Court of King's Bench of Alberta

Citation: Delta 9 Cannabis Inc (Re), 2025 ABKB 52

Date:
Docket: 2401 09668
Registry: Calgary

In the Matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as Amended

In the Matter of the Compromise or Arrangement of Delta 9 Cannabis Inc., Delta 9 Logistics Inc., Delta 9 Bio-Tech Inc., Delta 9 Lifestyle Cannabis Clinic Inc., and Delta 9 Cannabis Store Inc.

Reasons for Decision
of the
Honourable Justice M.A. Marion

I. Introduction and Background

[1] "**Delta 9**", comprised of Delta 9 Cannabis Inc (**Delta 9 Parent**), Delta 9 Logistics Inc, Delta 9 Lifestyle Cannabis Clinic Inc, Delta 9 Cannabis Store Inc and Delta 9 Bio-Tech Inc (**Bio-Tech**), is a vertically integrated group of companies in the business of cannabis cultivation, processing, extraction, wholesale distribution, retail sales and business to business sales.

[2] In recent years, Delta 9 has suffered losses due to a number of factors, including intense competition; over-supply of cannabis products leading to significant price compression; illicit supply of cannabis; burdensome regulatory costs; significant capital required for new product development; increased financing costs due to changing capital market investor sentiment driving investment away from the cannabis sector; and higher interest rates. By March 2024, Delta 9 was in breach of covenants owed to its secured creditor and, in May 2024, it received a demand and notice of intention to enforce security under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*).

[3] Delta 9 then sought relief under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (*CCAA*). On July 15, 2024, the Court granted an initial order (**Initial Order**) under the *CCAA* providing, among other things, a stay of proceedings against Delta 9 (**Stay**).

[4] On July 24, 2024, on the "comeback" application with respect to the Initial Order, the Court granted an Amended and Restated Initial Order (**ARIO**), a Claims Procedure Order and an order approving a sale and investment solicitation process (**SISP**) with respect to Bio-Tech (**Bio-Tech SISP Order**). The ARIO approved, among other things, the appointment of a Chief Restructuring

Officer, Delta 9 group borrowing funds from 2759054 Ontario Inc operating as Fika Herbal Goods (**Fika** or **Plan Sponsor**) subject to an approved interim financing term sheet, among other things.

[5] On September 11, 2024, the Court granted an order, among other things, extending the Stay period under the ARIO to November 1, 2024 and approving an amendment to the Interim Financing Term Sheet between the Delta 9 group and Fika.

[6] On November 1, 2024, I granted a further extension order extending the Stay to January 31, 2025, approving a further amendment to the interim financing, increasing the financing charge, and amending a claims procedure order to allow the court-appointed monitor (**Monitor**) to accept late claims.

[7] On November 8, 2024, I dismissed Fika's application seeking, among other things, a creditors' meeting for a proposed plan of arrangement: ***Delta 9 Cannabis Inc (Re)***, 2024 ABKB 657.

[8] On November 21, 2024, Fika's counsel notified the Court that January 10, 2025 had been scheduled for two separate applications in this matter: determining the amount owing under a credit facility between SNDL Inc and Delta 9 (**SNDL Dispute**) and an application for approval of an amended plan of arrangement (**Plan**).

[9] On December 2, 2024, the Court granted an order (**Meeting Order**) for, among other things, a creditor's meeting (**Meeting**) for the Plan.

[10] On December 20, 2024, the Meeting was held in accordance with the Meeting Order. The single class of unsecured affected creditors (**Affected Creditors**) overwhelmingly approved the Plan.

[11] On December 30, 2024, Delta 9's counsel served unfiled applications (**Applications**) to the service list in this matter, which included:

(a) an application for a Sanction Order and Stay Extension (**Sanction Application**) relating to the Plan for defined "Plan Entities", extending the Stay, and approving the fees and disbursements of the Monitor and its legal counsel; and

(b) an application for a "Sale Approval and Vesting Order" (**SAVO**) and an "Approval and Reverse Vesting Order" (**ARVO**), for two proposed transactions:

(i) first, approving a sale and vesting of certain assets to 6599362 Canada Ltd (**659**) contemplated in a December 28, 2024 asset purchase agreement (**APA**), including in particular a 95,000 square-foot cannabis cultivation and processing facility in Winnipeg, Manitoba (**Bio-Tech Facility**) (the **659 Transaction**); and

(ii) second, approving a December 28, 2024 share purchase agreement (**SPA**) between Delta 9 Parent, Bio-Tech and Simply Solventless Concentrates Ltd (**SSCL**) by which Delta 9 Parent would sell its shares of Bio-Tech to SSCL pursuant to a reverse vesting order (**RVO**) structure (the **SSCL Transaction**).

[12] At the same time, Delta 9's counsel served a sixth affidavit of John Arbuthnot IV (**Arbuthnot**) dated December 30, 2024 (**Sixth Affidavit**) and a seventh Arbuthnot affidavit dated December 30, 2024 (**Seventh Affidavit**).

[13] On January 3, 2025, the Monitor's counsel provided the Court with the sixth report of the Monitor dated January 4, 2025 (**Sixth Monitor's Report**).

[14] On January 4, 2025, Delta 9's counsel advised the Court that the SNDL Dispute application had been adjourned by consent to be heard by another Justice on February 11, 2025. On January 6, 2025, Delta 9's counsel served filed copies of the Applications, the Sixth Affidavit, the Seventh Affidavit, and briefs supporting the Applications.

[15] On January 9, 2025, Delta 9's counsel provided the Court updated proposed forms of orders and an affidavit of service. Counsel also advised that they had recently been told that the Canada Revenue Agency (**CRA**) may oppose aspects of the Applications and provided the Court additional case authorities and evidence filed earlier in the action that Delta 9 might rely on.

[16] On January 9, 2025, the Monitor's counsel provided the Court with a supplement to the Sixth Monitor's Report (**Monitor's Supplement**).

[17] There was no questioning on any of the evidence filed in respect of or relied on at the Hearing.

[18] On January 10, 2025, I heard the Applications (**Hearing**).

[19] During the Hearing, CRA objected to certain aspects of the Applications, particularly the releases contemplated in the AVRO for the SSCL Transaction. I understand that CRA raised its opposition only shortly before the Hearing. During oral argument at the Hearing, CRA provided me a written brief, which seeks (among other things) a lifting of the Stay to allow it to issue director's liability assessments against Bio-Tech's director (Arbuthnot) and former directors for Bio-Tech's unremitted excise duties. CRA filed no application or evidence in support of its position. It referred to, among other things, an SSCL press release that was not in evidence and upon which I have not relied in making my decision.

[20] No party sought an adjournment of the Hearing, or the opportunity to file any further evidence. The Applications proceeded on the record before me.

[21] Ultimately, only CRA had any opposition to the Applications.

[22] On January 10, 2025, I granted uncontested aspects of the Applications, for a restricted court access and sealing order, and approving the Monitor and its counsel's fees and disbursements. I reserved on the core aspects of the Applications.

II. Issues

[23] The issues raised in the Applications are:

(a) Should the Court sanction the Plan?

(b) Should the Court extend the Stay?

(c) Should the Court approve the 659 Transaction on the terms proposed?

(d) Should the Court approve the SSCL Transaction on the terms proposed?

III. Analysis

A. Sanction Application

1. Legal Framework for Plan Sanction under the *CCAA*

[24] The Court may sanction a compromise or plan of arrangement if a majority in number representing two thirds in value of the creditors (or class of creditors), at a creditors' meeting, vote in agreement to a compromise or arrangement as proposed (or altered or modified at the meeting): *CCAA*, section 6(1); ***9354-9186 Québec inc v Callidus Capital Corp***, 2020 SCC 10 [***Callidus***] at para 57; Once sanctioned, the plan is binding on each class of creditors that participated in the vote: *CCAA*, section 6(1); ***Callidus*** at para 57.

[25] The general test courts apply when considering whether to sanction a plan is well established. It requires: (i) strict compliance with all statutory requirements; (ii) all materials filed and procedures carried out must authorized by the *CCAA*; and (iii) a fair and reasonable plan: ***Target Canada Co (Re)***, 2016 ONSC 316 [***Target Canada 2016***] at para 70; ***Re Northland Properties Ltd***, 1988 CanLII 3250 aff'd 1989 CanLII 2672 (BC CA); ***Canadian Airlines Corp (Re)***, 2000 ABQB 442 at para 60 leave to appeal refused 2000 ABCA 238; ***Lutheran Church Canada (Re)***, 2016 ABQB 419 at para 114; ***Re: Canwest Global Communications Corp***, 2010 ONSC 4209 at para 14; ***Laurentian University of Sudbury***, 2022 ONSC 5645 at para 23.

