

COURT FILE NUMBER 2401-09688

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE OF THE *COMPANIES'*  
*CREDITORS ARRANGEMENT ACT*, RSC  
1985, C C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF  
COMPROMISE OR ARRANGEMENT OF

AND IN THE MATTER OF A PLAN OF  
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.

APPLICANTS 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.

DOCUMENT WRITTEN SUBMISSIONS ON BEHALF OF  
HIS MAJESTY THE KING IN RIGHT OF CANADA  
as represented by the Minister of National Revenue

PARTY FILING THE HIS MAJESTY THE KING IN RIGHT OF CANADA  
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**WRITTEN SUBMISSION OF THE CANADA REVENUE AGENCY (CRA)**

1. The CRA makes the following written submissions with respect to the Delta 9 companies' applications before this Honourable Court on January 10, 2025.

**A. The Directors Should Not be Released from their Liability Under Section 295 of the *Excise Act, 2001* and section 323 of the *Excise Tax Act***

2. The CRA requests that the stay against Delta Bio-Tech Inc. be lifted to the extent necessary to allow it to assess John Arbuthnot IV and the other directors for unremitted excise duties before Delta 9's liability for them is transferred to ResidualCo. The release of the liability for over 9 million dollars in unremitted excise duties and GST is simply a gratuitous benefit to Mr. Arbuthnot IV and the other directors, and it is not rationally connected nor necessary to the proposed restructuring the of the Delta 9 companies.
3. Pursuant to section 295 of the *Excise Act, 2001*,<sup>1</sup> John Arbuthnot IV, and the other directors, are liable for Delta 9 Bio-Tech Inc.'s \$8,216,924.0 of unremitted excise duties<sup>2</sup>. These excise duties were part of the purchase price paid for cannabis. Instead of remitting the duties to the Crown, as it was legally required to, Delta 9 Bio-Tech Inc. diverted this tax to other uses.
4. Bio Tech Inc. also failed to remit the \$936,993.68 in GST that it collected on cannabis sales and has a pre-initial CCAA order liability as a result<sup>3</sup>. As with the excise duties, Bio Tech Inc. diverted the GST it collected to other uses instead of remitting as required. John Arbuthnot IV and the other directors are liable for this unremitted GST pursuant to section 323 of the *Excise Tax Act*.<sup>4</sup>
5. During this time that the over million dollars in GST and excise duties were being diverted by Delta 9 Bio-Tech Inc., Mr. Arbuthnot IV and the other directors also received hundreds of thousands of dollars of compensation.

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<sup>1</sup> [S.C. 2002, c. 22](#)

<sup>2</sup> This amount includes penalties and interest

<sup>3</sup> This amount includes penalties and interest

<sup>4</sup> [\(R.S.C., 1985, c. E-15\)](#)

6. The enforcement of director's liability where GST and excise duties have been diverted is an essential component of the statutory framework for the regulation of cannabis established by the *Excise Act, 2001* and the *Excise Tax Act*.
7. Lifting the stay and allowing John Arbuthnot and the other directors to be assessed pursuant to the *Excise Act, 2001* and *Excise Tax Act* will have no impact upon the Plan of Compromise and Arrangement, the sale of the Winnipeg property to 6599366 Canada Ltd., the share purchase agreement with Simply Solvent Concentrates Ltd. or the reverse vesting order.
8. Applying the test in *Metcalf & Mansfield Alternative Investments II Corp.*,<sup>5</sup> a release of the directors is therefore not appropriate in this case as follows.

*(a) Releasing John Arbuthnot IV and the other directors is neither necessary nor essential to the restructuring of the Delta 9 companies*

9. Whether John Arbuthnot IV and the other directors are released from their liabilities for the excise duties and GST will have no impact on any aspect of the Delta 9 restructuring:
  - Regarding the Plan of Compromise and Arrangement, the liability of the directors under the *Excise Act, 2001* and *Excise Tax Act* is entirely separate from this plan and there is no evidence that not releasing the directors for their liability will reduce the amount received by the creditors in any way.
  - Regarding the sale of the Winnipeg property and the share purchase agreement, neither will be materially affected in any way by not releasing the directors from the liability and allowing the Minister to take steps to issue the assessments. Both the property and the shares can be sold with no reference to the liabilities of the directors. The fact that the sale purchase agreement was made conditional upon the release of John Arbuthnot IV and the other directors is simply gratuitous and ought to be disallowed. It denies the ability of the CRA to pursue the directors for their significant liability for no benefit to the creditors. In

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<sup>5</sup> [2008 ONCA 587](#)

*Green Relief Inc.*, a similar condition precedent was described by Justice Koehnen as a “strong-arm tactic that courts should resist.”<sup>6</sup>

- Regarding the reverse vesting order, the vesting of the Excluded Assets, Excluded Contracts and Excluded Liabilities in ResidualCo will not be affected in any way by maintaining the liability of John Arbuthnot IV and the other directors for the excise duties and GST diverted by Delta 9 Bio-Tech Inc.

