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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

Applicants

FACTUM OF THE APPLICANTS
(Stay Extension, Ongoing CCAA Relief and Plan Implementation Matters)
(Returnable December 16, 2021)

December 15, 2021

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PART I—INTRODUCTION

1. The relief sought on this motion is necessary to facilitate implementation of the CannTrust Group's[1] CCAA Plan and to provide necessary ongoing CCAA relief thereafter.

2. CannTrust Group has made significant progress in these CCAA proceedings, including obtaining approval and sanction of the CCAA Plan. However, due to numerous challenges, including headwinds affecting the Canadian cannabis industry more broadly, the CannTrust Group is running out of cash to fund the day-to-day operations of Opco.[2]

3. The CannTrust Group is pursuing financing and acquisition transactions to continue the going-concern operations of Opco but, in the meantime, the CannTrust Group does not want to jeopardize the CCAA Plan by delaying implementation and thereby making it become dependent on new financing.

4. The CannTrust Group remains of the view that implementing the CCAA Plan is in the best interests of the CannTrust Group and its stakeholders. As such, the relief sought on this motion includes:

   (a) steps to facilitate implementation of the CCAA Plan. This includes approving Articles of Reorganization, which is a required step pursuant to the CCAA Plan, and other confirmations;

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[1] Capitalized terms used but not defined herein have the meanings given to them in the Affidavit of Greg Guyatt sworn December 10, 2021 (the "**Guyatt Affidavit**"), Motion Record of the Applicants (Stay Extension, Ongoing CCAA Relief and Plan Implementation Matters) dated December 10, 2021 ("**Applicants' Motion Record**") at Tab 2.

[2] Not including the amounts held by CannTrust Holdings to contribute to the CCAA Plan.

(b) ongoing CCAA relief after implementation of the CCAA Plan. In light of the CannTrust Group's liquidity constraints, the ongoing relief sought will provide the necessary court-supervision to approve a financing transaction or acquisition of the business by a third party after implementation of the CCAA Plan, or, if that cannot be accomplished, will facilitate an orderly wind-down in respect of the business and assets of the CannTrust Group; and,

(c) an extension of the Stay Period to January 31, 2022 to allow for implementation of the CCAA Plan and the continuation of the next steps towards a transaction or orderly wind-down thereafter.

PART II—THE FACTS

5. The facts in support of this motion are more fully set out in the Guyatt Affidavit, the Sixteenth Report of the Monitor dated December 3, 2021 (the "**Sixteenth Report**") and the Supplement to the Sixteenth Report dated December 15, 2021. Certain key details are highlighted in this section.

(i) CCAA Proceeding

6. On March 31, 2020, the CannTrust Group sought and obtained relief from the CCAA Court pursuant to an initial order made under the CCAA (as amended from time to time, the "**Initial Order**").[3]

7. Facilitated by the relief granted in the Initial Order, the CannTrust Group has successfully completed many of its objectives for these proceedings, including reaching an

[3] Guyatt Affidavit at paras 10-11.

agreement regarding a framework for the settlement of all Securities Claims against CannTrust Holdings that is reflected in the CCAA Plan.[4]

(ii) CCAA Plan and Sanction Order

8. The CCAA Plan was overwhelmingly approved by each of the four classes of Affected Creditors.[5] When implemented, the CCAA Plan contemplates the following:[6]

(a) in relation to CannTrust Holdings and its Affected Creditors:

(i) the payment in full of all General Unsecured Claims against CannTrust Holdings;

(ii) Cash Contributions to a trust for the benefit of Securities Claimants, consisting of $50 million from CannTrust Holdings, $31 million from certain co-defendants, US $8 million from certain other co-defendants, and US $36.9 million from the Insurers;

(iii) the Actions will be dismissed as against CannTrust Holdings and the other Settlement Parties; and

(iv) CannTrust Holdings and the other Released Parties will be released from the Released Claims.