[26] In considering whether the applicant has complied with all statutory requirements under the *CCAA*, the Court will typically consider the following, as described in ***Laurentian University*** at para 24 (citing ***Canwest Global*** at para 15):

(a) if the applicant comes within the definition of a "debtor company" under section 2(1) of the *CCAA*:

(b) if the applicant has total claims in excess of $5 million;

(c) if the creditors were properly classified;

(d) if the notice of meeting was sent in accordance with the meeting order;

(e) if the meeting was properly constituted;

(f) if the voting was properly carried out; and

(g) if the plan was approved by the requisite majorities.

[27] The assessment of whether a plan is fair and reasonable engages the Court's discretion: ***Canadian Airlines*** at para 95. In considering whether a plan is fair and reasonable, perfection is not required: ***Laurentian University*** at para 31; ***AbitibiBowater Inc (Re)***, 2010 QCCS 4450 at

para 33. The Court should consider the relative degrees of prejudice that would flow from granting or refusing to grant the relief sought and whether the plan represents a fair balancing of interests in light of other options: ***Laurentian University*** at para 31; ***Canadian Airlines*** at para 3.

[28] Accordingly, the Court will consider the following, as set out in ***Laurentian University*** at para 32 (citing ***Canwest Global*** at para 21), and recently confirmed in ***Nordstrom Canada Retail, Inc***, 2024 ONSC 1622:

(a) whether the claims were properly classified and whether the requisite majorities of creditors approved the plan;

(b) what creditors would receive on bankruptcy or liquidation as compared to the plan;

(c) alternatives available to the plan and bankruptcy;

(d) oppression of the rights of creditors;

(e) unfairness to shareholders; and

(f) the public interest.

[29] The *CCAA* specifically allows for releases of directors for pre-filing claims that relate to the obligations of the company where the directors are by law liable in their capacity as directors for payment of such obligations: *CCAA*, section 5.1. However, the Court's power to sanction a plan goes further to include plans that contain other third-party releases: ***Canadian Airlines*** at para 92; ***Wiebe v Weinrich Contracting Ltd***, 2020 ABCA 396 at para 32; ***Metcalfe & Mansfield Alternative Investments II Corp, (Re)***, 2008 ONCA 587 at paras 43, 78; ***Lutheran Church Canada*** at para 171; ***Canwest Global*** at paras 28-30; ***Laurentian University*** at para 39.

[30] While no single factor will be determinative, the jurisprudence about releases of third parties has developed over time and currently reflects the consideration of the following key factors summarized in ***Laurentian University*** at para 40 and ***Green Relief Inc***, 2020 ONSC 6837 at para 27 (both citing ***Lydian International Limited (Re)***, 2020 ONSC 4006 at para 54):

(a) whether the released claims are rationally connected to the purpose of the plan;

(b) whether the plan can succeed without the releases;

(c) whether the parties being released contributed to the plan;

(d) whether the releases benefit the debtors as well as the creditors generally;

(e) whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(f) whether the releases are fair, reasonable and not overly broad.

[31] Some factors may assume greater weight in one case than in another. Where releases are objected-to, the Court may also analyze the quality of the claims the objecting party wishes to maintain: ***Green Relief*** at paras 28-29.

[32] Finally, in considering whether a plan is fair and reasonable, courts are also mindful of the *CCAA's* remedial purpose: ***Canadian Airlines*** at para 95; ***Canwest Global*** at para 20.

[33] A modern summary of the *CCAA's* remedial purpose is set out in ***Callidus*** at paras 40-42. In summary: among Canada's insolvency statutes' objectives (providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company), the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" and has "the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally": ***Callidus*** at paras 40-41, citing (among others): ***Century Services Inc v Canada (Attorney General)***, 2010 SCC 60 at para 70 [***Century Services***]; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp 4-5 and 14; ***Ernst & Young Inc v Essar Global Fund Ltd***, 2017 ONCA 1014 at para 103.

2. Should the Court Sanction the Plan?

[34] The Plan affects the Affected Creditors but not persons holding unaffected claims (as defined). It contemplates certain "convenience" Affected Creditors with small claims to elect to receive the lesser of $4,000 and the value of their allowed affected claim. It also provides for the establishment by the Plan Sponsor of a $750,000 cash creditor pool and a creditor equity pool of Fika shares worth $4,000,000 (and the entitlement of each eligible voting non-convenience Affected Creditor with a proven claim to receive a *pro rata* cash and equity payment from those pools on Plan implementation in satisfaction of their claims). SNDL will ultimately be paid in full as part of Plan implementation (subject to confirmation of the total amount as affected by resolution of the adjourned SNDL Dispute). Upon sanctioning, the Plan shall constitute the full, final and absolute settlement of all rights by Affected Creditors.

[35] The Plan provides for releases (**Plan Releases**) of the Plan Entities, past and current employees, legal and financial advisors, other Plan Entities' representatives, directors and officers, the Monitor (and its legal advisors), and the Plan Sponsor.

[36] I accept the unchallenged evidence and find that there has been compliance with the *CCAA* statutory requirements and that all materials filed, and procedures carried out, including the Meeting, were *CCAA*-authorized and compliant. The Plan was overwhelmingly approved by the required special majority of properly classified and unsecured Affected Creditors.

[37] With respect to whether the Plan is fair and reasonable, I accept the unchallenged evidence and find that:

(a) the Plan Entities and the Plan Sponsor made considerable efforts to prepare the Plan in a manner that addresses, to the extent possible, the various stakeholder concerns;

(b) there are no other viable restructuring options available other than the Plan, the alternative to which would be formal liquidation. Under a formal liquidation, the Affected Creditors would likely receive no recovery, while under the Plan they receive significant and material recovery and a potential upside through the receipt

of Plan Sponsor shares. In a liquidation scenario, there would be increased professional fees and bankruptcy costs;

(c) there is no prejudice to the Affected Creditors, who voted overwhelmingly in favour of the Plan. A high degree of creditor support creates an inference that a plan is fair, reasonable and economically feasible, and a court should be reluctant to second guess creditors' business assessment of a plan: ***Canadian Airlines*** at para 97; ***Kerr Interior Systems Ltd (Re)***, 2008 ABQB 286 at para 106;

(d) the Plan provides the Plan Entities with the greatest opportunity to repay the outstanding debts to SNDL and continue with a stronger owner. It allows for the continuation of the retail cannabis operations to continue as normal without disruption or further store closures following the Plan, with continuing employment of employees and contractors;

(e) the Monitor's opinion, pursuant to section 23(1)(i) of the *CCAA*, is that "the Plan is fair and reasonable and provides the best available return"; and

(f) there are challenges to restructuring cannabis companies at an operational level. To the Monitor's knowledge, since January 2022 there have been 66 companies in the cannabis industry that have entered insolvency proceedings in Canada and, of those, only five have successfully restructured their operations, with the rest resulting in liquidation.

[38] There was no opposition to the sanctioning of the Plan. CRA raised a concern about ongoing tax remittances between the date of plan sanctioning and implementation, but was satisfied by Delta 9's counsel's explanation that CRA's post-filing claims were unaffected by the Plan and for which the Plan Entities would remain responsible.

