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 Investment Approval Order)
(Returnable February 25, 2022)

February 23, 2022

McCarthy Tétrault LLP
Suite 5300, TD Bank Tower
Toronto ON M5K 1E6

James Gage LSO#: 34676I
Tel: 416-601-7539
Email: jgage@mccarthy.ca

Heather Meredith LSO#: 48354R
Tel: 416-601-8342
Email: hmeredith@mccarthy.ca

Natasha Rambaran LSO#: 80200N
Tel: 416-601-8110
Email: nrambaran@mccarthy.ca

Lawyers for the Applicants

PART I—INTRODUCTION

1. On this motion, the CannTrust Applicants[1] seek approval of: a) a Going-Concern Transaction and related relief; and b) an Investor DIP to enable ongoing operations prior to closing.

2. The CannTrust Applicants bring this motion in the face of severe liquidity issues. The Cash Flow Forecast demonstrates that unless the Transaction and Investor DIP are approved and implemented promptly, the CannTrust Applicants will have little choice but to commence an imminent wind-up of operations and liquidation of assets.[2]

3. Faced with the very real possibility of a liquidation and with limited funding and time available, the CannTrust Applicants implemented an efficient and targeted solicitation process that was informed by the previous court-approved SISP and involved close consultation with the Monitor and key stakeholders. The Transaction was identified as the best proposal received in that process.

4. The Transaction is a straightforward subscription for new common equity representing a 90% interest in CannTrust Equity, the entity that owns CannTrust Opco.

5. The Transaction provides value in the form of both: a) a Subscription Price payable on closing of the Transaction ("**Closing**"); and b) $5,500,000 in interim financing to be made available prior to Closing to support the ongoing operations of CannTrust Opco.

[1] Capitalized terms used but not defined herein have the meanings given to them in the Affidavit of Greg Guyatt sworn February 18, 2022 (the "**Guyatt Affidavit**"), Motion Record of the Applicants dated February 18, 2022 at Tab 2.

[2] Eighteenth Report of the Monitor dated February 23, 2022 ("**Eighteenth Report**") at para 74.

6. The Subscription Price is subject to a request for a sealing order and has not been publicly disclosed; however, the Subscription Price *alone* is well in excess of the Monitor's estimated recoveries for the CannTrust Applicants in its liquidation analysis and is *in addition to* the proposed $5,500,000 Investor DIP.

7. The Transaction and Investor DIP represent the best available option for the CannTrust Applicants and their stakeholders in the circumstances. Among other things:

(a) this represents a going-concern outcome, which will enable the CannTrust business to continue, avoiding the negative consequences of a liquidation on employees, suppliers, customers and other stakeholders;

(b) the Investor DIP (of $5,500,000) plus the additional Subscription Price to be paid on Closing, is expected to provide sufficient liquidity to both (i) pay all due and accrued unsecured creditor claims of the CannTrust Applicants, including post-filing suppliers of CannTrust Opco; and (ii) fund the current relaunch plans for CannTrust Opco; and

(c) shareholders of CannTrust Holdings will benefit from the Transaction through the satisfaction of all CannTrust Holdings' remaining unsecured creditor claims and a 10% ownership interest in the newly recapitalized business of CannTrust Opco, with an opportunity to realize value from the potential future success of that business.

8. The Transaction and Investor DIP represent the culmination of significant and ongoing efforts to identify and pursue a Going-Concern Transaction that can be implemented before the CannTrust Applicants are forced to liquidate. The Transaction and Investor DIP are

appropriate and reasonable in the circumstances, are the best available option for the benefit of the CannTrust Applicants and their stakeholders, and ought to be approved.

PART II—THE FACTS

9. The facts in support of this motion are more fully set out in the Affidavit of Greg Guyatt sworn February 18, 2022 (the "**Guyatt Affidavit**") and the Eighteenth Report of the Monitor dated February 23, 2022 (the "**Eighteenth Report**"). Certain key details are highlighted in this section.

(i) CCAA Proceedings

10. On March 31, 2020, the CannTrust Applicants sought and obtained relief from the CCAA Court pursuant to an initial order made under the CCAA (as amended and restated from time to time, the "**Initial Order**") that, among other things, imposed a stay of proceedings up to and including April 9, 2020 (as extended from time to time, the "**Stay Period**").[3]

11. Facilitated by the relief granted in the Initial Order, the CannTrust Applicants completed many of their objectives, including developing and implementing the CCAA Plan, which was overwhelmingly approved by each of the four classes of Affected Creditors in May 2021 and sanctioned by the Court on July 16, 2021 (the "**Sanction Order**").[4]

12. In August 2021, the CannTrust Applicants conducted an internal reorganization, with the approval of the CCAA Court, which involved the incorporation of CannTrust Equity as a