(b) in relation to the other members of the CannTrust Group:

[4] Guyatt Affidavit at para 12.
[5] Guyatt Affidavit at para 15.
[6] Guyatt Affidavit at para 14.

(i) the General Unsecured Creditors of Opco will receive distributions from the GUC Distribution Pool being established for them (with General Unsecured Creditors who are not Convenience Creditors anticipated to recover 17% of their Proven Claims, and with Convenience Creditors (who have small claims) recovering more than that proportion of their Proven Claims);

(ii) the sole General Unsecured Claim against Elmcliffe will be satisfied in full pursuant to payment arrangements agreed with the General Unsecured Creditor of Elmcliffe; and

(iii) the CCAA Proceedings in respect of CTI will be terminated (because it has no Proven Claims against it).

9. In July 2021, the CannTrust Group obtained Court approval for the CCAA Plan pursuant to the CCAA Sanction Order.[7]

10. On December 2, 2021, the CannTrust Group and the CCAA Representatives obtained the U.S. Approval Order, which approved the settlements reached with the plaintiffs, co-defendants and insurers for the purposes of the U.S. Class Action.[8]

11. The CannTrust Group is now working to satisfy the remaining conditions to implementing the CCAA Plan (the "**Plan Implementation Conditions**"), which include (i) the expiry of the 30-day appeal period in respect of the U.S. Approval Order; and (ii) reaching

[7] Guyatt Affidavit at para 16.
[8] Guyatt Affidavit at para 17.

agreement with the DIP and Exit Lender regarding the terms to govern the DIP and Exit Loan following implementation of the CCAA Plan.[9]

(iii) Current Situation

12. The CannTrust Group successfully had its licenses reinstated, resumed operations and launched its new product offerings. However, CannTrust has faced challenges in light of well-publicized headwinds in the Canadian cannabis industry generally and CannTrust-specific issues including that the time required to create a compelling consumer offering took longer than expected and CannTrust had play 'catch-up' with its competitors.[10]

13. CannTrust is presently experiencing a liquidity shortfall.[11] While CannTrust Holdings is holding sufficient cash to make the payments contemplated by the CCAA Plan, the CannTrust Group's cash position beyond that to fund Opco's operations is tight.[12]

14. The CannTrust Group previously conducted a court-supervised SISP, which was not successful.[13] However, more recently, CannTrust Group management has been in discussions with potential investors and strategic partners. Those discussions remain ongoing but no definitive agreement has been reached to date.[14]

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[9] Guyatt Affidavit at para 18.
[10] Guyatt Affidavit at paras 19-20.
[11] Guyatt Affidavit at para 21.
[12] Guyatt Affidavit at para 22.
[13] Guyatt Affidavit at para 12(e).
[14] Guyatt Affidavit at para 23.

15. In the circumstances, the CannTrust Group took additional steps to conserve its remaining cash, including laying off employees, renegotiating material contracts and the sale of non-core assets.[15]

16. Nonetheless, in light of its current liquidity position and without a definitive agreement settled at this time, it is not clear if the CannTrust Group will be able to complete a financing or strategic transaction or if it will be required to conduct an orderly wind-down.[16]

17. Based on the liquidation analysis prepared by the Monitor in relation to the Sanction Order motion and the claims (including post-filing claims) known to or anticipated by the CannTrust Group, all creditors of CannTrust Holdings are expected to be paid all amounts due to them in the event of an orderly wind-down. Secured and unsecured creditors of Opco, on the other hand (other than the DIP and Exit Lender and CannTrust Holdings) are expected to receive zero in a liquidation.[17] A financing or acquisition transaction, if one materializes before or after implementation of the CCAA Plan, might result in a better outcome for Opco.

PART III—ISSUES AND THE LAW

18. The key issues on this motion are:

  (a) Should the Court grant the requested relief necessary to facilitate implementation of the CCAA Plan and ongoing CCAA relief, including:

    (i) approving the Articles of Reorganization;

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[15] Guyatt Affidavit at para 24.