[39] I have considered the Plan Releases. I find that the Plan is fair and reasonable with the Plan Releases included, for these reasons:

(a) I am advised they are typical forms of releases in *CCAA* proceedings (although that alone does not justify their inclusion);

(b) the inclusion of the Plan Releases was not opposed by any party (although that alone does not justify their inclusion);

(c) the Plan Releases are rationally connected to the Plan and its purposes. For example, they release claims of the Affected Creditors as part of the consideration for Affected Creditors obtaining partial recovery of their claims under the Plan;

(d) the Plan could not succeed without the releases as Plan implementation relies on the continued participation and involvement of the releasees;

(e) I accept the unchallenged evidence that the proposed releasees contributed to the Plan in precarious circumstances. It is obvious from the cumulative evidence in this matter that the negotiation of the terms of the Plan and the Delta 9 restructuring has been complex, protracted and difficult, involving significant work by Delta 9

Parent, the Chief Restructuring Officer, the Plan Sponsor, SNDL, CRA and the Monitor (and their various consultants, advisors, counsel and representatives);

(f) the Plan Releases are a key component of the Plan, and a condition of Plan implementation which (as discussed above) benefits the debtors and the Affected Creditors and other stakeholders. The Plan Releases ensure that all stakeholders have certainty and finality about their liabilities at the conclusion of the Plan Entities' restructuring;

(g) the terms of the Plan Releases were expressly included in Article 9 of the Plan which was provided to the Affected Creditors; and

(h) the Plan Releases are fair, reasonable and not overly broad. The Plan confirms that the Plan Releases do not apply to (1) unaffected claims (as defined in the Plan); (2) obligations to Affected Creditors under the Plan or under any court order made in these *CCAA* proceedings; (3) SNDL's claim related to the SNDL Dispute; (4) claims finally determined to be based on breach of trust (whether common law or statutory), fraud, wilful misconduct or gross negligence; or (5) claims against directors referred to in section 5.1(2) of the *CCAA*.

[40] For the above reasons, I find that Plan is fair, reasonable and consistent with the *CCAA*'s remedial purpose.

B. Stay Extension Application

1. Legal Framework for Stay Extension Application

[41] The Court may make an order extending a stay, restraint and prohibition of proceedings for any period the Court considers necessary, provided the applicant satisfies the Court that circumstances exist that make the order appropriate, and the applicant has acted (and is acting) in good faith and with due diligence: *CCAA*, sections 11.02(2) and (3). The burden of proof is on the applicant: ***Mantle Materials Group, Ltd (Re)***, 2024 ABKB 19 at para 35. Appropriateness of an extension is assessed by inquiring into whether the order sought advances the policy objectives underlying the *CCAA*: ***Re Canada North Group Inc***, 2017 ABQB 508 at para 34, citing ***Century Services*** at paras 15, 70, 71.

2. Should the Court Grant the Stay Extension?

[42] No party opposed the further Stay extension application. I am satisfied that Delta 9 and the Plan Sponsor have, since my last extension order, acted in good faith and with due diligence. This finding is supported by the Monitor's reports. Further, having found that the Plan is fair, reasonable and consistent with the *CCAA's* remedial purposes, I find that an extension is necessary in the circumstances to allow for Plan implementation and the determination of the SNDL Dispute in February 2025, among other things.

[43] The form of proposed stay extension order, extending the Stay until February 28, 2025, is granted.

C. Application to Approve the 659 Transaction

1. Legal Framework for Approval of Asset Sale

[44] A debtor company under *CCAA* protection may not sell or dispose of assets outside the ordinary course of business without court authorization: *CCAA*, section 36(1).

[45] Whether to grant authorization to sell assets is a matter of judicial discretion. It is not a rubber-stamp exercise; it involves the balancing of the interests of stakeholders: ***Bellatrix Exploration Ltd (Re)***, 2020 ABQB 332 at para 30.

[46] The non-exhaustive statutory factors in sections 36(3)-(5) of the *CCAA* that the Court must consider, as well as additional or overlapping factors developed in the common law, do not form a rigid checklist of factors that must be present in every transaction: ***Target Canada Co (Re)***, 2015 ONSC 1487 at paras 14-17; ***Royal Bank v Soundair Corp***, 1991 CanLII 2727 (ON CA), 1991 CarswellOnt 205 [***Soundair***]; ***Long Run Exploration Ltd (Re)***, 2024 ABKB 710 at paras 11-12; ***Sanjel Corporation (Re)***, 2016 ABQB 257 at paras 54-55; ***Acerus Pharmaceuticals Corporation (Re)***, 2023 ONSC 3314 at paras 10-11.

[47] The statutory factors under section 36(3) of the *CCAA*, as augmented by recognized common law factors, are:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances. Common law factors include whether there was sufficient effort made to get the price at issue, whether the debtor or court-appointed officer acted improvidently, whether the process had integrity and was fair, reasonable, transparent and efficient; and whether the interests of all parties were considered: ***Sanjel Corporation (Re)*** at para 56; ***Soundair*** at para 16;

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

(c) whether the monitor filed 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. Common law factors include the weight to be given to the recommendation of the monitor and the business judgment rule, in that the Court will not lightly interfere with the exercise of the commercial and business judgment of the debtor company and a monitor where the process was fair, reasonable, transparent and efficient: ***Sanjel Corporation (Re)*** at para 57; ***Re AbitibiBowater*** at paras 70-72;

(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, accounting for their market value.

[48] I consider the 659 Transaction under this framework.

2. Should the Court Approve the 659 Transaction?

[49] The 659 Transaction involves the sale of the Bio-Tech Facility to 659, an arm's length party. It is conditional upon court approval of the proposed SAVO and the execution of a lease for the Facility between 659 (as landlord), SSCL (as tenant) and the Plan sponsor (as indemnifier).

[50] No party opposed the authorization of the 659 Transaction.

[51] Based on the evidence and the factors outlined above, I find it is appropriate to authorize the 659 Transaction, for these reasons:

(a) Sales Process. The sales process followed the court-approved Bio-Tech SISP Order. There was an extensive marketing process, assisted by a professional sales advisor, in which the Monitor solicited offers from many prospective bidders. There was interest from several parties, but only 659 (an arm's length party and previous owner of the land) made an offer. The APA was the result of good faith arm's length negotiations;

(b) Monitor's Recommendation. The Monitor is of the view that the 659 APA is commercially reasonable;

(c) Creditor Consultation. Creditors were provided notice of the application to approve the Bio-Tech SISP;

(d) Effect of the Sale. The effect of the 659 Transaction and the proposed SAVO is, among other things, to vest the Bio-Tech Facility in 659 and replace it with the proceeds for sale, preserving claims and their priority in the proceeds. Under the proposed SAVO, the Monitor shall not make distributions of the net proceeds without further court order;

The Plan Sponsor is the fulcrum creditor in respect of the priority of charges against the Bio-Tech Facility and it supports the sale. Bio-Tech owes significant amounts to CRA for unremitted GST ($657,056 as of July 12, 2024) and unremitted excise tax ($7,831,515 as of July 12, 2024) (together, **Arrears**) – CRA does not oppose authorization of the APA or the proposed SAVO; and

(e) Consideration. The only evidence of the value of the Bio-Tech Facility is the amount in the APA, which followed the extensive marketing process noted above.

[52] I am concerned with the definition of "Excluded Liabilities" and "Liabilities" in the APA as potentially overreaching and affecting future reclamation or remediation obligations which Manitoba Ministry of the Environment and Climate Change (**Ministry**) may later seek to enforce under *The Environment Act*, CCSM c E125 in respect of the Bio-Tech Facility. The Ministry was not served with or provided notice of the Applications. In response to that concern, Delta 9 (with the concurrence of the Plan Sponsor, the Monitor and 659) proposed that the SAVO be amended to give the Ministry the right to file a comeback application to vary the terms of the SAVO in respect of environmental obligations. That is appropriate in the circumstances.

[53] For these reasons, I grant the proposed form of SAVO (as amended).

D. Application to Approve the SSCL Transaction

[54] The application for authorization of the SPA involves the same general legal framework under section 36 of the *CCAA* as discussed above. However, its RVO structure warrants further discussion and analysis.

1. Legal Framework for Reverse Vesting Orders (RVO)

[55] The general structure of RVOs has been explained in J. Sarra, "Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions", 2022 CanLIIDocs 43 as follows (footnotes omitted) [*Sarra - RVO*]:

> RVO usually involve the sale of an insolvent debtor company's shares to a purchaser in a transaction where unwanted assets and liabilities are excluded in the purchase transaction and are transferred, assigned and vested in a newly-incorporated company ('newco') as part of a pre-closing reorganization, allowing the debtor company to shed liabilities and retain the most valuable assets.
>
> The result of an RVO is to expunge the existing corporate structure of the debtor company of anything the purchaser does not want. The newco is added to the insolvency proceeding and continues in that process while the debtor company exits the insolvency proceeding with broad liability releases; then the newco is liquidated or placed in bankruptcy to be liquidated. The transaction takes place outside of a negotiated and court-approved plan of arrangement or compromise.

[56] See also: ***Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al***, 2022 ONSC 6354 at para 27.