10. John Arbuthnot IV argues that he was essential to restructuring of the Delta 9 companies. He highlighted his role in being the director with the security clearances for the Excise and Health Canada licences in the affidavit filed in support of the necessity of the KERP plan.
11. First, it is submitted that Mr. Arbuthnot IV simply fulfilled his duty as a director and officer of the Delta 9 companies, for which he received his ongoing salary and had the possibility of additional payments under the KERP.
12. Second, the Delta 9 reorganization has been primarily driven by Fika Herbal Goods and not John Arbuthnot. Fika Herbal Goods pushed forward the applications to vote on the plan and its approval. It has also invested a significant amount of time and resources in the reorganization.
13. Third, John Arbuthnot IV and his father John Arbuthnot III used this reorganization to release themselves from significant third party liability to Uncle Sam’s Cannabis Ltd. In 2021, the Arbuthnots signed agreements with Delta 9 Cannabis that contained clauses granting them five million dollars each upon the change of control of Delta 9 Cannabis. The claims to these two five million dollar payments were then assigned to Uncle Sam’s Cannabis Ltd. in exchange for the release of personal guarantees.<sup>7</sup> This liability would not have otherwise been released by the reorganization. The Arbuthnot’s ten million dollars of claims, as assigned to Uncle Sam’s Cannabis Ltd., have further been accepted into the claims process and enabled Uncle Sam’s Cannabis Ltd. to vote with an extra 10 million dollars on the plan. The Arbuthnots have

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<sup>6</sup> 2020 ONSC 6837 at para. [52](#)

<sup>7</sup> Letter agreement April, 2022 attached assignment of claim agreement.

therefore used their ten million dollars of claims from Delta 9 Cannabis as consideration for their release from third party liability to Uncle Sam's Cannabis Ltd.

14. Fourth, the John Arbuthnot IV has devoted as significant amount of time and energy ensuring that this reorganization releases him from personal liability for nine million dollars in unremitted GST and excise duties that were diverted by Delta 9. The release of this personal liability has no benefit to either the creditors or the debtors.
15. The current situation is very different from the cases relied upon by the Delta 9 companies. Those cases focus on the release of all the officers, directors and professionals involved in the reorganization in order to protect them primarily from any liability that might arise from the reorganization process, itself. The releases in those cases would protect the individuals from being sued by, for example, shareholders who were dissatisfied with the results of the reorganization. This makes sense because otherwise such officers, directors and professionals would never participate in a reorganization.
16. In the present case, however, John Arbuthnot IV is seeking a release of nine million dollar personal liability that is completely unrelated to the work involved in the reorganization process. This debt arose as a result of GST and excise duties being diverted by Delta 9 rather than being remitted as they were legally required to do so. This is the exact situation that sections 295 of the *Excise Act, 2001* and 323 of the *Excise Act* exist in order to prevent.

*(b) The claims to be released are not rationally connected to the purpose of the plan and are not necessary for it.*

17. As set out above, there is no rational connection between the release of John Arbuthnot IV and the other directors from their liability for excise duties and GST and restructuring plan. All of the plan's components can proceed regardless of whether John Arbuthnot IV or other directors are assessed under sections 295 of the *Excise Act, 2001* and 323 of the *Excise Tax Act*.

*(c) The plan can succeed without the releases.*

18. The Plan of Compromise and Arrangement, the sale of the Winnipeg property to 6599366

Canada Ltd., the share purchase agreement with Simply Solvent Concentrates Ltd. and the reverse vesting order can all succeed without releasing John Arbuthnot IV and the other directors from their liability under the of the *Excise Act, 2001* and the *Excise Tax Act*.

*(d) John Arbuthnot IV and the other directors are not materially contributing to the plan*

19. Other than being directors during the reorganization, John Arbuthnot IV and the other directors have contributed nothing to the plan. They have not put any funds into the plan or the transactions related to the sale of the Winnipeg property and Bio-Tech Inc. shares. The Plan Sponsor developed the plan to purchase the retail entities and also agreed to acquire the shares of the Delta Parent when no other offers for that proceeded.
20. John Arbuthnot IV and the other directors also continued to receive significant compensation as well as a KERP payment for work during the reorganization. Their involvement in this restructuring does not justify being released from their liability for the unremitted GST and excise duties diverted by Delta 9 Bio-Tech Inc.