[16] Guyatt Affidavit at paras 38-39.

[17] Guyatt Affidavit at para 55.

(ii) continuing the CCAA Initial Order and the CCAA Charges after implementation of the CCAA Plan;

(iii) approving the KERP Amendment; and

(iv) granting enhanced powers to the Monitor to take effect if all directors of CannTrust Holdings resign?

(b) Should the Court extend the stay of proceedings to January 31, 2022?; and

(c) Should the Court authorize the Monitor to accept the Late Claims as described in the Sixteenth Report?

19. The CannTrust Group submits that this Court has the authority to grant such relief and that it is appropriate and necessary to do so for the benefit of the CannTrust Group and its stakeholders.

1. Implementation of the CCAA Plan and Related Relief is Appropriate: Overview

20. The relief sought on this motion is intended to facilitate implementation of the CCAA Plan and provide ongoing CCAA relief thereafter.

21. The Court's jurisdiction to grant the requested relief flows from section 11 of the CCAA, which gives this Court broad powers to "make any order that it considers appropriate in the circumstances," including an order that continues to apply after the CCAA proceedings have concluded.[18] The plain language of the statute is very broad.[19]

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[18] CCAA, s. 11; *Crystallex (Re)*, 2012 ONCA 404 [***Crystallex***] at para 68.
[19] *Century Services Ltd, Re*, 2010 SCC 60 [***Century Services***] at para 67.

22. In *Century Services*, the Supreme Court of Canada observed that judicial discretion has allowed the CCAA to adapt and evolve to meet contemporary business and social needs.[20] CCAA courts have been called upon to innovate as restructurings have become increasingly complex.[21]

23. The Court's discretionary authority pursuant to the CCAA is not limited to specific orders, but instead, is guided by the "baseline considerations" of appropriateness, good faith, and due diligence,[22] including "inquiring whether the order sought advances the policy objectives underlying the CCAA."[23] Appropriateness extends not only to the purpose of the order, "but also to the means it employs."[24]

24. In determining whether and how to exercise its discretion, the Court should ask itself whether the order will:

> [U]sefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs.[25]

25. In this case, the CannTrust Group is of the view that implementing the CCAA Plan is appropriate and in the best interests of the CannTrust Group and its stakeholders notwithstanding its current liquidity challenges.

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20 *Century Services* at para 58.

21 *Century Services* at para 61; see also *Just Energy Group Inc et al*, 2021 ONSC 7630 [***Just Energy***] at para 60.

22 *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 [***Callidus***] at para 49; see also *Just Energy* at para 32.

23 *Century Services* at para 70; see also *US Steel Canada Inc (Re)*, 2016 ONCA 662 at para 51 [***US Steel***]; *Just Energy* at para 32.

24 *Century Services* at para 70.

25 *Just Energy* at para 61.

26. The CCAA Plan is the result of extensive negotiations, including negotiations facilitated by the Court-Appointed Mediator.[26] Failing to implement the CCAA Plan would be contrary to the expectations of the Affected Creditors, who voted overwhelmingly in favour of the CCAA Plan[27] and devoted countless hours to negotiating the resolutions therein. Such resolutions include the multifaceted settlement in the CCAA Plan of more than $500 million of claims in Canada and the United States involving the Securities Claimants, the CannTrust Group, and all of the co-defendants and Insurers who are Settlement Parties.[28]

27. Moreover, Affected Creditors are better off or no worse off under the CCAA Plan:[29] all Affected Creditors that are General Unsecured Creditors of CannTrust Holdings and Elmcliffe will be paid in full,[30] all Affected Creditors who are General Unsecured Creditors of Opco will receive a higher recovery than is expected in a liquidation,[31] and CTI has no Affected Creditors.[32] In addition, the Securities Claimants will recover from a trust funded by contributions of $50 million from CannTrust Holdings and an additional $74.9 million from other parties.[33]

28. In determining to continue to implement the CCAA Plan, the CannTrust Group has also considered other creditors of the CannTrust Group who are not Affected Creditors.