[57] While not expressly contemplated in the *CCAA*, it is now well established that courts have discretionary jurisdiction to authorize transactions involving RVOs, including pursuant to sections 11 and 36 of the *CCAA*: ***Long Run Exploration*** at para 17; ***Invico Diversified Income Limited Partnership v NewGrange Energy Inc***, 2024 ABKB 214 at para 18; ***Southern Star Developments Ltd v Quest University Canada***, 2020 BCCA 364 at para 11; ***Just Energy*** at para 29; ***Fresh City Farms and Mama Earth Organics,*** 2024 ONSC 2016 at para 35; ***Harte Gold Corp (Re)***, 2022 ONSC 653 at paras 24-37; ***Rambler Metals and Mining Limited, Re CCAA***, 2023 NLSC 134 at paras 39-61;

[58] Concerns arise because RVOs lack the claims and creditor voting process contemplated by the *CCAA*, and releases included as part of the transaction may be overly broad, both of which may negatively impact negotiations which could otherwise lead to a more favourable compromise or arrangement: *Sarra-RVO* at 17; 24; ***Invico Diversified*** at para 19.

[59] Therefore, in the *CCAA* context, RVOs should not be routinely granted, must be justified by "compelling", "extraordinary" or "exceptional" circumstances, and should invite "close scrutiny" because they can lead to unfairness or prejudice to creditors or other stakeholders: ***Long Run*** at para 18; ***Harte Gold*** at para 38; ***Invico Diversified*** at para 19; *Sarra-RVO* at 25-31; ***Atlas Global Brands Inc***, 2024 ONSC 5570 at para 35; ***MCAP Financial Corporation v QRD***

(Willoughby) Holdings Inc, 2024 BCSC 1654 at para 11; ***Arrangement relatif à Blackrock Metals Inc***, 2022 QCCS 2828 at para 96 [***Blackrock Metals***].

[60] An RVO is not granted merely because it may be more convenient or beneficial for the purchaser; there must be an evidence-based rationale for value in the proposed RVO transaction: ***MCAP Financial*** at paras 11, 18; ***Harte Gold*** at para 38; ***Blackrock Metals*** at paras 114-116; ***Just Energy*** at para 33.

[61] Interrelated, non-exhaustive relevant factors to consider in approving a transaction involving an RVO include:

(a) the statutory basis for an RVO, which in my view includes consideration of whether the RVO furthers the *CCAA's* remedial purposes (as set out ***Callidus*** at paras 40-42 and ***Century Services*** at para 59);

(b) the factors outlined in section 36(3) of the *CCAA* (as noted above), as adjusted for the unique aspects of a reverse vesting transaction, including:

(i) the reasonableness of the sales process / sales effort;

(ii) any monitor recommendation;

(iii) creditor consultation;

(iv) the effect of the transaction on creditors and other stakeholders; and

(v) the consideration for the transaction;

(c) the reason why an RVO is necessary;

(d) whether the reverse vesting structure produces an economic result at least as favourable as any other viable alternative;

(e) the interests of all stakeholders, including whether any stakeholders are worse off under the reverse vesting structure than they would have been under any other viable alternative; and

(f) whether the consideration being paid reflects the value of the assets preserved under the reverse vesting structure.

See: ***Harte Gold*** at paras 23, 38; ***Long Run Exploration*** at paras 17-19; ***Fresh City Farms*** at paras 35-39; ***Rambler Metals*** at para 62; ***PricewaterhouseCoopers Inc v Canada Fluorspar (NL) Inc***, 2023 NLSC 88 at para 60; ***Blackrock Metals*** at paras 87-95; ***MCAP Financial*** at paras 11-12; ***Atlas Global*** at paras 50-53.

[62] Where releases are part of an RVO, then the factors noted above are also relevant (as adjusted for this context), namely:

(a) whether the released claims are rationally connected to the purpose of the plan / transaction;

(b) whether the plan / transaction can succeed without the releases;

(c) whether the parties being released contributed to the plan / transaction;

(d) whether the releases benefit the debtors as well as the creditors generally;

(e) whether the creditors have knowledge of the nature and the effect of the releases; and

(f) whether the releases are fair, reasonable and not overly broad. In my view, as illustrated by this case, when considering whether releases are fair it may be appropriate for the Court to consider the conduct of proposed releasees and any potential benefit a proposed releasee may obtain from the restructuring or transaction as a whole. I also find it is appropriate to consider the timelines and nature of the objection to the proposed release, and the effect on stakeholders if the RVO structure (with the proposed releases) is not approved.

[63] I now consider the SSCL Transaction under this framework.

2. Should the Court Approve the SSCL Transaction?

a. The SSCL Transaction

[64] The SSCL Transaction encompasses the SPA and the ARVO, which together involve (among other things):

(a) SSCL acquiring all the shares of Bio-Tech;

(b) the cancellation of any other securities in the capital of Bio-Tech, without consideration;

(c) the payment by SSCL of a deposit and the balance of the purchase price, which will be held by the Monitor for the benefit of Bio-Tech's stakeholders pending further court order;

(d) the potential termination (without compensation) of some Bio-Tech employees that SSCL may identify it does not wish to continue to employ;

(e) the creation of a residual company (**ResidualCo**) to which certain "Excluded Assets", "Excluded Contracts" and "Excluded Liabilities" will be transferred. Among other things, all taxes owing or accrued due by BioTech for the period prior to the *CCAA* filing date will be transferred to or vested in or assumed by ResidualCo;

(f) the release (**RVO Releases**) in favour of releasees (**RVO Releasees**), including Bio-Tech and its current and former directors and officers, legal counsel and advisors; the Monitor and its legal counsel; SSCL and its legal counsel, directors, officers, partners, employees, consultants, advisors and assignees; and any directors or officers of ResidualCo; and

(g) Bio-Tech's retention of all its other assets other than the Excluded Assets and Bio-Tech's cessation as applicant in the *CCAA* proceedings under the court's purview (other than the ARVO).

[65] Although the SSCL Transaction is distinct and requires its own separate authorization and approval, it must be considered in proper context. It is interrelated with the Plan and the 659 Transaction, the sanction, authorization and approval of which were sought at the same time as the SSCL Transaction as part of the overall restructuring of the Delta 9 group.

[66] Only CRA expressed any concern with the SSCL Transaction. Specifically, as noted above, it objects to the release of Bio-Tech's directors, with specific focus on Arbuthnot, from being assessed for personal liability for Bio-Tech's Arrears under the *Excise Tax Act*, RSC 1985 c E-15 and the *Excise Act, 2001*, SC 2002 c 22 (*Excise Act, 2001*). In my view, the RVO Releases must be viewed in context of their role in the SSCL Transaction and, in turn, the overall restructuring of the Delta 9 group.

[67] I turn to relevant factors below, with special attention paid to CRA's objection to the release of Bio-Tech's directors.

b. The Need for an RVO

[68] Reverse vesting transactions have been recognized as appropriate in cases where there are valuable assets which cannot be transferred to a purchaser, including where the debtor operates in a highly-regulated environment in which its existing permits, licences or other rights are difficult or impossible to transfer to a purchaser: ***Harte Gold*** at para 71; ***Just Energy*** at para 34; ***Xplore Inc (Re)***, 2024 ONSC 5250 at para 59; ***PaySlate Inc (Re)***, 2023 BCSC 608 at para 80; ***Peakhill Capital Inc v Southview Gardens Limited Partnership***, 2023 BCSC 1476at para 39 aff'd 2024 BCCA 246; ***Atlas Global*** at para 51.

[69] The cannabis industry is one such environment. The Court was advised of numerous examples where RVOs have been approved by courts in cannabis restructurings.[1] As noted in ***Atlas Global*** at para 36:

> It is fair to observe that the setbacks besetting the cannabis industry have in fact in large measure provided the impetus for the recently increased use of the reverse vesting structure. That is because in a highly regulated industry, like the cannabis industry, there are significant implications, for the transfer of a business, if a purchaser would have to start "from scratch" to obtain regulatory approval to

[1] Delta 9's Brief cited the following, not all of which have reported decisions: Atlas Global Approval and Reverse Vesting Order granted on October 29, 2024, Court File No. CV-24-00722386-00CL (ONSC); Indiva Limited, et al, Approval and Reverse Vesting Order granted October 21, 2024, Court File No. CV-24-00722044-00CL (ONSC); BZAM Ltd, et al, Approval and Vesting Order, granted October 15, 2024, Court File No. CV-24-00715773-00CL (ONSC); Phoena Holdings Inc, et al, Reverse Vesting Order granted March 21, 2024, Court File No.: CV-23-0069728500CL (ONSC); Fire & Flower, Reverse Vesting Order granted August 29, 2023, Court File No.: CV-23-0070058100CL (ONSC); Aleafia Health Inc., Reverse Vesting Order granted October 30, 2023, Court File No.: CV-2300703350-00CL (ONSC); Trees Corporation, Reverse Vesting Order granted April 5, 2024, Court File No.: CV-2300711935-00CL (ONSC); Eve & Co et al, Reverse Vesting Order granted October 7, 2022, Court File No.: CV-2200678884-00CL (ONSC).

operate the business in question rather than assuming the relevant licenses as part of the transaction.

