Court of King's Bench of Alberta

Citation: Delta 9 Cannabis Inc (Re), 2024 ABKB 657

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] On July 15, 2024, the Court granted an initial order (**Initial Order**) under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (*CCAA*) with respect to the "**Delta 9 Group**", namely Delta 9 Cannabis Inc (**Delta 9 Parent**), Delta 9 Logistics Inc (**Logistics**), Delta 9 Lifestyle Cannabis Clinic Inc (**Lifestyle**), Delta 9 Cannabis Store Inc (**Store**) and Delta 9 Bio-Tech Inc (**Bio-Tech**).

[2] 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 (**CRO**), Delta 9 Group borrowing from 2759054 Ontario Inc operating as Fika Herbal Goods (**Fika** or **Plan Sponsor**) subject to an approved an interim financing term sheet (**Interim Financing Term Sheet**), and a $1,500,000 break-fee in favour of Fika (**Break-Fee**).

[3] On September 11, 2024, the Court granted an order (**Extension 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.

[4] On October 22, 2024, Fika filed this application (**Application**). It seeks a creditors' meeting order:

(a) accepting the filing of a plan of compromise and arrangement of Delta 9 Parent, Logistics, Lifestyle and Store (collectively the **Plan Entities**) dated October 21, 2024 (**Plan**);

(b) authorizing the Plan Entities and Bio-Tech to establish a single class of creditors (**Affected Creditors Class**) for the purpose of considering and voting on the Plan;

(c) authorizing the Delta 9 Group to call, hold and conduct a virtual meeting (**Creditor Meeting**) of the Affected Creditors Class to consider and vote on a resolution to approve the Plan; and

(d) setting a date for the hearing of an order for the sanctioning of the Plan.

[5] On November 1, 2024, I granted a further extension order extending the stay period and increasing the authorized interim financing, an Amended and Restated Claims Procedure Order (to allow some late claims), and a sealing order. I reserved my decision on the Application.

[6] The Application is opposed by the senior secured creditor, SNDL Inc (**SNDL**). Effective July 5, 2024, SNDL purchased the senior secured debt (**SNDL Senior Debt**) from Connect First Credit Union Ltd (**CFCU**). SNDL argues that the Plan is not capable of sanction and should not be put to a creditor vote. Fika's position is that the concerns raised by SNDL should be dealt with at the Plan sanction hearing (which Fika advised can be scheduled in December 2024).

[7] The Monitor and the largest of the creditors in the Affected Creditors Class both support the Application. Nobody other than SNDL opposes it.

II. Issues

[8] The issue raised in this Application is whether a Creditor Meeting of the Affected Creditors Class should be ordered, together with ancillary relief set out in the Application.

III. Analysis

A. Legal Framework for Court-Ordered Creditor Meetings under the *CCAA*

[9] Fika relies on sections 4 and 5 of the *CCAA* as providing the authority for ordering a creditor meeting for the purpose of a creditor vote. Those sections provide:

> Compromise with unsecured creditors
>
> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

Compromise with secured creditors

> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[10] These sections are permissive, not mandatory: ***Fracmaster Ltd (Re)***, 1999 ABQB 379 at para 24 [***Fracmaster QB***] affirmed 1999 ABCA 178 [***Fracmaster CA***]. As such, they engage the Court's discretion as to whether to order the meeting: ***9354-9186 Québec inc v Callidus Capital Corp***, 2020 SCC 10 [***Callidus***] at para 57; ***Ursel Investments Ltd, Re***, 1990 CanLII 7504 (SK KB) at paras 24-25; ***Kerr Interior Systems Ltd (Re)***, 2011 ABQB 214 at para 29; ***Ultracare Management Inc v Gammon*** (Gen Div), 1990 CanLII 6898 (ON SC), citing ***Elan Corp v Comiskey*** (1990), 1990 CanLII 6979 (ON CA). The Court also has broad discretion under section 11 of the *CCAA* where there is no *CCAA* provision conferring more specific jurisdiction: ***Callidus*** at para 68. Oversight of the plan negotiation, voting and approval process falls squarely within the Court's purview: ***Callidus*** at para 69.