*(e) Releasing John Arbuthnot IV and the other directors benefits neither the debtors nor the creditors generally.*

21. The Delta 9 companies receive no benefit whatsoever from the release of John Arbuthnot IV and the other directors from their liability under of the *Excise Tax Act*. The Delta 9 companies' liabilities for the unremitted excise tax will remain until it is transferred to ResidualCo,
22. As well, no creditors will receive any more money as a result of the release of the directors and the failure to release the directors will not result in any future uncertainty for the creditors. The only result of the release of John Arbuthnot IV and the other directors from their liability under the *Excise Act, 2001* and the *Excise Tax Act* will be that the CRA will be precluded from attempting to recover unremitted excise duties and GST
23. In their Bench Brief in support of the Sanction Order, the Delta 9 companies also referred to two further considerations for the granting of releases that are set out in *Laurentian University*

of *Sudbury*<sup>8</sup> and *Lydian International Limited (Re)*:<sup>9</sup> (1) whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and (2) whether the releases are fair, reasonable, and not overly-broad. Neither of these considerations support the release of John Arbuthnot IV and the other directors from their liability for unremitted excise duties and GST.

24. The knowledge of the creditors that Delta 9 was seeking the release of John Arbuthnot IV and the other directors from liability for excise duties and GST is not relevant because it does not affect any of the creditors other than CRA.
25. The release of John Arbuthnot IV and the other directors from their liability for Delta 9 Bio-Tech's debt for unremitted excise duties and GST is unfair and unreasonable. The excise duties and GST were collected from individual customers of Delta 9. Contrary to the purpose and intent of the legislation, CRA will lose its ability to attempt to collect this money that was illegally diverted to other uses by the Delta 9 companies. The loss of the CRA's ability to collect this unremitted excise tax also provides no additional benefit to either the debtors or creditors. The proposed releases simply provide a gratuitous benefit to John Arbuthnot IV and the other directors.
26. It should be noted that even if CRA issues assessments for Director's liability against any of the directors, those assessments can be contested through the normal objection/ appeal to the Tax Court of Canada process that exists for any assessed person.
27. The Delta 9 companies further argue that the CRA should attempt to pursue a claim under their Directors and Officers Liability Insurance Policy with HDI Global Specialty SE. This is a particularly unreasonable aspect of the proposed plan.
28. It is Delta 9 Cannabis Inc., not the CRA, that has the contract with HDI and access to information related to it. It makes much more sense for Delta 9 Cannabis Inc. to pursue a claim

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<sup>8</sup> 2022 ONSC 5645 (CanLII) at para. [40](#)

<sup>9</sup> 2020 ONSC 4006 at para. [54](#)

under its own insurance policy than to attempt to force the CRA to do so. In *Green Relief*, the Justice Koehnen lifted the stay against the officers and directors for the purpose of allowing claims “for which there might be insurance coverage.”<sup>10</sup>

29. Once the excise tax is transferred to ResidualCo, John Arbuthnot IV and the other directors will also no longer be liable for it, if the stay is not lifted and DL assessments issued. This will likely make a claim under the HDI Policy impossible as Delta 9 will continue on without the liability, with the debt being transferred to Residual Co., and the directors will have a court ordered release.
30. It is therefore fair and reasonable in these circumstances to lift the stay and allow the CRA to take steps to issue director’s liability assessment prior to the Sale of shares and RVO process being implemented.

**B. The Claims of the Arbuthnots and James Lawnon**

31. It has only recently come to the attention of CRA that the Arbuthnots and James Lawson, have submitted claims in the claims process totalling \$10,500,000. These claims appear to relate to claims they are making through the termination provisions of employment agreements that they have executed with Delta 9 Cannabis Inc.

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<sup>10</sup> 2020 ONSC 6837 at para. [70](#) to [73](#)



32. The clauses associated with these claims are conditional and it appears the conditions have not been satisfied. These claims have been admitted into the claims process as contingent claims for voting purposes on the Plan. The existence of these claims increase the quantum of the total overall claims in the Plan.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

this 9<sup>th</sup> day of January, 2025

  

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**A. LIST OF AUTHORITIES**

**Appendix A – Statutes and Regulations**

1. Excise Act, 2001, [SC 2002, c 22](#)
2. Excise Tax Act, [RSC 1985, c E-15](#)

**Appendix B – Authorities**

1. *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, [2008 ONCA 587 \(CanLII\)](#)
2. *Lydian International Limited (Re)*, [2020 ONSC 4006 \(CanLII\)](#)
3. *Laurentian University of Sudbury*, [2022 ONSC 5645 \(CanLII\)](#)
4. *Re Green Relief Inc.*, [2020 ONSC 6837 \(CanLII\)](#)

**B. SCHEDULES**

1. s. 295 of Excise Act, 2001, SC 2002, c 22
2. s. 323 of Excise Tax Act, RSC 1985, c E-15