust c. Samson & Associés*, 2016 QCCA 1569

11. *Canadian Red Cross Society, Re*, 1998 CanLII 14907 (ON SC)

12. *Labourer's Pension Fund v. Sino Forest Corporation*, Order (Director Settlement Approval) dated November 16, 2016, Court File No. CV-11-431153-00CP

13. *Sears Canada Inc., Re*, Order (Approval Order) dated August 25, 2020, Court File No. CV-17-11846-00CL

14. *Hollinger Inc., Re*, 2012 ONSC 5107

15. *Stelco Inc., Re*, 2006 CarswellOnt 406 (SCJ)

16. *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, 2003 BCCA 344

17. *Armbro Enterprises Inc., Re*, 1993 CarswellOnt 241

18. *Hayes Forest Services Ltd., Re*, 2009 BCSC 1169

19. *Doman Industries Ltd., Re*, 2003 BCSC 376

20. *McIntyre Estate v. Ontario (Attorney General)*, 2002 CanLII 45046 (ON CA)

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

22. *Fredrickson v. I.C.B.C.*, 1986 CanLII 1066 (BCCA), reasons adopted by the Supreme Court of Canada in 1988 CanLII 38 (SCC)

23. *Ingle v. ACA Assurance,* 2005 CanLII 39682 (ON SC)

24. *Bow Valley Resource Services Ltd. v. Kansa General Insurance Co.*, 1991 CarswellBC 714 (SC), leave to appeal ref'd *Bow Valley Resource Services Ltd. v. Kansa General Insurance Co.*, 1991 CarswellBC 715 (CA)

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

SCHEDULE "B"
RELEVANT STATUTES

***Bankruptcy and Insolvency Act*, RSC 1985, c.B-3**

To whom proposal made

50 (1.2) A proposal must be made to the creditors generally, either as a mass or separated into classes as provided in the proposal, and may also be made to secured creditors in respect of any class or classes of secured claim, subject to subsection (1.3).

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

Compromise with unsecured creditors

4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

> (a) an agreement entered into on or after the day on which proceedings commence under this Act;
>
> (b) an eligible financial contract; or
>
> (c) a collective agreement.

Factors to be considered

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

> (a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

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.

***Civil Code of Québec*, CQLR c. CCQ-1991**

1531 Where, through the act or omission of the creditor, a solidary debtor is deprived of a security or of a right which he could have set up by subrogation, he is released to the extent of the value of the security or right of which he is deprived.

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

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

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