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 and Sale Approvals)
(Returnable January 31, 2022)

January 31, 2022

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PART I—INTRODUCTION

1. On this motion, the remaining Applicants in the CannTrust Group[1] seek a short extension of the CCAA stay to February 28, 2022, and approval of the disposition of two surplus investment interests.

2. The CannTrust Group has implemented the CCAA Plan but is still experiencing liquidity issues and is in ongoing discussions with multiple interested parties regarding a potential Going-Concern Transaction. An extension of the Stay Period is required to allow those discussions to continue or, in the alternative, to prepare a plan for and commence the wind-down of operations and a sale of the assets. The current Stay Period expires January 31, 2022.

3. A motion has been brought by a post-filing supplier, Consolidated Bottle Corporation ("**CBC**"), objecting to the extension of the Stay Period, as well as seeking alternate relief, albeit in a separate motion.

4. The arguments advanced by CBC do not justify refusing the extension of the Stay Period as requested (or to grant the remaining relief requested). Among other things:

   (a) There has been <u>no</u> breach of any Court Order;

   (b) CBC's argument that it is unfair to compel it to continue to supply reflects a misunderstanding of the Initial Order and the protections that are available to post-filing suppliers;

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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 January 25, 2022 (the "**Guyatt Affidavit**"), Motion Record of the Applicants dated January 25, 2022 ("**Applicants' Motion Record**") at Tab 2.

(c) CBC's position does not relate to *ongoing* supply. Its claim relates to its most recent invoices, which arose from orders made one year ago in January and February 2021, with deliveries in August and September 2021. Case law cited by CBC with respect to ongoing supply is not relevant;

(d) Having not availed itself of protections available to suppliers, CBC does not have priority in respect of its outstanding payments;

(e) Opco has not acted in bad faith with respect to CBC; and

(f) CBC mistakenly conflates its contractual counterparty, Opco, with another Applicant, CannTrust Holdings.

5. Importantly, the requested extension of the Stay Period is sought to permit the CannTrust Group to continue to explore a Going-Concern Transaction. Such a result furthers the purpose of the CCAA and is an effort undertaken to seek to preserve the business, which presently employs 240 active employees. The relief sought by CBC would not improve its position as an unsecured creditor, ranking behind secured and super-priority claims that exceed the liquidation value of Opco.

6. Moreover, its proposed relief would be unfair to other suppliers in the same position, and would imperil a Going-Concern Transaction that the CannTrust Group continues to actively seek for the benefit of the CannTrust Group and its stakeholders.

PART II—THE FACTS

7. The facts in support of this motion are more fully set out in the Guyatt Affidavit and the Seventeenth Report of the Monitor dated January 27, 2022 (the "**Seventeenth Report**").

PART III—ISSUES AND THE LAW

8. The key issues on this motion are:

   (a) Should the Court extend the stay of proceedings to February 28, 2022?; and

   (b) Should the Court approve the Grey Wolf Transaction and the Cannatrek Transaction?

9. The CannTrust Group submits that it is appropriate to grant such relief and the objections advanced by CBC should be dismissed.

1. Stay Extension

10. The CannTrust Group is seeking to extend the Stay Period (as defined in the Initial Order) to and including February 28, 2022.

11. 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.[2]

12. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA."[3] Among other things, this includes preserving and

[2] CCAA, s. 11.02(3); *9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10 ["***Callidus***"] at para 49.
[3] *Callidus*, *supra* at para 50.

maximizing value of the debtor's assets for the benefit of its stakeholders and the preservation of jobs and communities affected by the company's financial distress.

13. The CannTrust Group seeks to achieve these very goals through the requested extension of the Stay Period. The requested extension is necessary to allow the CannTrust Group to continue to pursue a potential Going-Concern Transaction.[4]

14. With respect to the requirement to act in good faith and due diligence, that requirement is also met. The Guyatt Affidavit describes the steps taken by the CannTrust Group, including successfully implementing the CCAA Plan and diligently continuing efforts to pursue refinancing arrangements and strategic options, as well as successfully negotiating agreements to dispose of certain surplus assets.[5]

15. In addition, the Monitor confirms its view in the Seventeenth Report that the Applicants have "continued to act in good faith and with due diligence since the Filing Date, and the extension would allow the Applicants to work toward a potential going concern strategic transaction."[6] The Seventeenth Report also states that, based on the Cash Flow Forecast, the Monitor believes the Applicants will have sufficient liquidity to fund their operations through to March 6, 2022, subject to completing the sale of the Grey Wolf Securities and collecting the HST refunds when projected.[7]

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[4] Guyatt Affidavit at para 61.