[3] Guyatt Affidavit at para 10.
[4] Guyatt Affidavit at para 11.

wholly-owned subsidiary of CannTrust Holdings. All common shares of CannTrust Opco were transferred from CannTrust Holdings to CannTrust Equity in consideration for additional common shares of CannTrust Equity.[5] CannTrust Equity is not a CCAA debtor.[6]

13. Notwithstanding the significant progress made by the CannTrust Applicants in these CCAA proceedings, the CannTrust Applicants have been experiencing a liquidity shortfall resulting from challenges facing the Canadian cannabis industry generally, and challenges facing the CannTrust Applicants specifically.[7]

14. On December 16, 2021, the CannTrust Applicants obtained a court order (the "**CCAA Relief Order**") which, among other things, approved steps to facilitate implementation of the CCAA Plan, including certain amendments to the Sanction Order, and continued the Initial Order and CCAA Proceedings following implementation of the CCAA Plan.[8]

15. The CCAA Plan was implemented on January 5, 2022 and the CCAA Proceedings in respect of CTI Holdings (Osoyoos) Inc. were terminated at that time.[9]

16. The CannTrust Applicants continue to face severe liquidity challenges and the Existing DIP and Exit Loan is nearly fully drawn having regard to the borrowing base.[10] In addition, potential receipts in the form of an HST Refund and proceeds from the sale of the Cannatrek Option Shares are uncertain and unable to be counted on in the timeframe required relative to

[5] Guyatt Affidavit at para 24.
[6] Guyatt Affidavit at para 28.
[7] Guyatt Affidavit at paras 12-13.
[8] Guyatt Affidavit at para 17.
[9] Guyatt Affidavit at para 18.
[10] Guyatt Affidavit at para 32.

existing liquidity, with receipt of the HST Refund delayed and no proceeds received to date through the Cannatrek Call Option Agreement.[11]

(ii) Investment Solicitation Process and Transaction

17. To address ongoing funding for CannTrust Opco in the face of the ongoing liquidity challenges, management of the CannTrust Applicants has been actively seeking a potential investment or strategic partner to effect a financing or sale transaction to facilitate the continued operations of its business (a "**Going-Concern Transaction**").[12]

18. The recent process to identify a Going-Concern Transaction (the "**Recent Strategic Process**") followed from and was informed by the prior unsuccessful court-approved SISP, which was conducted in 2020.[13] It was a targeted and efficient process to identify a Going-Concern Transaction in the face of the severe liquidity and timing constraints.

19. Ultimately, the CannTrust Applicants, working in consultation with the Monitor, received three non-binding letters of intent (each an "**LOI**") in the Recent Strategic Process by the deadline provided of February 2, 2022.[14]

20. The CannTrust Applicants, in consultation with legal counsel and the Monitor, selected the LOI of the Investor having regard to a number of factors, including the pricing and net value provided by the proposal, speed and certainty to closing, provision of interim

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[11] Eighteenth Report at para 56, with capitalized terms in this paragraph not otherwise defined herein, as defined in the Eighteenth Report.

[12] Guyatt Affidavit at para 33.

[13] Guyatt Affidavit at para 35.

[14] Guyatt Affidavit at paras 39-40.

financing, simplicity of deal structure, impact on stakeholders and long-term value-creation opportunities.[15]

21. The CannTrust Applicants subsequently negotiated with the Investor and modifications were made to the form of Transaction from the original LOI. One modification was that certain Individual Investors (Daniel Koehn, Andrew Peppin, Jeffrey Zietlow and Greg Guyatt) also agreed to participate in the Transaction, alongside the Investor:

(a) Greg Guyatt and Jeffrey Zietlow are CannTrust Holdings' Chief Executive Officer and Chief Commercial Officer, respectively. Many days after the CannTrust Applicants determined to accept the LOI proposed by the Investor and to negotiate definitive terms of the Transaction, the Investor requested that each of these executives support the completion of the Transaction by investing personally in shares of CannTrust Equity, at the same price per share being paid by the Investor. The Investor requested that these two executives participate in the proposed private placement by CannTrust Equity, but they were not invited to participate in the Investor DIP loan;[16]

(b) The other two Individual Investors were welcomed by the Investor to participate as parties to the Transaction, as both co-lenders under the Investor DIP loan and as equity investors in CannTrust Equity. These other two Individual Investors are existing shareholders of CannTrust Holdings and were

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[15] Guyatt Affidavit at paras 41-42.