[26] Guyatt Affidavit at paras 12(h), 47.
[27] Guyatt Affidavit at para 15.
[28] Guyatt Affidavit at para 25.
[29] Guyatt Affidavit at para 46.
[30] Guyatt Affidavit at para 48.
[31] Guyatt Affidavit at para 14.
[32] Guyatt Affidavit at para 12(h).
[33] Guyatt Affidavit at paras 14(a)(ii), 48.

29. In particular, recognizing that the CCAA Plan is providing for payment to a trust for the benefit of Securities Claimants with equity claims as against CannTrust Holdings, the CannTrust Group considered the known and anticipated creditor claims that would be asserted against CannTrust Holdings in the event of a liquidation.[34] Of course, the CannTrust Group has done so while remaining hopeful of securing a financing or acquisition transaction that will allow Opco's business to continue and a liquidation to be avoided.

30. The only known claims or anticipated claims that are not Affected Claims at the CannTrust Holdings level are the DIP and Exit Loan obligations and possible employment claims of a small number of executives and other key employees.[35] The CannTrust Group has obtained support from each of these claimants for the relief sought:

(a) The DIP and Exit Lender has confirmed to the CannTrust Group that it supports the relief sought on this motion;[36] and

(b) The key employees with possible claims against CannTrust Holdings also support implementation of the CCAA Plan, conditional upon approval of the KERP Amendment discussed below.[37]

31. The support from these stakeholders for implementation of the CCAA Plan reflects that the relief sought on this motion is fair and reasonable in the circumstances. Among other things:

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[34] Supplemental Sixteenth Report dated December 15, 2021 ("**Supplemental Report**") at para 24.

[35] Guyatt Affidavit at para 49.

[36] Supplemental Report at para 15.

[37] Supplemental Report at paras 24-25.

(a) as described below, the CannTrust Group is seeking the continuation of the DIP Lender's Charge to provide ongoing protection to the DIP and Exit Lender after implementation of the CCAA Plan;[38]

(b) the liquidation analysis shows that, based on an understanding of the claims and anticipated claims other than Affected Claims, all creditors of CannTrust Holdings, including post-filing creditors, are expected to be paid in the event of an orderly wind-down after implementation of the CCAA Plan;[39]

(c) the CannTrust Group is seeking the authority to pay claims against CannTrust Holdings that are not Affected Claims, including post-filing claims.[40] In other words, even though the CannTrust Group is proposing that the Initial Order continue after implementation of the CCAA Plan, it is seeking to ensure that it is entitled to pay creditors of CannTrust Holdings; and

(d) with respect to the executives and key employees who have contracts with CannTrust Holdings, the KERP Amendment provides an incentive to support implementation of the CCAA Plan and to continue the effort to find a financing or acquisition transaction.[41]

32. Moreover, by granting the requested relief, including the requested extension of the stay of proceedings, the CannTrust Group is able to continue to seek a financing or acquisition transaction that, ideally, will enable the business to continue as a going concern.

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[38] Guyatt Affidavit at para 28.

[39] Guyatt Affidavit at para 48; Supplemental Report at para 19.

[40] Supplemental Report at para 10(d).

[41] Guyatt Affidavit at para 50.

33. For these reasons, the CannTrust Group continues to believe that implementing the CCAA Plan, together with the other requested relief, is the best choice and in the best interest of the CannTrust Group and its stakeholders. The CannTrust Group submits that the requested relief is appropriate and advances the policy interests underlying the CCAA.