[11] The Court's discretion must be exercised in furtherance of the *CCAA's* remedial purpose: ***Canada v Canada North Group Inc***, 2021 SCC 30 at para 138, citing ***Century Services Inc v Canada (Attorney General)***, 2010 SCC 60 at paras 58-61; ***Callidus*** at para 49. A modern summary of the *CCAA's* remedial purpose is set out in ***Callidus*** at paras 40-42:

> [40] Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: 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 (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law* 2016 (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).
>
> [41] Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such

> a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).
>
> [42] That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "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" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 ("*Essar*"), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the CCAA landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

[12] The test as to whether a creditor meeting should be ordered is whether it is in the best interests of the debtor and its stakeholders to do so: ***Unique Broadband Systems (Re)***, 2013 ONSC 676 at para 52; ***Re Canadian Red Cross Society***, 1998 CanLII 14907 (ON SC) at para 37; ***Fracmaster QB*** at para 24. It has been described as a low standard: ***Arrangement relatif à Bloom Lake***, 2018 QCCS 1657 at para 19.

[13] In the majority of *CCAA* proceedings, an order directing a creditor meeting is an uncontroversial procedural step in the *CCAA* process and is not usually the time to argue whether the proposed plan is fair and reasonable: ***Jaguar Mining Inc (Re)***, 2014 ONSC 494 at para 48; ***Target Canada Co (Re)***, 2016 ONSC 316 at para 17; ***Bloom Lake*** at para 19; ***Quest University Canada (Re)***, 2020 BCSC 1845 at para 32.

[14] However, this procedural step often justified on a low standard may be refused in appropriate circumstances. When the order is objected-to, it is incumbent on the Court to carefully examine the material filed and the issues or concerns raised: ***Ursel Investments*** at paras 25 and 37; ***Unique Broadband*** at para 69. As part of that, the Court may consider the equities as they relate to the debtor companies and its secured creditor: ***Elan***. When issues raised are significant, they may warrant determination prior to ordering a creditor's meeting: ***Target Canada*** at para 29.

[15] Courts have confirmed that it may be appropriate to refuse to grant a request to direct a creditor meeting where:

(a) the plan is not in the best interests of the debtor and its stakeholders (including its creditors): ***Kerr Interior*** at para 29, citing ***Re Avery Construction Co Ltd***, 1942 CanLII 352 (ON SC); ***Unique Broadband*** at para 52; ***Canadian Red Cross Society*** at para 37; ***Fracmaster QB*** at para 24;

(b) where there is no reasonable chance the debtor will be able to continue in business: ***Kerr Interior*** at para 29; ***First Treasury Financial Inc v Cango Petroleums Inc***, 1991 CanLII 8338 (ON SC);

(c) where the plan "lacks economic reality": ***Fracmaster*** at paras 24-25; ***Federal Gypsum Company (Re)***, 2007 NSSC 384 at para 32; ***Canadian Red Cross Society*** at para 37; ***Bloom Lake*** at para 19;

(d) where there is no hope the plan would be approved by creditors: ***Quest University*** at para 32; ***Kerr Interior*** at para 29; ***Elan***; ***ScoZinc Ltd (Re)***, 2009 NSSC 163 at para 7. However, if it is "premature to conclude at this stage that the applicants cannot arrive at a plan or arrangement acceptable to a majority of its creditors", the court may grant the order: ***Ultracare***. Courts should "not impose a heavy burden on a debtor company to establish the likelihood of ultimate success at the outset" or "second guess the probability of success" unless it is doomed to failure: ***Target Canada*** at para 44 citing ***Elan***; ***ScoZinc*** at para 7; ***Quest University*** at para 32;

(e) where the plan would not be approved by the Court: ***ScoZinc*** at para 7; ***Quest University*** at para 32; ***Target Canada*** at paras 62, 71 and 85-86 and ***Re Crystallex International Corporation***, 2013 ONSC 823 at para 9. For example, this may be the case if the Court does not have jurisdiction to approve the plan: ***Elan***; ***Crystallex*** at para 9; ***Re, Doman Industries Ltd (Trustee of)***, 2003 BCSC 376 at para 9; ***Lemare Holdings Ltd (Re)***, 2014 BCSC 893 at para 28; ***CannTrust Holdings Inc, et al (Re)***, 2021 ONSC 4408 at para 26; and

(f) where the plan is inconsistent with court orders or the *CCAA* process did not unfold in a "fair and transparent manner": ***Target Canada*** at paras 78-86.