[5] Guyatt Affidavit at para 24.

[6] Seventeenth Report of the Monitor dated January 27, 2022 ["**Seventeenth Report**"] at para 62.

[7] Seventeenth Report at para 61.

16. As such, the CannTrust Group submits that the test to extend the Stay Period as requested is met.

17. The objections of CBC do not justify refusing to extend the Stay Period as requested. This would have the effect of denying the CannTrust Group and its stakeholders the opportunity to continue to pursue a Going-Concern Transaction without improving the position of CBC.

2. Allegations of Consolidated Bottle Should be Dismissed

18. CBC contracted with Opco, one of the Applicants, for the supply of certain product packaging. There is no dispute that funds remain payable to CBC by Opco in respect of post-filing supply; however, the Applicants strongly object to the suggestions made by CBC that they have breached any order or acted in any way other than fairly and transparently and in accordance with all orders in these CCAA proceedings. There is simply no basis to justify the relief requested by CBC.

a. <u>No Breach of a Court Order</u>

19. While CBC draws the Court's attention to the Court's direction to suppliers in paragraph 16 of the Initial Order, they fail to point out that the Initial Order expressly provides at paragraph 11 that the Applicants are entitled but <u>not required</u> to pay for goods or services supplied post-filing:

> THIS COURT ORDERS that, except as otherwise provided to the contrary herein, the Applicants *shall be entitled but not required* to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

> …
>
> (c) *payment for goods or services actually supplied to the Applicants following the date of this Order.* [Emphasis added]

20. This provision makes crystal clear that the Applicants are *not required* by the Initial Order to make payments for post-filing supply, although they are *entitled* to do so.

21. Indeed, in *Quest*,[8] the case cited by CBC in support of its position (which is otherwise distinguishable in relation to the principles CBC seeks to invoke, as set out below), the Court concludes that the CCAA applicant in that case already had the ability to "forego" post-filing rent payments because the CCAA initial order said the applicant was "entitled" to make such payments (notwithstanding an additional provision stating that *required* payment of post-filing rent):

> [50] I conclude that, even if I were to grant Quest the ability to "forego" the rent payments (the proposed addition to para. 9 of the ARIO), nothing would change. Quest already has that general ability under para. 7 of the ARIO, which says that Quest is only "entitled" to make such payments.

22. There is simply no basis for the arguments advanced by CBC that the Applicants have acted in breach of the Initial Order (or any other Order in this case).

b. Protections Available to Post-Filing Suppliers

23. The arguments advanced by CBC that it is in the same position as the landlord in *Quest* or that it was unfairly compelled to supply in a manner akin to a critical supplier, reflect

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[8] *Re Quest University*, 2020 BCSC 921 ["***Quest***"].

a misunderstanding of the Initial Order and the protections that are available to post-filing suppliers.

24. First, section 16 of the Initial Order must be read together with section 11.01 of the CCAA, which provides:

> **11.01** No order made under section 11 or 11.02 has the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> (b) requiring the further advance of money or credit.

25. The effect of this section is to permit a post-filing supplier to require immediate payment. However, this does not give priority to the post-filing supply:

> [19] It is important to note that *this provision [section 11.01 of the CCAA] does not in itself assign priority to post-filing creditors. It is then up to these creditors to obtain a judgment that will modify the original order if they wish to obtain a judicial security right, which was not done in this case.*[9]

26. Another protection that may be available to post-filing suppliers is the "critical supplier" designation.[10] While CBC cites the critical supplier provision and suggests it was treated as a critical supplier, that again reflects a fundamental misunderstanding. CBC was not a critical supplier in this case and the Quebec Court of Appeal has confirmed that such priority cannot be given implicitly:

> [20] It is also possible for post-filing creditors to have their claims secured by priority if the debtor obtains a court order declaring them essential suppliers of the company, in accordance with section 11.4 [of the CCAA]. As author Kevin P. McElcheran points out:

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[9] *Arrangement relating to Gestion Éric Savard inc*., 2019 QCCA 1434 ["***Eric Savard***"] at para 19.