[70] The Monitor's view is that an RVO structure is necessary to maximize value in this case due to the highly regulated nature of the cannabis business, the value of which is dependant on maintaining two non-transferrable licences: a licence with Health Canada under the *Cannabis Act*, SC 2018, c16 that permits BioTech to cultivate, process and sell cannabis and a licence with CRA requiring it to apply cannabis excise stamps to its cannabis products in accordance with the *Excise Act, 2001*.

[71] No party suggested that an RVO was unnecessary in this case or that the justification for an RVO was unreasonable.

[72] I find that there is a legitimate need for an RVO structure for Bio-Tech.

c. The Bio-Tech SISP Process

[73] As noted above, the Bio-Tech SISP process was court-approved in the July 24, 2024 Bio-Tech SISP Order, on notice to interested stakeholders including CRA.

[74] The approved Bio-Tech SISP process provided potential interested purchasers an opportunity to propose a wide range of transaction structures, including "one or more of a restructuring, recapitalization or other form of reorganization of the business and affairs of [Bio-Tech] as a going concern, or a sale of all, substantially all, or one or more component's of [Bio-Tech]'s assets ... and business operations ... as a going concern or otherwise".[2]

[75] Despite the extensive marketing process, SSCL (an arm's length cannabis producer) made the only offer for Bio-Tech's business or shares (whether by a reverse vesting structure or otherwise).

[76] I find the Bio-Tech SISP process was fair and reasonable.

d. Monitor Recommendation

[77] The Monitor's view is that an RVO is necessary to maximize value in this case. It is of the view that the ARVO, including the proposed releases, is a condition precedent in the SPA which allows Bio-Tech to continue its operations as a going concern. With respect to the RVO Releases, the Monitor is of the view that their inclusion is an "important element to ensure the orderly transaction and transition of the business of Bio-Tech and is supported by the Monitor".

e. Creditor Consultation

[78] Creditors have been on notice about the potential need for an RVO transaction in respect of Bio-Tech, together with releases of Bio-Tech directors, since early in and throughout these *CCAA* proceedings.[3]

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[2] Bio-Tech SISP Order, Schedule A (clause 7).
[3] Arbuthnot's Seventh Affidavit, para 52.

[79] In Arbuthnot's second affidavit sworn July 18, 2024, he deposed that Delta 9 had entered into a July 12, 2024 Restructuring Term Sheet with the Plan Sponsor, which provided:

> The Plan Sponsor shall support any request of the Delta 9 Group for the Court to approve third party releases in favour of the board of directors of [Bio-Tech] as part of any approval and reverse vesting order sought in the CCAA Proceedings.

[80] In that same affidavit, Arbuthnot explained the terms of a proposed key employee retention plan (**KERP**) for which Delta 9 sought Court approval. Arbuthnot was one of the key employees. He stated (emphasis added):

> The Key Employees also include directors and officers that are necessary and integral to the business and operations of Delta 9 continuing to operate in the normal course. **A key component, and part of the intended consideration under the KERP, is that releases be sought for the directors and officers as part of any sales transaction and in conjunction with any plan of arrangement that is approved**. I am Bio-Tech's only director and the only person with the necessary security clearance to allow Bio-Tech to operate in compliance with its Health Canada Licence. It would be very difficult, if not impossible, to successfully complete the SISP for Bio-Tech without my continued involvement in the operation of the business and in the SISP.

[81] The Monitor included the proposed KERP terms in its first report dated July 22, 2024 (**First Monitor's Report**). The Monitor noted that "certain Key Employees have indicated that they are considering alternative employment opportunities should the consideration in the KERP not be provided, including both the material retention payment amounts and the traditional director and officer releases in the specified circumstances".[4] The KERP was developed to incentivize and retain the defined "Key Employees" including Arbuthnot.[5]

[82] The proposed KERP was attached as Appendix E to the First Monitor Report. It provided (emphasis added):

> As part of the enticement and compensation to the D&Os for continuing to provide services and maintain their roles as directors and officers of the D9 Group during their CCAA proceedings, the D9 Group agrees to seek and obtain a release of all **liability as a director and officer of any member of the D9 Group that is subject to a sale of its business and operations by way of a reverse vesting order** and/or a release of all liability as a director and officer of each member of D9 Group that is subject to a plan of arrangement or compromise in the CCAA Proceedings.[6]

[83] Schedule A of the KERP provided further specific references to releases as part of a reverse vesting order process with other specific key employee entitlements.

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[4] First Monitor's Report, para 104(e).
[5] First Monitor's Report, para 100.
[6] First Monitor's Report, Appendix E (clause 13).

[84] On July 24, 2024, the Court granted the ARIO (which approved the KERP), and the Bio-Tech SISP. Nobody sought permission to appeal those orders.

[85] On October 22, 2024, the Plan Sponsor applied for an order for a creditor's meeting with respect to its then proposed plan. The evidence and Monitor's report at that time further contemplated the release of the Bio-Tech directors.[7]

[86] As noted above, on December 30, 2024, Delta 9 served unfiled copies of its Applications and Arbuthnot's Sixth and Seventh Affidavits on the parties in the service list, including CRA. These materials include a redacted copy of the SPA for the SSCL Transaction, the specific terms of the RVO Releases, and the form of ARVO for the SSCL Transaction.

[87] CRA argues that it only received relevant details of the benefit Arbuthnot is obtaining from the restructuring process when it received the Sixth Monitor's Report in early January 2025 and the Monitor's Supplement on January 9, 2025.

[88] CRA is correct that the Court is not necessarily bound by the previous disclosed intention of Delta 9 and the Plan Sponsor to seek releases for Bio-Tech directors, or the Court's approval of the KERP which expressly contemplated them. However, they are relevant and important factors. Creditor consultation is a two-way street. By necessity, *CCAA* processes often move quickly and require diligent engagement by the Court and all stakeholders, including creditors. CRA chose to wait and see "how the *CCAA* process unfolded". It never questioned Arbuthnot on any of his affidavits. CRA allowed significant effort and resources to be expended or invested, while awaiting the outcome of the Bio-Tech SISP process, without apparently making it known to all stakeholders that it might object to a director's release if CRA was later of the view the director obtained an unjustified personal benefit out of the restructuring process.

[89] I find that there was reasonable consultation with creditors in respect of the SSCL Transaction. The possibility of an RVO structure, coupled with a requested release for Bio-Tech directors, was flagged very early on in these proceedings. The specific SSCL Transaction could not be proposed until the Bio-Tech SISP process had run its course, and the overall terms of the interrelated restructuring involving the Plan, the 659 Transaction, and the SSCL Transaction were finalized. Although time was compressed, as it often is in *CCAA* proceedings, there was sufficient time for creditors, including CRA, to respond.

f. Effect on Creditors and Other Stakeholders

i. General Effect on Creditors

[90] Bio-Tech creditors have not had the benefit of a creditor vote with respect to the proposed RVO structure, as contemplated by the *CCAA*.

[91] The proposed transactions, including the SSCL Transaction, will not provide sufficient proceeds to pay Bio-Tech's unsecured creditors, including CRA's significant claims against Bio-Tech for the Arrears. The Monitor noted that the lack of proceeds to pay CRA "is a function of the value of Bio-Tech's business, as fully tested under the SISP, and the priority of the CRA claims

[7] Affidavit of Mark Townsend sworn October 21, 2024, paras 42-43; Third Report of the Monitor dated October 29, 2024 (filed October 30, 2024), para 47; Sixth Monitor's Report, para 64.

relative to the claims of the priority creditors".[8] Delta 9 pointed to other cannabis restructurings where releases were approved notwithstanding significant amounts owing to CRA for excise tax and/or GST/HST.