[16] Eighteenth Report at para 36.

part of a consortium of investors that had submitted a different LOI in the Recent Strategic Process.[17]

22. The Transaction consists of the following:[18]

(a) A subscription for new common equity of CannTrust Equity pursuant to Subscription Agreements. The aggregate subscription price to be set out in the Subscription Agreements (the "**Subscription Price**") is subject to a request for a sealing order pending closing of the Transaction; however, the Subscription Price is in an amount that is significantly greater than the $5,500,000 that will be made available under the Investor DIP and, when taken together with the amount available under the Investor DIP, is expected to be sufficient to provide CannTrust Opco with liquidity to satisfy creditor claims of the CannTrust Applicants (other than the continuing secured claims) and to fund the remainder of CannTrust Opco's current re-launch plans;

(b) A Unanimous Shareholder Agreement to be executed upon completion of the Transaction, which will include a right for the Investor to elect to cause the exchange of the Investor's shares in CannTrust Equity for a like number of shares in CannTrust Holdings within an 18 month period (the "**Share Exchange Option**"). It is anticipated that the Unanimous Shareholder Agreement will provide that, (i) if the Investor elects to exercise the Share Exchange Right before its expiry, the Individual Investors will be obligated to

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[17] Guyatt Affidavit at para 43; Eighteenth Report at para 36.
[18] Guyatt Affidavit at para 44.

exchange their shares in CannTrust Equity for a like number of shares of CannTrust Holdings, on the same terms as the Investor, and CannTrust Holdings will initiate a rights offering for its shareholders and, (ii) if the Share Exchange Option is not exercised prior to its expiry and the extant board of directors then determines to liquidate CannTrust Holdings, CannTrust Equity will become obligated to fund the reasonable costs of such liquidation;[19]

(c) Prior to executing the Subscription Agreements and while CannTrust Equity remains a wholly-owned subsidiary of CannTrust Holdings, the assignment from CannTrust Holdings to CannTrust Equity of: a) intercompany debt owed by CannTrust Opco to CannTrust Holdings; and b) CannTrust Holdings' 50% equity interest in Cannabis Coffee and Tea Pod Company Ltd;[20]

(d) Limited conditions to close the Transaction ("**Closing**") and a short anticipated time to Closing; and

(e) The $5,500,000 Investor DIP, effective upon Court approval of the Transaction and subject to a charge being granted for borrowings under the Investor DIP.

(iii) Investor DIP

23. The Investor, Daniel Koehn and Andrew Peppin (collectively, the "**Investor Lenders**") have agreed to provide the Investor DIP in the maximum amount of $5,500,000, on the terms and subject to the conditions set forth in the Investor DIP Term Sheet.[21]

[19] Guyatt Affidavit at Exhibit "C", Terms and Conditions of Subscription.
[20] Guyatt Affidavit at paras 22, 44.
[21] Guyatt Affidavit at para 56.

24. The CannTrust Applicants are seeking, as required by the Investor Lenders, the Investor DIP Charge in favour of the Investor Lenders on the property of the CannTrust Applicants in the maximum principal amount of $5,500,000, ranking immediately behind the Existing DIP and Exit Charge in favour of the Existing DIP and Exit Lender.[22]

PART III—ISSUES AND THE LAW

25. The issues to be determined by this Court are whether it is appropriate and reasonable in the circumstances to:

(a) approve and authorize the Transaction, the related agreements and Assignments, and related relief;

(b) approve and authorize the Investor DIP and the Investor DIP Charge;

(c) grant the extension of the stay of proceedings to the earlier of the Closing Effective Time and March 25, 2022; and

(d) grant a sealing order with respect to the Confidential Exhibit to the Guyatt Affidavit (the "**Confidential Exhibit**") and the Confidential Appendix to the Eighteenth Report (the "**Confidential Appendix**").

26. The CannTrust Applicants submit 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 Applicants and their stakeholders.

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[22] Guyatt Affidavit at para 57.

1. The Court should approve the Transaction and related relief

27. This Court has broad discretionary authority to approve the Transaction and related relief under section 11 of the CCAA, which empowers the Court to make any order that it considers appropriate in the circumstances.[23]

28. This discretionary authority is broad in nature and must be exercised in furtherance of the remedial objectives of the CCAA.[24] A key remedial objective of the CCAA is "avoiding the social and economic losses resulting from liquidation of an insolvent company."[25] This is precisely the goal of the Transaction and Investor DIP in this case.[26]

29. The Transaction is not an asset sale. Rather, it is a subscription by the Investor and Individual Investors for new common equity in the non-CCAA debtor, CannTrust Equity. Nonetheless, it is instructive to review the factors in subsection 36(3) of the CCAA and *Soundair*, which support approval of the Transaction and demonstrate that the order sought is appropriate in the circumstances.

30. Section 36 of the CCAA authorizes this Court to approve a sale of a debtor company's assets outside of the ordinary course of business.[27] In deciding whether to authorize such a

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[23] *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 ["**CCAA**"], s 11.

[24] *9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10 ["***Callidus***"] at para 49.

[25] *Callidus*, *ibid* at para 41, citing *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 70.