2. Specific Relief Sought is Appropriate

(i) Approval of the Articles of Reorganization and Additional Settlement Parties

34. The CannTrust Group is seeking an order approving Articles of Reorganization and confirming that the Insurers and Peter Aceto are Additional Settlement Parties for the purposes of the CCAA Plan and the CCAA Sanction Order:

(a) *Articles of Reorganization:* Pursuant to the CCAA Plan, filing Articles of Reorganization commences the implementation process, yet pursuant to the Sanction Order at paragraph 8, CannTrust Holdings must first seek Court approval before it can file its Articles of Reorganization.[42]

(i) While the CannTrust Group initially intended to seek approval of a more significant name change, the proposed Articles of Reorganization provide for the creation of a French name for CannTrust Holdings that is equivalent to its English name;[43]

[42] Guyatt Affidavit at para 31.
[43] Guyatt Affidavit at para 33.

(ii) It is appropriate to approve the proposed Articles of Reorganization since this approval is necessary to implement the CCAA Plan pursuant to the CCAA Plan and Sanction Order.

(b) *Additional Settlement Parties Confirmation:* The CannTrust Group and CCAA Representatives have entered into Additional RSAs with the Insurers and Peter Aceto.[44]

(i) The CCAA Plan provides that if that occurs prior to the Plan Implementation Date, which it has, they will become Additional Settlement Parties and entitled to the benefits of the CCAA Plan.[45] For greater clarity, the CannTrust Group is seeking an order confirming that effect and that no CCAA Plan amendment is necessary.

35. The CannTrust Group also seeks an ordering confirming that, notwithstanding the requested amendments to the Sanction Order, the amended Sanction Order will satisfy the Plan Implementation Condition set out in section 9.1(b), which requires that:

> "the CCAA Sanction Order will have been issued by the CCAA Court, consistent with the terms of Section 8.2, with such amendments as may be acceptable to the CannTrust Plan Companies."

36. The CCAA Plan itself remains unchanged.

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[44] Guyatt Affidavit at para 36.

[45] Guyatt Affidavit at para 35.

(ii) Ongoing CCAA Relief

37. Paragraph 37(c) of the CCAA Sanction Order currently provides that the Initial Order will terminate at the Effective Time (except for the protections in favour of the Monitor). The CannTrust Group believes it is necessary and appropriate for the Initial Order and CCAA Proceedings to continue after implementation of the CCAA Plan.

38. The Court has jurisdiction to grant such an order. The broad scope of powers provided under section 11 of the CCAA described above allow a Court to make "any order that it considers appropriate in the circumstances."[46] This includes an order that continues to apply after the CCAA proceedings have concluded.[47]

39. There are numerous instances of the Court granting relief to a CCAA debtor after implementation of a CCAA Plan. For instance, in the CCAA proceedings of *The Clover on Yonge Inc. and The Clover on Yonge Limited Partnership* ("**Clover**"),[48] the Court granted an order extending the CCAA proceedings after the plan implementation date, including providing for the continuation of the CCAA charges after plan implementation.[49]

40. The Clover CCAA applicants described the issue as follows in the affidavit filed in support of a stay extension request and approval of an amendment to the DIP commitment letter:

> [R]egardless of when [the] Plan Implementation Date occurs, these CCAA proceedings will need to continue for a period of time thereafter to complete the remaining steps in the CCAA proceedings, including providing time for distributions to occur under the Plan (following

[46] CCAA, s. 11.

[47] *Crystallex* at para 68.

[48] *Re The Clover on Yonge Inc. and The Clover on Yonge Limited Partnership*, [2021] (Ont SCJ [Commercial List]), Court File No. CV-20-00642928-00CL, Sanction Order dated January 8, 2021 [***Clover* Sanction Order**].

[49] *Clover* Sanction Order at para 23.