[92] Zero recovery for unsecured creditors is often a function of the financial state of the debtor, not the RVO process: ***Long Run Exploration*** at para 19, citing ***Acerus Pharmaceuticals*** at para 32; ***Just Energy*** at para 57, ***Blackrock Metals*** at para 109; ***CCAA Plan of Arrangement – Clearbeach and Forbes***, 2021 ONSC 5564 at para 27(k). Further, there is no requirement that creditors be treated equally: ***Clearbeach and Forbes*** at para 27(k), citing ***Grafton-Fraser v Cadillac***, 2017 ONSC 2496 at paras 23-24.

[93] The Monitor is not aware of any stakeholder in the *CCAA* proceedings that would be worse off under the RVO structure.

[94] On the other hand, approval of the SSCL Transaction (which includes the RVO Releases) will allow the Bio-Tech business to continue as a going concern under the new ownership of SSCL, for the future benefit of all stakeholders including CRA.

ii. Effect on Future Application of the *Income Tax Act*

[95] CRA raised an issue with the potential effect of approving clause 4.3 of the SPA, which provides (with the language of concern emphasized):

> Pursuant to the Implementation Steps and the Approval and Vesting Order, at the Closing Time, all Taxes owed or owing or accrued due by Bio-Tech in respect of the period prior to the Filing Date shall be transferred to, vested in and assumed by ResidualCo, **including any Taxes related to debt forgiveness arising from or in connection with the consummation of the Transaction and the transfer of the Excluded Assets and Excluded Liabilities to ResidualCo**; provided, however, that the foregoing shall not: (a) relieve the Purchaser from Liability for Taxes arising during and in respect of the period from and after the Filing Date and relating to Retained Liabilities, or arising from audits or reassessments that relate to Retained Liabilities; or (b) relieve the Purchaser from any obligation to pay Taxes exigible by a purchaser in respect of a transaction like the Transaction in the same or similar circumstances. Any and all obligations and Liabilities arising from any audits or reassessments with respect to any Taxes that relate to a time period occurring, or facts arising, prior to the Closing Date, regardless of when such audit was commenced or completed, shall be transferred to and vest in ResidualCo.

[96] CRA argued that, if applicable, section 80 of the *Income Tax Act*, RSC 1985 c 1 (5th Supp) (*ITA*) operates to include certain forgiven debt amounts as income in the future and the Court cannot approve a provision in a transaction contract that requires the Minister not to apply the *ITA*. CRA relies on ***R v Beach***, 2001 BCCA 7 and ***Proposal of Sail Plein Air inc***, 2024 QCCS 1689 (under appeal) to say that such a court approval would be illegal. Such a provision prohibiting the Minister from including income would be unenforceable: ***Canadian Red Cross Society, Re***, 2006 CanLII 22141 (ON SC) at para 45.

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[8] Sixth Monitor's Report, para 54.

[97] Counsel for the Plan Sponsor provided some proposed language to include in the ARVO to attempt to address CRA's concern, as CRA made it clear it did not intend this "technical issue" (as CRA's counsel described it) to derail the Delta 9 restructuring process. The proposed language, in my view, assists by ensuring that CRA's position is not intended to bind the Minister. However, the proposed language effectively defers the matter in the same way that was rejected as inappropriate by the British Columbia Court of Appeal in ***Beach***. In ***Beach***, at para 18, the Court held that a court could not sanction a bankruptcy proposal that exempts a debtor from section 80 of the *ITA* and imposes that exemption on Revenue Canada. In my view, I must consider whether the SPA can be approved in its current form.

[98] An important rule of contractual interpretation is that if there are two apparently viable interpretations and one of them would result in illegality, the other interpretation should be preferred: ***Calgary (City) v International Association of Fire Fighters (Local 255)***, 2008 ABCA 77 at para 32. I interpret clause 4.3 of the SPA such that it was not objectively intended by the parties to the SPA to include a provision that would be illegal for the Court to approve.

[99] Accordingly, and based on the specific wording used by the parties to the SPA, I do not interpret any inclusion of *income* based on the operation of section 80 of the *ITA* to be part of "Taxes related to debt forgiveness arising from or in connection with the consummation of the Transaction" which are transferred to and vest in ResidualCo, under clause 4.3. At this time, it is unknown exactly how or whether section 80 of the *ITA* may be engaged or, if it is engaged, whether it would necessarily lead to taxes payable in any event.

[100] The proposed ARVO must be amended to include the language proposed by the Plan Sponsor in argument, as well as language that makes it clear that clause 4.3 does not apply to any future inclusion of income to Bio-Tech pursuant to section 80 of the *ITA*. As this matter was only briefly argued at the Hearing, I leave it to counsel to draft appropriate agreeable language based on these reasons. If issues arise in doing so, or if my decision has unintended consequences not raised in argument, counsel may seek my further direction.

iii. Effect on Future Environmental Obligations

[101] Although it was not raised by any party, it is incumbent on the Court to be vigilant about attempts to shed environmental remediation and reclamation obligations in an RVO: *Sarra-RVO* at para 24. RVO structures that retain environmental remediation and reclamation obligations, and which avoid attempting to usurp the regulatory enforcement of environment remediation and reclamation obligations, are factors cited in support of (or required for) the approval of RVOs: ***Long Run Exploration*** at para 23; ***Re Mantle Materials Group, Ltd***, 2023 ABKB 488 at paras 10-11; ***Rambler Metals*** at para 105; ***Harte Gold*** at para 83.

[102] It is also incumbent for applicants seeking approval of RVOs to ensure that all parties interested in or affected by the RVO are served and given notice: ***Validus Power Corp et al and Macquarie Equipment Finance Limited***, 2023 ONSC 6367 at para 119. Whenever real property is involved in a transaction, it is best practice to ensure that the applicable Crown office or environmental regulatory agency is given notice.

[103] I raised a concern with the definition of "Excluded Liabilities" in the SPA as potentially overreaching and affecting future reclamation or remediation obligations the Ministry may seek to

enforce in the future in respect of the Bio-Tech Facility. Section 2.2 of the SPA provides (emphasis added):

> 2.2 Excluded Liabilities
>
> (a) Pursuant to the Approval and Vesting Order, save and except for the Retained Liabilities, **all** debts, **obligations**, Liabilities, Encumbrances, indebtedness, Excluded Contracts, leases, agreements, undertakings, Claims, rights and entitlements **of any kind or nature whatsoever** (whether direct or indirect, **known or unknown, absolute or contingent, accrued or unaccrued**, liquidated or unliquidated, **matured or unmatured or due or not yet due**, **in law or in equity and whether based in statute or otherwise**) **of or against Bio-Tech**, the Bio-Tech Shares, or against, **relating to or affecting any of the Retained Assets**, or any Excluded Assets or Excluded Contracts, including, *inter alia*, the non-exhaustive list of Liabilities set forth in Schedule "C" (collectively, the "**Excluded Liabilities**") **shall be excluded and will no longer be binding on Bio-Tech**, the Bio-Tech Shares (or the holders thereof), Retained Assets, Employees, Permits and Licenses or Books and Records following the Closing Time.

[104] In argument, I was advised that there are no known environmental concerns with the Bio-Tech Facility, although that was not in evidence. I understood the position of Delta 9 to be that the definition of Excluded Liabilities was not intended to include the Ministry's right to take steps to protect the environment (including to issue environmental protection orders) in the future (which I took to mean whether any adverse environmental conditions arose before or after the *CCAA* filing). SSCL did not participate in the Hearing.

[105] As it did with the SAVO, following the Hearing, Delta 9 (with the concurrence of the Plan Sponsor, the Monitor and SSCL) proposed an additional term to the ARVO which would provide the Ministry 21 days upon service of a granted ARVO to apply to come back to vary its terms in respect of environmental liabilities. That is appropriate in the circumstances, if necessary, to allow appropriate language to be included to ensure that the ARVO does not have unintended consequences related to the future statutory discretion of the Ministry.

g. Viable Alternatives and Recovery Under Liquidation

[106] I find that there are no viable alternatives to the SSCL Transaction. According to the Monitor, if the SSCL Transaction were not to close and the ARVO is not granted, this would result in an immediate shut-down and liquidation of Bio-Tech. The Monitor is not aware of any viable alternative that would produce a more favourable result in the proceedings.[9] I accept the Monitor's unchallenged evidence.