[16] This is not intended to be an exhaustive list.

[17] SNDL raises several issues with the Plan, including (1) it purports to bind and affect SNDL's rights without giving SNDL a right to vote, in violation of section 6 of the *CCAA*; (2) it involves a payment to equity holders in violation of section 6(8) of the *CCAA*; and (3) it allows holders of equity claims to vote, in violation of section 22.1 and 6(1) of the *CCAA*. I address these concerns below.

B. Section 6(1) of the *CCAA* and the Plan's Effect on SNDL

[18] Section 6(1) of the *CCAA* provides:

> 6 (1). If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

[19] "Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement", subject to specific provisions that may restrict voting rights or the proper exercise of the Court's discretion under section 11 of the *CCAA* to bar a creditor from voting where the creditor is acting for an improper purpose: ***Callidus*** at paras 56-58 and 65-76; ***Fracmaster CA*** at paras 13-14. There is no assertion in this matter that SNDL acts for an improper purpose.

[20] Consistent with these principles, as noted above, courts have refused to order a creditor meeting where a creditor is affected by a plan but is not given a right to vote under the plan. I highlight two examples.

[21] In ***Crystallex***, certain noteholders applied to have a creditor meeting ordered with respect to their plan. The plan, which was sprung on the debtor and other stakeholders shortly before the motion, "could not be implemented in the present form" because it was contrary to the terms of the DIP facility: ***Crystallex*** at paras 9-10. The Court's view was that the application was "tactical and raised to get a perceived leg up in negotiations": ***Crystallex*** at para 13. The application was dismissed without prejudice to the noteholders bringing it back on later.

[22] In ***Doman***, the Court held that creditors of a debtor company under the *CCAA* cannot be bound by the provisions of a plan of compromise or arrangement if they have not been given the opportunity to vote on it: ***Doman*** at para 9, citing ***Menegon v Philip Services Inc***, 1999 CanLII 15004 (ON SC) at para 38. The Court concluded it would be inappropriate to authorize the calling of a creditor meeting to consider the plan when the Court would later refuse to sanction it "on the basis it purports to bind parties who were not given an opportunity to vote on it": ***Doman*** at para 9. The Court gave the applicant debtor group an opportunity to propose a revised plan.

[23] In this case, SNDL has no right to vote on the Plan because it is expressly excluded from being an Affected Creditor. The issue is whether the Plan affects SNDL's rights such that it must be given a right to vote, failing which the Plan is doomed to fail for non-compliance with section 6(1) of the *CCAA*.

[24] Fika argues that SNDL is unaffected, based on its interpretation of the Plan. SNDL argues that the Plan materially affects it by amending the repayment terms or timing of the SNDL Senior Debt, its payor, and the collateral subject to SNDL's security through the sale of Bio-Tech.

1. Timing of Payment of the SNDL Senior Debt

a. Background Context

[25] Since 2022, SNDL held the second ranking security against some or all of the Delta 9 Group's assets. On May 21, 2024, SNDL issued a demand and notice of intention to enforce security in respect of these facilities, and demanded immediate payment of the related indebtedness (**SNDL Mezzanine Debt**)[1] in the amount of over $12.5 million. This demand expired on June 22, 2024.

[26] As noted above, effective July 5, 2024, SNDL acquired the SNDL Senior Debt from CFCU. No challenge to that transaction has been raised in this Application.

[27] On July 10, 2024, SNDL issued a second set of demands and notices of intention to enforce security against some or all of the Delta 9 Group in respect of the SNDL Senior Debt. SNDL demanded "immediate repayment" of all indebtedness, liabilities and other obligations under a February 2, 2022 CFCU commitment letter (**Commitment Letter**)[2], which it claimed was $27,868,283.94, plus additional indebtedness (accrued interest, legal fees and expenses or other recoverable amounts). The demand indicated that payment should be made by August 12, 2024.