[26] *Callidus*, *ibid.*

[27] CCAA, s 36(1).

sale, subsection 36(3) of the CCAA requires courts to consider the following non-exhaustive factors:[28]

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

31. These factors are frequently considered concurrently with the principles articulated in *Soundair*:[29]

(a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;

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[28] CCAA, s 36(3); *Nelson Education Ltd, Re*, 2015 ONSC 5557 at para 38 ["***Nelson***"]; *Target Canada Co, Re*, 2015 ONSC 1487 at paras 14-15 ["***Target Canada***"]; *Canwest Publishing Inc/Publications Canwest Inc, Re*, 2010 ONSC 2870 at para 13 ["***Canwest***"].

[29] *Royal Bank v Soundair Corp*, 1991 CanLII 2727 (ON CA) at para 16 ["***Soundair***"]; *Nelson*, *ibid* at paras 37-38; *Target Canada*, *ibid* at para 17; *Canwest*, *ibid* at para 13.

(b) whether the interests of all parties have been considered;

(c) the efficacy and integrity of the process by which offers have been obtained; and

(d) whether there has been unfairness in the working out of the process.

32. In considering a sale pursuant to this section, a court will not lightly interfere with the exercise of the commercial and business judgment of a CCAA applicant and the monitor where the marketing and sale process was "fair, reasonable, transparent and efficient."[30]

33. Courts have also noted the importance of the Monitor's recommendation, emphasizing that the Court should only intervene "where there is clear evidence that the Monitor failed to act properly."[31]

34. Moreover, perfection is not required in a sales and marketing process.[32] Rather, the sales process must be "reasonable in the circumstances".[33] The reasonableness of a sales process involves questions of the "fairness and integrity" of the process.[34]

(a) Reasonable Process in the Circumstances: No Unfairness

35. In this case, the Recent Strategic Process was reasonable in the circumstances and was approved by the Monitor.[35] Unlike the SISP process followed in 2020, the CannTrust Applicants did not have sufficient liquidity or time available to conduct a lengthy solicitation

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[30] *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742 ["***Abitibi***"] at para 71.

[31] *Abitibi*, *ibid* at para 72.

[32] *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 1920 ["***Bloom Lake***"] at para 59.

[33] CCAA, s 36(3)(a); see also *Bloom Lake*, *ibid* at para 39.

[34] *Bloom Lake*, *ibid* at para 83.

[35] Guyatt Affidavit at paras 54-55.

process in late 2021 or to agree to pay any additional fees to their financial advisor for preparing and delivering any fairness opinion or valuation. However, management of the CannTrust Applicants was able to leverage the failed SISP process to assist in informing and targeting their activities and efforts in the Recent Strategic Process, including identifying the mostly likely targets to complete a Going-Concern Transaction in the timeframe available.[36]

36. The CannTrust Applicants, after consulting with the Monitor, identified a list of ten potential investors or strategic partners.[37] This list was shorter than the 36 "known potential bidders" in the original SISP for various reasons.[38] Among other things,

(a) the CannTrust Applicants were seeking a going-concern outcome specifically and were informed by the original SISP that several participants were interested only in purchasing certain discrete assets rather than participating in any going-concern transaction;[39]

(b) the domestic cannabis industry is facing challenges more broadly and very few potential strategic investors are seeking to expand their domestic footprint in the industry at this time, which limits the pool of potential transaction counterparties;[40]

[36] Guyatt Affidavit at para 37.
[37] Guyatt Affidavit at para 38.
[38] Guyatt Affidavit at para 36.
[39] Eighteenth Report at para 26.
[40] Eighteenth Report at para 28.

(c) potential investors in CannTrust Equity are limited to accredited investors or must satisfy some other exemption from prospectus requirements under applicable securities laws;[41] and

(d) given the limited time and severe liquidity constraints, the CannTrust Applicants required a potential investor or strategic partner with the potential to complete a transaction within the necessary timeframe.[42]

37. In addition to the list of ten potential investors or strategic partners, management of the CannTrust Applicants reached out to their financial advisor (which had assisted in the earlier unsuccessful SISP process) to seek out other potential participants.[43]

38. Further, it was well-known in the industry, including through the court materials filed in respect of motions in these CCAA proceedings in December 2021 and January 2022, that the CannTrust Applicants were seeking a Going-Concern Transaction. No eligible party willing to enter into a customary form of non-disclosure agreement was refused access to the process.[44] Indeed, in light of the severe liquidity issues, the CannTrust Applicants were uniquely open to considering any and all potentially viable proposals.