[107] CRA is potentially worse off if the RVO Releases are included in the ARVO. CRA has not adduced evidence of what, if any, likely recovery it might obtain from Arbuthnot or former Bio-Tech directors if the RVO Releases are not approved.

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[9] Sixth Monitor's Report, paras 49-52.

[108] There is no specific evidence of what the liquidation of Bio-Tech alone would likely generate, however, given that the only interest in the Bio-Tech business was from SSCL based on the assumption that required licences would be available and operations would continue, it can be inferred that recovery for creditors overall would be materially less.

[109] Further, as noted elsewhere in these Reasons, the SSCL Transaction is intertwined with the 659 Transaction and the Plan (both of which CRA agrees with or did not oppose). A liquidation of the Delta 9 businesses would result in Affected Creditors receiving no recovery, reduced recovery for the priority secured creditor SNDL, the shut-down of retail outlets and the Bio-Tech manufacturing business, the loss of jobs, and increased fees and bankruptcy costs.

[110] Based on the evidence before me, I find that the proposed RVO structure produces an overall economic result better than liquidation.

h. Consideration

[111] The consideration to be paid by SSCL in the SSCL Transaction is the only evidence of value of the assets preserved under the RVO structure. SSCL negotiated at arm's length pursuant to the Bio-Tech SISP. There is no evidence that the consideration is unreasonable. CRA appears to acknowledge that "the market has spoken".

i. The RVO Releases

[112] As noted, CRA's objection is not to the SSCL Transaction, *per se*, but the Bio-Tech directors or former directors being included in the RVO Releasees relating to the Arrears.

[113] I consider relevant factors below.

i. Rational Connection?

[114] I find that the RVO Releases, including the release of Arbuthnot, are rationally connected to the SSCL Transaction. Arbuthnot will be involved in the implementation of the SSCL Transaction and is the only person with the necessary security clearance to allow Bio-Tech to operate in compliance with its Health Canada Licence. Releasing Arbuthnot is part of the *quid pro quo* for his continued participation in the implementation of the SSCL Transaction, the 659 Transaction and the Plan. Further, the releases may avoid director indemnity claims or future litigation about director indemnity claims.

[115] CRA's argument that the release of Arbuthnot and former Bio-Tech directors in respect of the Arrears is not rationally connected to the SSCL Transaction or the Plan is based, at least in part, on its premise that their release is not necessary to the SSCL Transaction. I address that argument below.

ii. Can the SSCL Transaction or the Plan Succeed without the Releases?

[116] CRA stated that "mere assessing of directors does not impact the plan going forward". Unfortunately, CRA's statement is based on speculation and not evidence and I must base my

decision on evidence. CRA has not contradicted the evidence filed by Delta 9, including Arbuthnot's affidavits, or the opinion and advice of the Monitor.

[117] I find that, based on the undisputed evidence, the release of Arbuthnot is integral to the success of the SSCL Transaction. CRA acknowledged that he was the "lynchpin" for the Health Canada licence. If that licence is not available to Bio-Tech, its business would be immediately disrupted and would likely result in an immediate shut-down and liquidation of Bio-Tech, which would garner a lower purchaser price.[10]

[118] As noted above, in the early phases of these proceedings, Arbuthnot and other directors were considering their options and the KERP, which contemplated their later release, was approved by the Court to incentivize their retention. It can be reasonably inferred that the contemplated releases, now coming to fruition, were important for Arbuthnot to continue to be involved.

[119] Without approval of the RVO Releases, one of the conditions to the SSCL Transaction would not be fulfilled. I agree with CRA that the Court should not accept releases simply because they have been packaged together as a condition precedent to a transaction or restructuring, and that "strong-arm tactics" of incumbent directors should be resisted: ***Green Relief*** at para 52. Success of the transaction or plan should be assessed with regard to factors other than potential strong-arming: ***Green Relief*** at para 53.

[120] However, in my view, the Court's assessment of whether requiring releases even constitutes director "strong-arming" in the *CCAA* process must be based on the evidence available. In this case, the concept of proposed releases was in the Restructuring Term Sheet and supported by the Plan Sponsor before the *CCAA* process even began.

[121] CRA speculates that, without the releases, SSCL would nonetheless proceed with the transaction. In my view, without the protection of the RVO Releases, there would be considerable uncertainty for SSCL as to whether Arbuthnot would agree to stay involved or on what terms. Without Arbuthnot's involvement, the entire nature of the SPA would be different and whether SSCL would waive the release condition or renegotiate another transaction is unknown. For example, if SSCL had to indemnify Arbuthnot or former Bio-Tech directors for their potential personal liability for the Arrears, it would materially change the economics of the SSCL Transaction. The best evidence I have is that the RVO Releases were made a condition of the SPA and the RVO structure because they were required and important, and that without them the closing of the SSCL Transaction would be at serious risk.

[122] If the SSCL Transaction were not to close, I find there would likely be a harmful ripple impact on the overall Delta 9 restructuring. In that event, the lease required for the 659 Transaction to close would not be signed, and the conditions of the 659 Transaction would be unfulfilled. It is unlikely that 659 would close the 659 Transaction at the same price, if at all, without a locked-in and operating tenant. In turn, then, conditions of the Plan would be unfulfilled, and the implementation of the Plan would be at risk. The Plan Sponsor may withdraw the Plan if the Plan's conditions, including the approval of the SSCL Transaction, are not met.[11] The Plan Sponsor

[10] Sixth Monitor's Report, para 50.
[11] Fifth Monitor's Report dated November 26, 2024, paras 36-37.

explained that the SSCL Transaction, with the RVO Releases, is critical to the Plan Sponsor because it is legally unable to acquire Bio-Tech due to its own regulatory restrictions.

[123] The best evidence before me is that the loss of Arbuthnot's cooperation and involvement could potentially cause the entire restructuring of Delta 9 to fail, or to have to restart the process over again, all of which would likely lead to less recovery, increased costs, and the loss of time and expense incurred to date by the Plan Sponsor and other stakeholders.

[124] It is fully open to creditors, like CRA, to argue that director's releases, that are made a condition precedent to transactions in restructurings, are not actually necessary for the transaction or plan to succeed, but they must provide the Court the evidentiary foundation to support those arguments. CRA did not do that, and, on balance, I find that the evidentiary record does not support CRA's position.

iii. Releasee Contribution

[125] The undisputed evidence is that the RVO Releasees, including Arbuthnot, contributed significantly to the SSCL Transaction, and they will continue to do so until the transaction closes and is implemented as part of the overall Delta 9 restructuring. CRA's argument that Arbuthnot was not the only one that contributed is true but is not a persuasive reason to reject the RVO Releases in this case.

iv. Benefit to Debtors and Creditors

[126] CRA argues that the RVO Releases do not benefit the creditors, but rather simply prevent CRA from potentially collecting against Bio-Tech's directors for amounts that Bio-Tech misappropriated when it failed to pay for excise duties and GST.

[127] CRA's position is again based on the premise that the RVO Releases are not necessary for the success of the SSCL Transaction or the Plan. For the reasons above, I find that premise to be unsupported and find that the RVO Releases benefit Bio-Tech and creditors generally.

v. Creditor Knowledge of the Nature and Effect of the Releases

[128] For the reasons above, including under the heading "creditor consultation", the creditors (including CRA) have had knowledge of the nature and effect of the proposed RVO Releases.

vi. Fair, Reasonable and Not Overly Broad?

[129] The proposed ARVO provides the RVO Releasees a broad release of all present future claims, liabilities and other matters based on any act, omission transaction, dealing or other occurrence existing or taking place prior to the "Closing Time" or arising in connection with or relating in any manner whatsoever to the SPA, the SSCL Transaction, or the conduct of these *CCAA* proceedings.

[130] However, there are exceptions: the RVO Releases as treated under the proposed ARVO:

(a) do not release any claim not permitted to be released pursuant to section 5.1(2) of the *CCAA*, namely claims that relate to contractual rights of creditors or are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors;

(b) do not release any claim or liability arising out of any gross negligence or wilful misconduct on the part of the released directors and officers of Bio-Tech and ResidualCo;

(c) do not apply to or prevent any person from commencing or continuing actions for an "Insured Claim" under any insurance policy maintained by Bio-Tech, which can be a mitigating factor to the loss of claims: ***Atlas Global*** at paras 92-93;

(d) do not apply to performance of obligations under the SSCL Transaction; and

(e) do not affect certain CRA set-off rights against Bio-Tech for pre and post *CCAA* filing amounts owed.