[28] The Delta 9 Group immediately sought an initial *CCAA* order. It relied on a July 12, 2024 affidavit of Delta 9 Parent's Chief Executive Officer, John Arbuthnot IV (**Arbuthnot**). In that affidavit, Arbuthnot confirmed that SNDL was now the Delta 9 Group's primary senior secured creditor and that "SNDL is now owed the estimated collective amount of $38,701,617.27 (**Estimated Outstanding Indebtedness**)". He described that the Delta 9 Group needed time to implement a restructuring that will "ultimately see SNDL repaid in full for the amounts owed to it under the Estimated Outstanding Indebtedness".

[29] Arbuthnot further deposed that the Delta 9 Group had entered into a July 12, 2024 "**Restructuring Term Sheet**" with Fika that "sets out the key steps of the proposed restructuring plan for the Applicants in the context of these CCAA proceedings, as supported by the Plan Sponsor". The Restructuring Term Sheet contemplated numerous steps, including a SISP process with respect to Bio-Tech. One of the steps of the Restructuring Term Sheet was explained as follows:

> ... the remaining Estimated Outstanding Indebtedness owing to SNDL will be paid down from the proceeds realized from the SISP, with full payout of any of the remaining Estimated Outstanding Indebtedness to be completed by the Plan Sponsor upon plan implementation.

[30] The Restructuring Term Sheet provided, under "Consideration", that the "Plan Sponsor shall pay out the outstanding balance of the SNDL Debt on Plan implementation".

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[1] This is referred to as the "SNDL Debenture" in the Third Report of the Monitor dated October 29, 2024 (**Third Monitor's Report**).

[2] The Commitment Letter is referred to as the "**SNDL Credit Agreement**" in the Plan.

[31] On July 15, 2024, the Court granted the Initial Order, with reference to Arbuthnot's July 12, 2024 affidavit.

[32] On July 18, 2024, Arbuthnot swore another affidavit prior to the comeback application scheduled for July 24, 2024. In that affidavit, Arbuthnot again referred to and relied on the Restructuring Term Sheet. He stated that the significant aspects of the proposed restructuring included Fika providing "payment in full to SNDL in respect of the senior-ranking indebtedness previously held by CFCU ... owing by the Applicants upon plan implementation". On July 24, 2024, with reference to both Arbuthnot affidavits, the Court granted the ARIO (which approved the Interim Financing Term Sheet, the appointment of the CRO, and the Break-Fee), the Bio-Tech SISP Order and a Claims Procedure Order.

[33] On September 11, 2024, the Court granted the Extension Order. Arbuthnot again relied on his earlier affidavits. No change to the treatment of SNDL or the SNDL Senior Debt appears to have been disclosed to the Court.

[34] On September 12, 2024, Fika paid an undisputed amount of the SNDL Mezzanine Debt (totalling approximately $11.6 million) to SNDL. The Monitor advised that a resolution of the disputed portion of this debt (totalling approximately $3.1 million) is scheduled to be the subject of an application before the Court on December 5, 2024. To be clear, this payment was not with respect to the SNDL Senior Debt.

[35] On October 21, 2024, Fika and the Delta 9 Group filed their materials to support the relief of, among other things, seeking the Creditor Meeting. The Plan is discussed below.

b. The Potential Effect of the Plan on SNDL

[36] Fika argues that the "**SNDL Claim**", a defined term under the Plan, is an "**Unaffected Claim**" under the Plan. An Unaffected Claim is defined to include "Secured Claims" (any Claim of a secured creditor as defined in section 2(1) of the *CCAA*) and an "Unaffected Creditor" is defined as a creditor who has an Unaffected Claim. Fika says, therefore, that SNDL is properly not entitled to vote on the Plan because its rights are not affected and the Plan complies with section 6(1) of the *CCAA*.

[37] Of course, it is the substance of the Plan that is important, not its form. It is insufficient that a claim or creditor is defined as unaffected – the question is whether it is in fact unaffected.