> resolution of outstanding claims) and paying out the First DIP Lender. It is not presently expected that it will be possible to pay out the First DIP Lender until its facility is either converted to conventional construction financing or its facility is replaced by other financing. This must occur in the CCAA proceedings because otherwise the First DIP Lender would have to be paid since the current security package includes the protection of a CCAA Charge.
>
> Depending on the take up rate of the Plan's Purchase Option, it might be possible to move quickly after [the] Plan Implementation Date to a refinancing of the project by conventional construction financing, but that could also take some months if the take up rate of the Purchase Option is low and it is therefore necessary to sell unsold units to satisfy construction lender conditions.[50]

41. The Court granted the requested relief in the Clover Sanction Order, ordering that all CCAA Charges, except for the Director's Charge, continue and survive the Plan Implementation Date and continued as to the property of the Clover CCAA Applicants as set out in the Initial Order in that case, without further order of the Court.[51]

42. Similarly, in the CCAA proceedings of *The Cash Store Financial*, Regional Senior Justice Morawetz (as he then was) issued an order expanding the powers of the Monitor from and after the Plan Implementation Date to conduct the "Remaining Estate Actions" and the Court has extended the stay period numerous times after plan implementation while litigation remains ongoing.[52]

43. In this case, the relief sought is appropriate in the circumstances and furthers the purposes of the CCAA:

(a) If a refinancing or strategic transaction materializes, it may require court relief of some form to implement the transaction. Facilitating such a transaction

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[50] *Re The Clover on Yonge Inc. and The Clover on Yonge Limited Partnership*, [2021] (Ont SCJ [Commercial List]), Court File No. CV-20-00642928-00CL, Affidavit of Cliff McCracken sworn January 20, 2021 at paras 10-11.

[51] *Clover* Sanction Order at para 23.

[52] *Re The Cash Store Financial Services Inc.*, [2015] (Ont SCJ [Commercial List]), Court File No. CV-14-10517-00CL, Sanction Order dated November 19, 2015 at para 24.

furthers the purposes of the CCAA by enabling a potential going concern outcome;

(b) Equally, if a refinancing or strategic transaction does not materialize, a court-supervised process to conduct an orderly wind-down and sale process will be appropriate and necessary; and

(c) it is necessary and appropriate for the CCAA Charges to continue post-implementation until further Order of the Court to protect the beneficiaries thereof. For example, it would be inappropriate to discharge the DIP Lender's Charge absent new arrangements with the DIP and Exit Lender. The ongoing DIP Lender's Charge is a key component of obtaining the ongoing support of the DIP and Exit Lender and thereby meeting the Plan Implementation Condition of reaching an arrangement with it.

(iii) Enhanced Powers of the Monitor

44. At this time, it is not clear whether any of the existing directors of the CannTrust Group will remain in office after the Plan Implementation Date given the uncertainty regarding post-implementation operations. Accordingly, the CannTrust Group is seeking an order that would grant the Monitor enhanced powers, to take effect immediately if all of the directors of CannTrust Holdings have resigned.

45. The proposed incremental authority of the Monitor is set out in the draft order and would include the power to enter into or complete a refinancing or strategic transaction (subject to approval by the court of any material transaction) and the power to commence or continue a wind-down of the operations of the business and sale of its assets.

46. These expanded powers would only arise in the event all directors resign. If a refinancing or strategic transaction is arranged, the CannTrust Group will return to court for approval and can make an adjustment to the Monitor's powers at that time, if necessary.

47. Section 23 of the CCAA expressly grants the Court discretion to grant additional powers to the Monitor as it considers appropriate.[53] Section 23 provides that the monitor's powers and duties may be extended to "do anything in respect of the company that the court directs the monitor to do."[54] As with section 11 of the CCAA, such an order must be exercised in a manner consistent with and directed toward the attainment of the objectives of the CCAA.[55]

48. The enhanced powers requested are appropriate and consistent with relief sought in other proceedings. For instance, in *Nortel*, the debtor company's directors resigned and the Court authorized the monitor to "exercise any powers which may be exercised by a board of directors of any of the applicants."[56] Similarly, in *Carillion*, the court granted the monitor enhanced powers aimed at ensuring the continued orderly wind-down of the Applicants' estates.[57]

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[53] CCAA, s. 23; see also *Ernst & Young Inc v Essar Global Fund Limited*, 2017 ONCA 1014 at paras 105-106 [***Essar***]; *Arrangement relatif à 9323-7055 Québec inc (Aquadis International Inc)*, 2020 QCCA 659 at para 61 [***Aquadis***].