[131] Other than CRA, no creditor or stakeholder opposed the releases as being unfair or overly broad.

[132] CRA's core position is that the release of Arbuthnot from assessment for the Arrears renders the RVO Releases unfair. CRA appears to suggest that Arbuthnot has intentionally and by design orchestrated the Delta 9 restructuring to his personal benefit, and that Arbuthnot has already received benefits that more than compensate him for his involvement and continued involvement in the restructuring. CRA describes the further release related to assessment for Arrears as a "gratuitous benefit".

[133] CRA argues the following:

(a) although Arbuthnot was integral to Bio-Tech due to his security clearance related to Health Canada licence, that should not excuse his mismanagement and his causing the effective misappropriation of funds owed to CRA for GST and Excise remittances;

(b) Arbuthnot obtained the benefit of the KERP program. CRA argues that this already compensated him for remaining involved and assisting the restructuring process and that he does not need the further benefit of the RVO Release for staying involved;

(c) Arbuthnot will remain employed by Bio-Tech moving forward, after SSCL becomes its owner;

(d) Arbuthnot and his father (Bill Arbuthnot) created for themselves an employment agreement which provided them each a right to $5,000,000 upon a change of control of Bio-Tech, for which they both filed claims in the *CCAA* proceedings in August 2024 (**Arbuthnot Claims**). CRA argues that the Arbuthnot Claims, which have been accepted as contingent claims, inflated the creditor pool which decreased

potential recovery for other creditors and, further, gave those claims significant voting power on the Plan; and

(e) Arbuthnot and Bill Arbuthnot assigned the Arbuthnot Claims to another creditor (Uncle Sam's Cannabis Ltd), in return for a release of their personal liabilities to that creditor. CRA argues that Arbuthnot should not be able to obtain the benefit of those releases and then also release from potentially liability for the Arrears.

[134] CRA asserts that many of these details were not previously available and, therefore, CRA did not have an opportunity to provide comments earlier. I reject that notion. The Arbuthnot proofs of claims based on their employment agreements were filed in August 2024 as part of the claims process. The proposed release of Bio-Tech directors was known before and since that time. The quantum of claims was reported in the Fifth Report of the Monitor's dated November 26, 2024. It was open to CRA to seek more information about the claims of directors, or to question Arbuthnot on his affidavits, if CRA wanted to know more information about their claims or how they are affected by Delta 9's financial situation or its restructuring.

[135] Arbuthnot's employment agreement was executed in 2021, by a different director on behalf of Delta 9, long before the *CCAA* proceedings. There is no evidentiary basis to suggest it was improper when executed. Delta 9 Parent is a public company and Arbuthnot and others owed fiduciary obligations to ensure they acted in the best interest of the corporations. Delta 9 Parent had public reporting obligations that likely disclosed terms of his employment agreement. In my view, without more, Arbuthnot cannot be blamed for advancing claims in the *CCAA* proceedings he is contractually entitled to claim, or from assigning those claims to another party.

[136] Further, Arbuthnot cannot be blamed for the creation or use of the regulatory regime which makes his participation integral to a restructuring.

[137] I agree with CRA that, in appropriate cases, as part of considering the fairness of a release, other benefits connected to a restructuring obtained by a proposed releasee, and the proposed releasee's circumstances and conduct in the context of a restructuring, may be relevant in approving releases within an RVO structure. This could include whether the proposed releasee has acted in good faith: *CCAA*, section 18.6; ***Bellatrix Exploration Ltd (Re)***, 2020 ABQB 809 at para 105; ***Razor Energy Corp, Razor Holdings Gp Corp, and Blade Energy Services Corp (Re)***, 2025 ABKB 30 at paras 49-51.

[138] In my view, however, a party seeking to oppose a release on these grounds should engage and advise of its position early in the process and build an evidentiary record to allow the Court to reasonably assess those factors. That might include (among other things) evidence about the alleged net benefits already received by the proposed releasee, the economic benefits of the transaction overall, the potential value of the release to the releasee, the potential economic impact of not approving the release, the actual prejudice to the creditor, and whether the proposed releasee is acting in good faith.

[139] CRA has not done these things. While it is true that Delta 9 misused funds owed to CRA for other purposes, it appears to have been to attempt to maintain the business as a going concern during tumultuous times in a new industry. This is not an excuse but is a relevant factor, particularly given that the Arrears appear to have accumulated over an extended period and CRA

did not strictly enforce its rights. In the *CCAA* proceedings, CRA waited to see how things unfolded, including whether the Bio-Tech SISP process might garner a qualifying bid that would generate CRA better recovery. Then, at the last possible moment, CRA asked the Court to reject the Bio-Tech directors' release and lift the Stay in its favour without a filed application or supporting evidence. CRA has not proven, on this record, that Arbuthnot or former directors did not act in good faith contrary to section 18.6 of the *CCAA*. The evidence and arguments from other Hearing participants, including the Monitor as court officer, suggests Arbuthnot has been acting in good faith.

[140] A creditor's approach and timeliness in advancing its position against a proposed release is also a relevant factor in assessing whether to approve an RVO structure with releases. I find that if I were to accede to CRA's position and grant the relief it seeks, it would be inconsistent with this Court's supervisory role to ensure that the *CCAA* process unfolds in a fair and transparent manner: ***Delta 9*** at para 64, citing ***Target Canada 2016*** at para 72. It would be unfair to the other *CCAA* stakeholders, particularly the Plan Sponsor (who has provided significant funding to Delta 9 for this *CCAA* process), SNDL (the priority secured creditor that stands to lose its full recovery if the restructuring is frustrated), and Arbuthnot (whose personal intentions and conduct is the target of CRA's assertions).

[141] Ultimately, in addition to these concerns, CRA essentially asks the Court to deny the proposed release of Bio-Tech's directors as unfair, on the speculative assertion or hope that doing so will allow CRA to collect more of the Arrears while not destroying the hard-earned benefits of the overall complex Delta 9 restructuring (which CRA otherwise supports). I am not satisfied it is appropriate to take that risk on the evidentiary record before me.

[142] In the circumstances, I am unable to agree with CRA that RVO Releases are unfair based on Arbuthnot's conduct or due to other benefits he may or may not have received. I find that, based on the record before me, that the RVO Releases are fair, reasonable and not overly broad.

j. Effect of Not Approving the RVO

[143] As noted above, I find that the effect of not approving the RVO, with the RVO Releases, at this juncture puts the benefits of the SSCL Transaction, the 659 Transaction and the Plan at serious risk.

k. Remedial Purpose of *CCAA*

[144] The remedial purpose of the *CCAA* favours approving the SSCL Transaction for the benefit of allowing Bio-Tech to continue as a going concern for the general benefit of stakeholders, including the Plan Sponsor, SNDL, Bio-Tech employees and others (including CRA). This is not overridden in this case by CRA's position, or the fact that Arbuthnot and other Bio-Tech Directors are released from being assessed for the Arrears.

l. Conclusion re SSCL Transaction

[145] For the reasons set out above, I find that the approval of the SSCL Transaction, including the RVO Releases is appropriate. I grant the form of proposed ARVO with the noted amendments noted above.

IV. Conclusion

[146] I grant the proposed "Order – Sanction of Plan and Stay Extension", the proposed SAVO and the proposed ARVO, as amended as noted above.

Heard on the 10th day of January 2025.
Dated at the City of Calgary, Alberta this 29th day of January 2025.

M.A. Marion
J.C.K.B.A.

Appearances:

Ryan Zahara, Molly McIntosh and Chris Nyberg, MLT Aikins LLP
for Delta 9 Cannabis Inc., Delta 9 Logistics Inc., Delta 9 Bio-Tech Inc., Delta 9 Lifestyle Cannabis Clinic Inc. and Delta 9 Cannabis Store Inc.

James Reid and Matthew Cressati, Miller Thomson LLP
for 2759054 Ontario Inc. operating as Fika Herbal Goods

Ashley Bowron, McCarthy Tetrault LLP
for SNDL Inc.

David LeGeyt, Burnet, Duckworth & Palmer LLP
for the Monitor, Alvarez & Marsal Canada Inc.

Howard A. Gorman, K.C., Norton Rose Fulbright Canada LLP
for the directors and officers of Delta 9 and Bio-Tech

Daniel Segal and David Smith, Department of Justice Canada
for the Canada Revenue Agency