[38] "SNDL Claim" is defined in the Plan as "all amounts owing by the Applicants and Bio-Tech to SNDL under the SNDL Credit Agreement[3], plus all accrued and outstanding pre-filing fees, costs, interest, or other amounts confirmed to be owing pursuant to the SNDL Credit Agreement pursuant to a Final Order or agreement between the Plan Sponsor and SNDL".

[3] The SNDL Credit Agreement is defined in the Plan as "the Commitment Letter dated February 1, 2022 among [CFCU], as lender, [Delta 9 Parent], as borrower, and Bio-Tech, Delta Lifestyle and Delta Retail, as guarantors, pursuant to which Connect First Credit Union Ltd. made available to [Delta 9 Parent] a commercial mortgage loan in the maximum principal amount of $23,000,000, a commercial mortgage loan in the maximum principal amount of $5,000,000, and an authorized overdraft facility in the maximum principal amount of $4,000,000; as assigned to SNDL on July 5, 2024."

[39] Section 3.9 of the Plan expressly addresses the SNDL Claim (emphasis added):

> **<u>Section 3.9 Treatment of SNDL Claim</u>**
>
> **As a Secured Claim, the SNDL Claim shall constitute an Unaffected Claim under the Plan**. Subject to the terms and conditions of the Plan, from and after the Retail Implementation Date, **the SNDL Claim shall constitute valid outstanding indebtedness of the Applicants, which shall be serviced in the ordinary course in accordance with the terms of the SNDL Credit Agreement**. **The SNDL Credit Agreement and the SNDL Security**[4] **shall constitute Continuing Contracts** which shall remain in place, unaffected by the implementation of the Plan. For certainty:
>
> (a) The SNDL Security will remain valid and effective as against the Applicants and Bio-Tech, unaffected by the Plan in all respects, and shall be discharged **upon the full and final satisfaction of the SNDL Claim**.
>
> (b) From and after the Retail Implementation Date, the Plan Sponsor **will service the SNDL Claim in the ordinary course and in accordance with the terms of the SNDL Credit Agreement**. The Plan Sponsor will keep the SNDL Credit Agreement in good standing and, if necessary, will provide a guarantee of the outstanding obligations of the Applicants and Bio-Tech under the SNDL Credit Agreement.
>
> (c) The Plan Sponsor will execute such documents and other agreements as SNDL may reasonably require to acknowledge and confirm the continued validity of the SNDL Security following and notwithstanding the Retail Implementation Date.
>
> (d) In the event that the Plan Sponsor acquires the assets and/or equity of Bio-Tech in accordance with Section 10 of this Plan, the SNDL Security will remain valid and effective against the assets of Bio-Tech following and notwithstanding the issuance of the Bio-Tech Certificate, and the Plan Sponsor agrees that it shall execute such documents and other agreements as SNDL may reasonably require to confirm the continued validity and enforceability of the SNDL Security.

[40] A "Continuing Contract" is defined as a "contract, arrangement, or other agreement (oral or written) for which a notice of disclaimer pursuant to section 32 of the *CCAA* has not been sent by any of the Applicants".

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[4] SNDL Security is defined in the Plan as "any and all security granted by the Applicants and Bio-Tech to secure obligations existing under the SNDL Credit Agreement." The Monitor's counsel has provided an opinion, subject to standard qualifications and assumptions, that SNDL's security is enforceable in accordance with its terms against the Delta 9 Group's property.

[41] In summary, the Plan does not contemplate “full payout” of SNDL. In doing so, Fika changed a material aspect of the consideration in the Restructuring Term Sheet. This is fairly described at paragraph 70 of the Third Monitor’s Report:

> Notwithstanding that the Restructuring Term Sheet ...contemplates in section 1(d) that the Plan Sponsor will pay out the balance of the SNDL Debt upon Plan implementation, the Plan now classifies SNDL’s Senior Debt as unaffected and contemplates survival of the SNDL Senior Debt beyond Plan implementation. Specifically, the Plan proposes that servicing of the SNDL Senior Debt will resume in the ordinary course and, if necessary, Fika will provide a guarantee of the outstanding obligations of the Applicants and Bio-Tech under the SNDL Credit Agreement.