39. The Recent Strategic Process that was undertaken over the course of ten weeks was transparent and the Monitor was kept apprised throughout. Management of the CannTrust Applicants worked diligently with the potential investors or strategic partners, compiled a dataroom that was accessed by the interested parties and, while complying with the limitations

[41] Eighteenth Report at para 27.
[42] Eighteenth Report at para 26.
[43] Guyatt Affidavit at para 38.
[44] Eighteenth Report at para 28.

associated with the COVID-19 pandemic, provided site visits and facilitated management tours to all parties that were interested in doing so.[45]

40. The CannTrust Applicants, in consultation with the Monitor, ultimately provided potential investors and strategic partners with a deadline of February 2, 2022 to provide a non-binding LOI. The Monitor assisted the CannTrust Applicants with the correspondence to interested parties that communicated the deadline and articulated the expectations for the matters to be addressed in the LOIs (including a proposal for interim financing).[46]

41. Three LOI's were received including one from the Investor and another from a group including existing shareholders of CannTrust Holdings (including two of the Individual Investors). Each of the LOIs was reviewed by management of the CannTrust Applicants, counsel and the Monitor. Consideration was given to the following factors, among others:

(a) Value: Pricing and net value provided by the proposal;

(b) Speed and Certainty: Identity and wherewithal of the transaction proponent, conditions attaching to the proposal, an assessment of the amount of time needed to negotiate definitive documents to execute the proposal and close, and certainty of closing;

(c) Interim Financing: Provision of interim financing to the extent required to enable continued operations until the closing of the proposed transaction;

[45] Guyatt Affidavit at para 39.
[46] Guyatt Affidavit at para 40.

(d) Deal Structure and Stakeholder Impact: Structure of the proposed transaction, including the likelihood of ongoing employment and impact on other stakeholders of the CannTrust Applicants; and

(e) Long-term value-creation opportunities and strategic rationale.[47]

42. After reviewing the LOIs in consultation with legal counsel and the Monitor and considering the above factors as well as the CannTrust Applicants' current liquidity, business plan and strategy, and the reasonable expectations of affected stakeholders, the CannTrust Applicants selected the LOI presented by the Investor.[48]

43. As compared to the LOIs received from other participants in the process, the Transaction provides the highest amount of cash investment in the CannTrust Applicants and offers the best economic outcome for their stakeholders viewed as a whole, taking into account relative simplicity, speed of execution and certainty of closing. [49]

44. In addition, the $5,500,000 afforded by the Investor DIP loan (which amount is in addition to, but much less than, the Subscription Price payable at closing of the Transaction) will provide crucially important liquidity needed by CannTrust Opco to get to closing.[50] Other LOIs received in the process either did not contemplate interim financing or contemplated financing from other sources that the management of the CannTrust Applicants, in

[47] Guyatt Affidavit at para 41.
[48] Guyatt Affidavit at para 42.
[49] Guyatt Affidavit at para 48.
[50] Guyatt Affidavit at para 48.

consultation with the Monitor, considered less likely to materialize, particularly in the timeframe required, making it less certain that such transactions could close.[51]

45. The process followed was an efficient and transparent one that was informed by the original Court-approved SISP, was approved by the Monitor and made sufficient effort to identify the highest and best option available considering the timing, liquidity issues and current market for cannabis companies in Canada. The process was reasonable in the circumstances and the selection of the LOI submitted by the Investor was the result of an exercise of reasonable business judgment by the CannTrust Applicants, in consultation with the Monitor, and should be respected.

(b) Subsequent Management Participation at Investor's Request: No Unfairness

46. Transactions that involve a sale to a person related to the company require additional scrutiny by the court. Indeed section 36(4) of the CCAA requires that in such circumstances, the court also be satisfied that:

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

[51] Guyatt Affidavit at para 47.

47. However, in this case, the LOI selected was from the arm's length Investor with no involvement of any related persons. The selection of the Transaction was made on a fully arm's length basis by the CannTrust Applicants, in consultation with the Monitor.

48. Only after selection of the Transaction did the Investor request that Greg Guyatt and Jeffrey Zietlow, the Chief Executive Officer and Chief Commercial Officer, respectively, of CannTrust Holdings, make a small personal investment in CannTrust Equity as part of the Transaction.[52] This kind of management participation is not unusual in a private equity transaction where the financial investor may seek to create additional alignment from management, and also gain comfort in the face of an abbreviated due diligence process by management agreeing to make a personal contribution. Unlike the other Individual Investors, the Investor did not invite Messrs. Guyatt and Zietlow to participate as lenders under the Investor DIP loan.[53] Although the amounts are much more than nominal to Messrs. Guyatt and Zietlow, they will result in their owning significantly less than 5% (in the aggregate) of CannTrust Equity's shares at closing of the Transaction.

49. This is not the type of 'sale to a related person' in which the related party influences the selection process for personal gain. Indeed, at the time the LOI was selected, management had no personal interest in the proposed Transaction and had no expectation of being required to participate as investors in CannTrust Equity.[54]

50. Moreover the Transaction would meet the additional criteria set out in subsection 36(4) of the CCAA in any event since: a) the Transaction was selected as part of the broader

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[52] Guyatt Affidavit at para 43.