[54] CCAA, s. 23(1)(k).

[55] *Century Services* at para 59.

[56] *Nortel Networks Corporation et al*, [2012] (Ont SCJ [Commercial List]), Court File No. 09-CL-7950, Monitor's Expansion of Power Order dated October 3, 2021; see also *Re Nortel Networks Corporation et al*, 2014 ONSC 6973 at para 31,

[57] *Re Carillion Canada Holdings Inc et al*, [2019] (Ont SCJ [Commercial List]), Court File No CV-18-590812-00CL, Stay Extension and Enhanced Monitor's Powers Order dated October 18, 2019.

(iv) KERP Amendment

49. The CannTrust Group seeks the Court's approval to amend the KERP (as defined in the Initial Order) on the basis described in the Supplement to the Sixteenth Report of the Monitor (the "**KERP Amendment**").

50. The Court has jurisdiction to approve a KERP or an amendment to a KERP pursuant to its general power under section 11 of the CCAA to make any order it considers appropriate in a CCAA proceeding.[58] Courts have frequently recognized the importance and utility of KERPs in restructuring proceedings.[59]

51. The CannTrust Group has negotiated and obtained the support for the implementation of the CCAA Plan from the individuals with potential employment claims against CannTrust Holdings. That support is conditional on the CannTrust Group seeking and obtaining approval for the KERP Amendment.[60]

52. In this case, the KERP has already been approved. The CannTrust Group is seeking the KERP Amendment, which will entitle each of the four executives with an employment contract with CannTrust Holdings to receive 50% of their second milestone payment upon implementation of the CCAA Plan (with the second 50% payable on the second milestone date, which involves a going concern outcome). It will also entitle one non-executive with an employment contract with CannTrust Holdings (who has been temporarily laid off and who filed a proof of claim in the claims process, which will be withdrawn as part of the settlement)

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[58] CCAA, s. 11; *Cinram International Inc. (Re)*, 2012 ONSC 3767 at para 91.

[59] *Cinram* at paras 90-93; *Re Grant Forest Products*, 2009 CanLII 42046 (ON SC) [***Grant Forest Products***] at paras 8-10; *Re Target Canada Co*, 2015 ONSC 303 at paras 56-59.

[60] Guyatt Affidavit at para 50.

to receive a $40,000 payment upon implementation of the CCAA Plan. The CannTrust Group would consider that amount a reduction of the discretionary fund of $200,000 included the KERP originally. [61]

53. The KERP Amendment does not increase the aggregate amount payable under the original KERP.[62]

54. The implementation of the CCAA Plan is a key objective of the CannTrust Group in these proceedings and the applicable individuals have made important contributions to that success. The proposed KERP Amendment not only secures the support of those individuals for implementation of the CCAA Plan but also it incentivizes key executives to continue their efforts to find a financing or acquisition transaction by retaining a portion of the remaining KERP for those executives to be payable upon a going concern outcome.

55. As such the proposed KERP Amendment is reasonable and necessary. It is also supported by the Monitor.[63]

3. Late Claims

56. The Claims Procedure Order did not grant the Monitor discretion to extend the Pre-Filing Claims Bar Date (which was 5:00 p.m. on June 22, 2020) or the Restructuring Claims Bar Date (as each term is defined in the Claims Procedure Order). Claims received after the Claims Bar Date are considered "Late Claims."

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[61] Supplemental Report at para 25(b).

[62] Supplemental Report at para 26.

[63] Supplemental Report at para 28.

57. The Monitor seeks the Court's authorization to allow the Late Claims as identified and described in the Sixteenth Report. The Monitor is of the view that the claimants in each case acted in good faith and that there is no relevant prejudice in permitting the late filing.[64]

4. Stay Extension

58. Given the CannTrust Group's request for the Initial Order to continue following implementation of the CCAA Plan, the CannTrust Group is seeking to extend the Stay Period (as defined in the Initial Order) to January 31, 2022.