[42] SNDL’s first argument about the Plan’s impact on the repayment of the SNDL Senior Debt is that SNDL is owed the full amount of the indebtedness, which was accelerated and became due and owing upon the delivery of its July 10, 2024 demands. The Commitment Letter provides under “Repayment”: “payable on demand but until demand, interest only is payable monthly in arrears on the first day of each month”. SNDL made a demand on July 10, 2024, before the Initial Order. SNDL argues that there is no question that the debt was validly accelerated. SNDL relies on the principle that the *CCAA* process cannot be used to undo pre-*CCAA* transactions: ***SNV Group Ltd (Re) (Trustee of)***, 2001 BCSC 1644 at para 18.

[43] In its October 31, 2024 Reply Brief, Fika asserted that there is “currently a dispute between the Applicants and SNDL” as to whether SNDL’s demand letters validly accelerated the SNDL indebtedness. The Reply Brief noted that SNDL’s demands were made only 5 days after SNDL purchased its position from CFCU and that payments since the SNDL demands have been kept current. No further explanation of the basis for Delta 9 Group’s position in the dispute with SNDL about acceleration was articulated by Fika’s counsel, Delta 9 Group’s counsel, Arbuthnot, the CRO or the Monitor. I am not aware whether this dispute was brought to the Court’s attention prior to the Fika Reply Brief being provided. It is unclear to me when it was first raised with SNDL.

[44] Fika and Delta 9 Group argue that the validity of SNDL’s debt payment acceleration can be dealt with in a separate application in December 2024, or thereafter, and should not be an impediment to ordering the Creditor Meeting.

[45] When I asked about what would happen if the indebtedness of the Delta 9 Group to SNDL has been validly accelerated, Fika responded that Fika would either have to pay SNDL out or the matter would have to be dealt with by way of a waiver of default.

[46] SNDL argues that section 7.2(g) of the Plan effectively operates as a waiver of default because it prevents SNDL from enforcing or exercising any right or remedy by reason of “any event which occurred prior to, and is not continuing after, the Retail Implementation Date”. It also points to the definition of “Claim” which includes a “Pre-Filing Claim”, which in turn includes any contractual rights or claims. SNDL argues the Plan is a “back-door” way to effect a waiver of pre-filing defaults, similar to those referenced in ***Doman*** at para 9 (section 4.12).

[47] Fika relies on ***12178711 Canada Inc v Wilks Brothers, LLC***, 2020 ABCA 430 [***Wilks Brothers***]. In ***Wilks Brothers***, a second lien noteholder argued it was contrary to Canadian law to fail to grant a creditor a voting right and then require a waiver of defaults as part of a restructuring, relying on ***Doman***. Justice Paperny disagreed at para 44:

> First, I do not interpret ***Doman*** to require that all persons who might have default provisions that exist prior to or arising during restructuring must have a vote. Rather, the court concluded that it ought not to grant an order waiving a future default, not a default that occurred before or during implementation of the plan itself. Second, I agree with the respondents that in these circumstances the absence of the waiver will very likely frustrate the restructuring efforts and is likely to be used by the appellant to attack the arrangement in a different forum.

[48] I agree with SNDL that ***Wilks Brothers*** is distinguishable. First, it involved a plan of arrangement under the *Canada Business Corporations Act*, RSC 1985, c C-44 (*CBCA*) which has different statutory requirements than the *CCAA*. In particular, the *CBCA* plans of arrangement do not involve insolvent corporations, and the *CBCA* does not have a statutory creditor voting requirement like section 6(1) of the *CCAA*. To the extent ***Wilks Brothers*** can be said to be making a general statement applicable to the *CCAA* (which I do not believe it was), it is *obiter*. Further, in ***Wilks Brothers*** there were findings that the second lien noteholder was acting for an improper purpose, that the absence of a waiver would "very likely frustrate the restructuring efforts and is likely to be used ... to attack the arrangement in a different forum", and that the second lien noteholder failed to act in a timely manner because it knew the proposed plan of arrangement process did not give it a voting right but did not complain about that when the *CBCA* interim order was granted. These are different facts than this case.