[53] Eighteenth Report at para 36.

[54] Eighteenth Report at para 36.

Recent Strategic Process in which arm's length parties (including the Investor) were solicited; and b) the Transaction Subscription Price and the Investor DIP (in which no management personnel is participating as an Investor Lender) provides the highest amount of cash investment in the CannTrust Applicants and offers the best economic outcome for the stakeholders viewed as a whole when compared to the other LOIs received in the Recent Strategic Process.

(c) Transaction beneficial to stakeholders

51. The factors in the section 36 test relating to the effects of the Transaction on creditors and other interested parties, consultation with creditors, and the Monitor's report regarding the benefits of the Transaction relative to a liquidation all weigh strongly in favour of approving the Transaction.

52. First, the Transaction is a Going-Concern Transaction. Courts have repeatedly emphasized that an overarching purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders and to facilitate arrangements that might avoid liquidation.[55]

53. The Transaction contemplates offering ongoing employment to all key employees of the CannTrust Applicants and continuing operation of the CannTrust Opco business. CannTrust Opco currently employs approximately 250 employees.[56] In addition, the

[55] *Re Nortel Networks Corporation*, 2009 CanLII 39492 (ON SC) at paras 33, 36-40.
[56] Guyatt Affidavit at para 49.

continuing operation of the business will benefit other stakeholders, including suppliers and customers.[57]

54. With respect to post-filing suppliers to CannTrust Opco, the Transaction offers a starkly better choice than would be offered in a liquidation scenario. Pursuant to the Transaction and Investor DIP, post-filing suppliers with due and accrued claims will be paid in full. In a liquidation scenario, according to the Monitor's liquidation analysis, such unsecured creditors of CannTrust Opco would receive no recovery.[58]

55. The Monitor has also stated in its Eighteenth Report that the overall impact of the Transaction on stakeholders "is better than a wind-down scenario."[59] The liquidation analysis performed by the Monitor indicated that the potential funds to CannTrust Holdings after satisfaction of creditor claims could range from $nil to approximately $5,000,000 while the creditors of CannTrust Opco would receive no recovery.[60]

56. In comparison, pursuant to the Transaction and Investor DIP:

(a) the Investor DIP alone is for $5,500,000 – an amount that exceeds the anticipated liquidation recovery to CannTrust Holdings;

(b) the Subscription Price, which is in addition to the cash that will be available under the Investor DIP, is significantly greater than the anticipated value to CannTrust Holdings in a liquidation, meaning that the value made available to operate the CannTrust business through the Subscription Price and Investor

[57] Guyatt Affidavit at para 50.
[58] Guyatt Affidavit at para 61.
[59] Eighteenth Report at para 41.
[60] Eighteenth Report at para 38.

DIP significantly exceeds the estimated value to CannTrust Holdings in a liquidation;

(c) unsecured creditors of CannTrust Holdings and CannTrust Opco with due and accrued claims, including post-filing suppliers, will be paid in full pursuant to a Payment Direction on Closing of the Transaction if not paid earlier. Under the liquidation analysis, unsecured creditors of CannTrust Opco will receive no funds and would plainly be worse off; and

(d) at the closing of the Transaction, the shareholders of CannTrust Holdings will continue to have an indirect 10% interest in the newly recapitalized business of CannTrust Opco and an opportunity to share in any potential returns from that business in the future pursuant to the Transaction. While the potential for a return from this investment depends on future performance of CannTrust Opco, the funding available from the Investor DIP and Subscription Price are anticipated to be sufficient to fund the CannTrust Opco relaunch plans (in addition to paying its unsecured creditor claims) and management of the CannTrust Applicants exercised their reasonable business judgment to determine that this option was preferable to a liquidation in which the potential return as estimated by the Monitor ranges from $nil to $5,000,000.

57. Accordingly, while not strictly applicable to an equity subscription in CannTrust Equity, the Transaction meets the test set out in section 36 of the CCAA:

(a) the Transaction was identified in a fair process that was reasonable and appropriate in the circumstances;

(b) the Monitor approves the process followed to identify the Transaction and participated in it;

(c) the Eighteenth Report clarifies that the overall impact of the proposed Transaction on stakeholders of the Applicants is better than a wind-down scenario;

(d) the effects of the proposed Transaction and Investor DIP are considered better or significantly better for employees, suppliers, customers, post-filing suppliers, shareholders and other stakeholders than a wind-down alternative;

(e) the DIP and Exit Lender was consulted in the process. All other arm's length creditors with due and accrued claims are expected to be paid in full pursuant to the Transaction; and

(f) the consideration to be received pursuant to the Transaction is greater than the anticipated liquidation value and represents the highest amount of cash investment in the CannTrust Applicants of any LOI received in the process and best economic outcome for their stakeholders. [61]

2. Investor DIP and Investor DIP Charge

58. Section 11.2 of the CCAA provides the Court with authority to approve the Investor DIP and the Investor DIP Charge.[62]

[61] Guyatt Affidavit at para 48.
[62] CCAA, s 11.2.