[10] CCAA, s. 11.4.

> Such suppliers can only gain priority over existing secured creditor claims if they are declared to be critical suppliers under section 11.4 or are granted security by court order in the CCAA proceedings. *Certainly, neither section 11.01 nor section 19 create a priority for post-filing supply.*

[21] Here, no such application has been made to the Superior Court.

[22] *Such priority cannot be given implicitly*. In this regard, the Alberta Court of Appeal rightly noted in Smoky River Coal Ltd. that:

> [15] CCAA orders become the roadmap for the proceedings and the litigation which may follow. Orders must therefore be drafted with clarity and precision. [...]
>
> [16] It is particularly important that the terms and scope of any charge created by an order be clearly defined. Creditors need to know from the outset whether or not they are entitled to benefit in any charge or other priority created by the order. Those extending credit, be it trade credit or otherwise, should not be forced to participate in litigation after the CCAA proceeding to discover whether or not they hold some form of security or are entitled to a super-priority.[11] [Emphasis Added]

27. Having not availed itself of such protections, the reality is the post-filing amount that remains outstanding to CBC is unsecured and ranks behind, among other things, the court-ordered charges in favour of the DIP and Exit Lender.

28. *Quest*, the case cited by CBC does not assist CBC in this regard. Unlike the case at bar that deals with unpaid invoices in relation to orders made a year ago, the applicant in *Quest* sought an order from the Court permitting it to forego *ongoing* payments to its landlord in the context of COVID-19. Moreover, it dealt with payment of rent that the initial order provided “shall” be paid until such time as it is disclaimed (in addition to the language in section 7, cited above).[12]

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[11] *Eric Savard*, *supra* at paras 20-22.

[12] *Quest*, *supra* at para 49.

29. As noted above, the Court concluded that the applicant already had the right to forego payments pursuant to the initial order in that case. The Court went on to comment that what Quest was really seeking was, in essence, to provide that the landlord was not allowed to make a demand under section 11.01(a) and seek to lift the stay if Quest decided to "forego" paying the rent payments:

> I consider that, in essence, Quest is seeking a determination that, if the Court allows Quest to "forego" paying the rent payments, Southern Star or BMO are not allowed to make demand under s. 11.01(a) and seek to lift the stay.[13]

30. This request was rejected by the Court because it would essentially prevent the landlord from taking advantage of the protections available in the CCAA for post-filing suppliers, including that it would be required to continue to provide access to its property but could not demand immediate payment and, if not paid, seek to lift the stay.[14]

31. That is not the situation in the case at bar where the supply relates to orders that are complete, and there is no attempt to remove the supplier's ability to invoke section 11.01.

c. The Applicants did not Act in Bad Faith

32. There is no suggestion that Opco did not intend to pay for the product ordered from CBC in January and February 2021, when Opco was in very different circumstances from those in which it finds itself today. Rather, the Applicants have had to adapt to liquidity constraints and have worked closely with the Monitor to ensure equitable payment of

[13] *Quest*, *supra* at para 52.
[14] *Quest*, *supra* at para 102.

suppliers and other stakeholders. This includes that Opco has made payments to CBC to reduce the total payable, as CBC acknowledges.

33. Moreover, Opco is *continuing* to seek to make payment in full to CBC as reflected in the cash flow projection attached to the Monitor's Seventeenth Report. Such a payment is intended to be made at the same time as payment of other post-filing suppliers to Opco rather than in priority to them. Far from suggesting bad faith, this reflects a fair and balanced approach in the circumstances. Indeed, faced with a liquidity crunch, it would have been imprudent to pay one supplier for past supply in preference to others.

34. Of course, inclusion in a cashflow projection does not guarantee payment, particularly for a non-priority claim, but this demonstrates the ongoing effort of Opco to pay all post-filing suppliers in this case and demonstrates its ongoing good faith in challenging circumstances.

d. Payments Funded by CannTrust Holdings

35. In its materials, CBC appears to conflate Opco (its contractual counterparty) with CannTrust Holdings. This distinction is important.