[49] I find that, if SNDL's claim that the Delta 9 Group's indebtedness under the SNDL Senior Debt was validly accelerated prior to the Initial Order, then the Plan would affect and purport to bind SNDL and its claim without giving it a voting right.

[50] Fika argues that it was not its intention to adversely impact SNDL's position, that Fika is heavily invested in this process, and that amendments to the Plan could be made even though the Creditor Meeting is ordered. While that may be true based on the proposed Creditor Meeting order and section 7 of the *CCAA*, this does not seem to me to be an attractive or practical solution but rather one that could involve significant expense and use of court resources that may ultimately be shown to be wasted and unnecessary. In my view, it is preferable, in the circumstances of this case, that the SNDL debt acceleration issue raised in the Reply Brief be resolved (by agreement or court determination) prior to the Court ordering a Creditor Meeting for this proposed Plan.

[51] This is a factor against ordering the proposed Creditor Meeting.

c. Plan Inconsistency With Prior Representations About Timing of Payment

[52] SNDL argues that the Plan is inconsistent with the Restructuring Term Sheet. In argument, Fika's counsel candidly acknowledged that the Plan is not consistent with the Restructuring Term

Sheet's provision that the "Plan Sponsor shall pay out the outstanding balance of the SNDL Debt on Plan implementation".

[53] SNDL also argues that the Plan is not consistent with the Court's approval of the Restructuring Term Sheet in the ARIO. In reply oral argument, Fika's counsel suggested that the Court did not "approve" the Restructuring Term Sheet. That is a troubling argument for Fika to now make given that, in paragraph 10 of its of its Brief filed October 24, 2024, Fika stated: "This Court **approved** [the Restructuring Term Sheet] pursuant to the ARIO" (emphasis added).

[54] In any event, whether the Court formally or expressly used the words that the Restructuring Term Sheet was "approved" is not determinative. It is the substance of the Court order that prevails. Like other orders, *CCAA* orders should be interpreted by reading them as a whole, in the context of the pleadings, the arguments made by the parties, the factual and legal context in which the order was made, and the intention of the court that granted the order: ***Weinrich Contracting Ltd v Wiebe***, 2022 ABCA 176 at para 25 citing ***Alberta Health Services v Alberta (Information and Privacy Commissioner)***, 2020 ABQB 263 at paras 29-31; ***Campbell v Campbell***, 2016 SKCA 39 at paras 14-17. Even template orders must be interpreted in the context of the particular litigation in which they are granted: ***Weinrich Contracting*** at para 25.

[55] In the ARIO, the Court approved the appointment of the CRO, including on these terms (emphasis added):

> Subject to the terms of this Order and authorization from the Applicants, the CRO is hereby authorized to assist the Applicants and to do all things, **carry out all actions and perform all duties described in the CRO Agreement**, and without limiting the generality of the foregoing, **the CRO is hereby empowered to do the following**:
>
> (a) assist the Applicants with the Restructuring (as defined in the CRO Agreement);
>
> [...]
>
> (d) **assist the Applicants in preparing and evaluating their projected cash flow statements** and approving the same, **in accordance with the terms** of the Interim Financing Term Sheet and the **Restructuring Term Sheet** (collectively, the "Term Sheets");
>
> (e) **assist with the proposed plan of arrangement in accordance with the terms of the Term Sheets** and the applicable orders of this Court, and any potential sale and investment solicitation process in connection with these proceedings;
>
> (f) assist the Applicants with any deliverables owed to the Plan Sponsor **pursuant to the Term Sheets**; [...]

[56] Further, the ARIO approved the Interim Financing Term Sheet, which appears to have also referenced the binding Restructuring Term Sheet. The ARIO also approved Fika's $1,500,000

Break-Fee "pursuant to the provisions" of the Restructuring Term Sheet, which would be triggered upon certain events, including a condition based on whether the Court's approval of any plan, compromise or transaction effectively precluded the "Acquisition Transaction" from proceeding. The "Acquisition Transaction" was as defined in the Restructuring Term Sheet.

[57] Further, the Bio-Tech SISP Order approved the Bio-Tech SISP process in Schedule A of that Order. The approved SISP process expressly referenced the Restructuring Term Sheet in its preamble.