59. Section 11.02(2) of the CCAA empowers a court to extend the stay of proceedings granted to a debtor company. In considering whether to grant a stay extension, the Court must court must consider the following: (i) whether the order sought is appropriate in the circumstances; and (ii) whether the applicant has been acting in good faith and with due diligence.[65]

60. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA".[66] These objectives include: (a) the timely, efficient and impartial resolution of a debtor's insolvency; (b) preserving and maximizing value of the debtor's assets for the benefit of its stakeholders; (c) ensuring the fair and equitable treatment of claims against the debtor; and (d) the preservation of jobs and communities affected by the company's financial distress.[67]

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[64] *Blue Range Resource Corp (Re)*, 2000 ABCA 285, leave to appeal to SCC refused, [2000] SCCA No. 648.

[65] CCAA, s. 11.02(3); *Callidus* at para 49.

[66] *Callidus* at para 50.

[67] *Callidus* at paras 40, 42 and 50.

61. The requested stay extension is necessary to allow the CannTrust Group to carry out the steps necessary to satisfy the Plan Implementation Conditions and to continue to pursue potential refinancing and strategic transactions.[68]

62. The CannTrust Group has acted, and continues to act in good faith and with due diligence.[69] The Supplement to the Sixteenth Report states that the CannTrust Group will have sufficient liquidity to fund their operations through the maximum length of the proposed extension of the Stay Period.[70] Accordingly, the requested stay extension is appropriate in the circumstances.[71]

63. For the reasons set out above, the Applicants submit that it is necessary and appropriate in the circumstances to grant the requested relief.

64. **ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 15th day of December, 2021.

N Rambaran

McCarthy Tétrault LLP

Lawyers for the Applicant

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[68] Guyatt Affidavit at para 61.

[69] Guyatt Affidavit at para 62.

[70] Supplemental Report at para 36.

[71] CCAA, s. 11.02(2); *US Steel* at para 2.

SCHEDULE "A"
LIST OF AUTHORITIES

No.	Case
1.	*9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10.
2.	*Arrangement relatif à 9323-7055 Québec inc*, 2020 QCCA 659.
3.	*Blue Range Resource Corp (Re)*, 2000 ABCA 285.
4.	*Century Services Ltd, Re*, 2010 SCC 60.
5.	*Cinram International Inc. (Re)*, 2012 ONSC 3767.
6.	*Crystallex (Re)*, 2012 ONCA 404.
7.	*Ernst & Young Inc v Essar Global Fund Limited*, 2017 ONCA 1014.
8.	*Just Energy Group Inc et al*, 2021 ONSC 7630.
9.	*Re Grant Forest Products*, 2009 CanLII 42046 (ON SC).
10.	*Re Nortel Networks Corporation et al*, 2014 ONSC 6973
11.	*Re Target Canada Co*, 2015 ONSC 303.
12.	*US Steel Canada Inc (Re)*, 2016 ONCA 662.

SCHEDULE “B”
RELEVANT STATUTES

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

General power of court

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

Stays, etc. — other than initial application

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

> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

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

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

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

Monitors

Duties and functions
23 (1) The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

A. make the order publicly available in the prescribed manner,

B. send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and

C. prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

(c) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

(d) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

(iii) at any other time that the court may order;

(d.1) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(e) advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);

(f) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(f.1) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(g) attend court proceedings held under this Act that relate to the company, and meetings of the company’s creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(h) if the monitor is of the opinion that it would be more beneficial to the company’s creditors if proceedings in respect of the company were taken under the Bankruptcy and Insolvency Act, so advise the court without delay after coming to that opinion;

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company’s creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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(Stay Extension, Ongoing CCAA Relief and Plan Implementation Matters)

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