36. CannTrust Holdings is the parent company of Opco and a secured and super-priority creditor of Opco. The $50 million payment under the CCAA Plan was funded by CannTrust Holdings in respect of its Affected Creditors.

37. The Applicants filed materials in December 2021 that made the position of creditors of CannTrust Holdings and Opco clear. This included clarification that, while all creditors of CannTrust Holdings (including its post-filing creditors) were expected to be paid in a

liquidation, the estimated "recovery for secured and unsecured creditors of Opco (other than the DIP and Exit Lender and CannTrust Holdings) would be zero in a liquidation."[15]

e. No Reasonable Alternative

38. It is also important to acknowledge that if CBC were to succeed in opposing the requested extension of the Stay Period, CBC would still not have priority for the unpaid portion of its unpaid supply. That position will not improve in a bankruptcy or receivership.

39. Indeed, the best opportunity for CBC to recover is the plan proposed by Opco: a short stay extension to enable it to continue efforts to seek a Going-Concern Transaction, coupled with the intention to pay the remaining unpaid invoice amounts to CBC as set out in the Cashflow Forecast. This is a key reason why, if the Court were to consider a lift stay motion from CBC, CBC would not be able to demonstrate resulting prejudice in respect of its past debt sufficient to enable it to meet the high burden to lift the stay.

40. The proposed extension of the Stay Period to continue to explore a Going-Concern Transaction and, if not possible, to convert to an orderly wind-down is also in the best interests of other stakeholders and in furtherance of the objectives of the CCAA.

41. Accordingly, the CannTrust Group respectfully submits that the Stay Period be extended as requested and the objections of CBC be dismissed.

[15] Guyatt Affidavit at para 55.

(i) Sale of Surplus Assets

42. The proposed Grey Wolf Transaction and Cannatrek Transaction are each appropriate means to realize on surplus assets of Opco and should be approved.

43. The Grey Wolf Transaction involves the sale of Opco's minority interest in Grey Wolf, a private company specializing in health and wellness-related pharmaceuticals, nutraceuticals and consumables for veterinary purposes in Canada.[16]

44. In particular, it involves the sale of Securities that were purchased for $1,750,000 in 2018 for a sale price of $1,100,000. The sale is to a major shareholder of Grey Wolf, which is the logical buyer given restrictions on marketing and selling a minority interest in a private company.

45. The Cannatrek transaction involves a Call Option Agreement to identify sales of Opco's minority shareholding in Cannatrek, an Australian private company specializing in research, cultivation, manufacturing and delivery of medical cannabis.[17]

46. The Call Option Agreement permits the Optionholder to identify sales, to be completed by exercising options under the Call Option Agreement, at a price of AUS$0.20 per share. Opco acquired its Cannatrek Option Shares in 2018 for AUS$6,400,000 and anticipates receipts of approximately C$5,922,948 after payment of fees and transaction fees if all options are exercised.

[16] Guyatt Affidavit at para 28.
[17] Guyatt Affidavit at para 38.

47. Both the CannTrust Group and the Monitor believe the purchase price in both cases is fair and reasonable, particularly to realize on the number of shares of a private company in the timeframe required.[18]

48. The Applicants submit that the test for approval of the sale set out at section 36 of the CCAA is met in this case. While a broad sale process was not conducted in light of the nature of the interests in private companies and restrictions on transfers, the process of identifying the logical buyer and negotiating the best possible transaction is reasonable in the circumstances. In addition, the Monitor approves the process, the DIP and Exit Lender and CannTrust Holdings – two key economic stakeholders of Opco, were consulted and approved the transactions.[19]

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

50. **ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 31st day of January, 2022.

N Rambaran

McCarthy Tétrault LLP

Lawyers for the Applicant

[18] Guyatt Affidavit at paras 35, 43 and 51; Seventeenth Report at paras 40, 46 and 48.

[19] Guyatt Affidavit at paras 52 and 53; Seventeenth Report at paras 40, 46 and 48.

SCHEDULE "A"
LIST OF AUTHORITIES

No.	**Case**
1.	*9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10.
2.	*Re Quest University*, 2020 BCSC 921.
3.	*Arrangement relating to Gestion Éric Savard inc.*, 2019 QCCA 1434.

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.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

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.

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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.

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