59. Section 11.2(4) lists the factors Courts must consider in deciding whether to approve a priming charge in connection with interim financing:

> **Factors to be considered**
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.

60. In *Canwest*,[63] the Court highlighted the importance of the criteria set out in section 11.2(1), which should be met in addition to the factors set out in section 11.2(4):

> (a) whether notice has been given to secured creditors likely to be affected by the security or charge;
>
> (b) whether the amount to be granted under a DIP facility is appropriate and required having regard to the debtors' cash-flow statement; and

[63] *Canwest*, *supra* note 28 at paras 31-34.

(c) whether the DIP charge secures an obligation that existed before the order approving the DIP was made.

61. The criteria from section 11.2(1) and 11.2(4) support approval of the Investor DIP and the Investor DIP Charge on the terms sought in the Investment Approval Order:

(a) the Investor DIP Charge ranks immediately behind the Existing DIP and Exit Charge in favour of the Existing DIP and Exit Lender;

(b) the CannTrust Applicants have immediate liquidity needs, and given their current financial circumstances, the funds provided by the Investor DIP are required for the ongoing operation of CannTrust Opco in the period before Closing;

(c) the Investor DIP is necessary in order for the CannTrust Applicants to implement the Going-Concern Transaction, which will preserve the employment of a number of individuals and maximize value for the CannTrust Applicants' stakeholders;

(d) without the Investor DIP, the CannTrust Applicants will not be able to continue operating;

(e) the quantum of the Investor DIP is reasonable and appropriate having regard to the Cash Flow Forecast; and

(f) the Monitor is of the view that the Investor DIP and the Investor DIP Charge are appropriate and limited to what is reasonably necessary in the circumstances.[64]

62. The Existing DIP and Exit Lender supports the Investor DIP and Investor DIP Charge, and it is also supported by CannTrust Holdings, the other main secured creditor of CannTrust Opco (subject to the Assignment to CannTrust Equity).[65]

63. The Investor DIP and Investor DIP Charge will facilitate the going-concern Transaction. Without that Transaction, the liquidation analysis previously filed by the Monitor indicates that no creditor of CannTrust Opco other than the super-priority creditors, the Existing DIP and Exit Lender and CannTrust Holdings, are anticipated to recover any value in a liquidation. Moreover, without the Transaction, other stakeholders such as employees, customers and suppliers would be negatively impacted by the closure of CannTrust Opco's business. As such, the CannTrust Applicants' stakeholders will benefit from the Investor DIP and the Investor DIP Charge and will not be materially prejudiced by it.[66]

3. Stay Extension

64. The CannTrust Applicants are seeking to extend the Stay Period (as defined in the Initial Order) to the earlier of the Closing Effective Time and March 25, 2022.[67]

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[64] Guyatt Affidavit at paras 57-61; Eighteenth Report at para 51.
[65] Guyatt Affidavit at para 60.
[66] Guyatt Affidavit at para 61.
[67] Guyatt Affidavit at para 67.

65. 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 (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.[68]

66. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA."[69] Among other things, this includes preserving and 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.[70]

67. The CannTrust Applicants seek to achieve these very goals through the requested extension of the Stay Period. The requested extension is necessary to allow the CannTrust Applicants to implement the Transaction for the benefit of the CannTrust Applicants and their stakeholders.[71]

68. The requirement to act in good faith and with due diligence is also met. The Guyatt Affidavit describes the steps taken by the CannTrust Applicants, including successfully identifying and negotiating the Transaction and arranging for the Payment Direction to satisfy post-filing suppliers and other amounts.[72]

69. In addition, the Monitor confirms its view in the Eighteenth Report that the CannTrust Applicants have "continued to act in good faith and with due diligence since the Filing Date,

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[68] CCAA, s 11.02(3); *Callidus*, *supra* note 24 at para 49.
[69] *Callidus*, *ibid* at para 50.
[70] *Callidus*, *ibid* at para 42.
[71] Guyatt Affidavit at para 68.
[72] Guyatt Affidavit at para 70.

and the extension would allow the Applicants to work toward the completion of the Transaction."[73] The Eighteenth Report also states that, based on the Cash Flow Forecast and taking into consideration the Investor DIP, the Applicants will have sufficient liquidity to operate their business and meet their obligations to the outside date of the Proposed Stay Extension Period.[74]

70. As such, the CannTrust Applicants submit that the test to extend the Stay Period as requested is met.

4. Sealing Order

71. In addition to the above relief sought, the CannTrust Applicants seek an order sealing the Confidential Exhibit and the Confidential Appendix.

72. In *Sierra Club*,[75] the Supreme Court set out the test to determine if a sealing order should be granted. More recently, the Supreme Court in *Sherman Estate*[76] recast the test as requiring a party to establish that:

(a) court openness poses a serious risk to an important public interest;

(b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

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[73] Eighteenth Report at para 72.

[74] Guyatt Affidavit at para 69; Eighteenth Report at para 71.

[75] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 ["***Sierra Club***"] at para 55.

[76] *Sherman Estate v Donovan*, 2021 SCC 25 ["***Sherman Estate***"].

(c) as a matter of proportionality, the benefits of the order outweigh its negative effects.[77]

73. Courts have explicitly recognized that commercial interests such as preserving confidential information or avoiding a breach of a confidentiality agreement are an "important public interest" for purposes of this test.[78]

74. Courts have applied this test in the insolvency context to authorize sealing orders over confidential or commercially sensitive documents to protect the interests of debtors.[79] In fact, Courts have acknowledged that it is "common" practice in the insolvency context for information in relation to the sale of the assets of an insolvent corporation to be kept confidential until after the sale is completed pursuant to a Court order.[80]

75. In this case, publication of the Subscription Price and the Monitor's summary of the other LOIs received in the Recent Strategic Process could result in serious commercial damage to the CannTrust Applicants in the event that the Transaction does not close.

76. The CannTrust Applicants further submit that salutary effects of a sealing of the Confidential Exhibit and Confidential Appendix for the short period until Closing outweigh any deleterious effects that may be caused by the sealing.

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[77] *Sherman Estate*, *ibid* at para 38.

[78] *Sierra Club*, *supra* note 75 at para 55; *Sherman Estate*, *ibid* at paras 41-43.

[79] *Re Danier Leather Inc*, 2016 ONSC 1044 at para 82.

[80] *Look Communications Inc v Look Mobile Corporation*, 2009 CanLII 71005 (ON SC) at para 17.

77. The Monitor is supportive of the sealing of the Confidential Exhibit and the Confidential Appendix.[81]

PART IV—ORDER SOUGHT

78. For the reasons set out above, the CannTrust Applicants submit that it is necessary and appropriate in the circumstances to grant the requested relief substantially in the form of the draft Order attached at Tab 3 of the Motion Record.

79. **ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 23rd day of February, 2022.

N. Rambaran

McCarthy Tétrault LLP

Lawyers for the Applicant

[81] Eighteenth Report at paras 15, 42.

SCHEDULE "A"
LIST OF AUTHORITIES

No.	Case
1.	*9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10.
2.	*AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742.
3.	*Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 1920.
4.	*Century Services Inc v Canada (Attorney General)*, 2010 SCC 60.
5.	*Look Communications Inc v Look Mobile Corporation*, 2009 CanLII 71005 (ON SC).
6.	*Nelson Education Ltd, Re*, 2015 ONSC 5557.
7.	*Re Canwest Publishing Inc/Publications Canwest Inc*, 2010 ONSC 2870.
8.	*Re Danier Leather Inc*, 2016 ONSC 1044.
9.	*Re Nortel Networks Corporation*, 2009 CanLII 39492 (ON SC).
10.	*Royal Bank v Soundair Corp*, 1991 CanLII 2727 (ON CA).
11.	*Sherman Estate v Donovan*, 2021 SCC 25.
12.	*Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41.
13.	*Target Canada Co, Re*, 2015 ONSC 1487.

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.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

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.

Interim financing

11.2 (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, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

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

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

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

> **(a)** the period during which the company is expected to be subject to proceedings under this Act;
>
> **(b)** how the company's business and financial affairs are to be managed during the proceedings;
>
> **(c)** whether the company's management has the confidence of its major creditors;
>
> **(d)** whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> **(e)** the nature and value of the company's property;
>
> **(f)** whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> **(g)** the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
(b) whether the monitor approved the process leading to the proposed sale or disposition;
(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
(d) the extent to which the creditors were consulted;
(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;
(b) a person who has or has had, directly or indirectly, control in fact of the company; and
(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

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

FACTUM OF THE APPLICANTS
(Stay Extension and Investment Approval Order)

McCarthy Tétrault LLP
Suite 5300, TD Bank Tower
Toronto ON M5K 1E6

James Gage LSO#: 34676I
Tel: 416-601-7539
Email: jgage@mccarthy.ca

Heather Meredith LSO#: 48354R
Tel: 416-601-8342
Email: hmeredith@mccarthy.ca

Natasha Rambaran LSO#: 80200N
Tel: 416-601-8110
Email: nrambaran@mccarthy.ca

Lawyers for the Applicants

MT MTDOCS 44034816