[58] I find that while the ARIO and the Bio-Tech SISP Order do not expressly state that the Restructuring Term Sheet is approved, the above-referenced provisions indicate that the Restructuring Term Sheet was effectively endorsed by the Court as the basis upon which these *CCAA* proceedings were approved to move forward. The Court in granting the Initial Order and the ARIO satisfied itself that the Restructuring Term Sheet sufficiently disclosed a reasonable possibility that the Delta 9 Group would be able to restructure its affairs through "a germ of a reasonable and realistic plan" to allow it to initially engage the *CCAA*: ***Alberta Treasury Branches v Tallgrass Energy Corp***, 2013 ABQB 432 at para 14. It is unclear if the Delta 9 Group would have been able to meet that hurdle and obtain court protection without the "full payout" of SNDL as had been described to the Court. In any event, the Court relied on or referenced the Restructuring Term Sheet in granting the ARIO, the Bio-Tech SISP Order and the Extension Order.

[59] Further, SNDL asserts it relied on Fika's proposal to fully pay SNDL out when SNDL did not object to the $1,500,000 Break-Fee in the ARIO, or the terms of the Bio-Tech SISP Order. That does not appear to be disputed.

[60] Then, as noted above, at some point Fika's proposed plan for dealing with the SNDL Senior Debt significantly changed. Fika has not materially or sufficiently explained why that happened.

[61] The Monitor flagged concerns prior to Fika's Application being filed. Prior to the Plan being finalized (and, therefore, prior to SNDL being notified of Fika's new approach), the Monitor, the Monitor's counsel, and counsel to the Delta 9 Group met with Fika to advise Fika of the Monitor's concerns regarding the "uncertainty surrounding the position of SNDL". Fika's counsel advised that Fika "intended to proceed with its application for the Creditor's Meeting Order and, if necessary, would seek a determination from this Court confirming whether or not SNDL is affected by the Plan".

[62] SNDL asserts it first learned about the changed Plan when the materials on this Application were filed, about a week before the Application was heard.

[63] In my view, while the facts are different, this Application has some similarities with ***Target Canada***. In that case, ***Target Canada*** obtained an Amended and Restated *CCAA* order that provided that the claims of Target Canada's landlords would not be released or affected in any way in any plan filed by ***Target Canada***; those terms were the subject of significant negotiation between the landlords and Target Canada. A Claims Procedure Order, also settled after prolonged negotiations between Target Canada and their creditors (including the landlords), excluded landlord guarantee claims and further provided that nothing in the Claims Procedure Order shall prejudice the landlord guarantee claims. Target Canada then requested the court grant a creditor-

meeting order to vote on a plan that varied the protection of the landlord guarantee claims. The landlords asserted that they would not have withdrawn their opposition to the *CCAA* proceedings without the protection of their guarantee claims.

[64] In dismissing the application for a creditor meeting, Regional Senior Justice Morawetz (as he then was), stated in part as follows:

> [72] It is incumbent upon the court, in its supervisory role, to ensure that the CCAA process unfolds in a fair and transparent manner. It is in this area that this Plan falls short. [...]
>
> [...]
>
> [81] The CCAA process is one of building blocks. In this proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made [sic] number of orders. It is essential that court orders made during CCAA proceedings be respected. In this case, the Amended Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.
>
> [...]
>
> [84] In my view, it is clear that this Plan, in its current form, cannot withstand the scrutiny of the test to sanction a Plan. It is, in my view, not appropriate to change the rules to suit the applicant and the Plan Sponsor, in midstream.
>
> [85] It cannot be fair and reasonable to ignore post-filing agreements concerning the CCAA process after they have been relied upon by counter-parties or to rescind consent orders of the court without grounds to do so.
>
> [86] Target Canada submits that the foregoing issues can be the subject of debate at the sanction hearing. In my view, this is not an attractive alternative. It merely postpones the inevitable result, namely the conclusion that this Plan contravenes court orders and cannot be considered to be fair and reasonable in its treatment of the Objecting Landlords. In my view, this Plan is improper (see *Crystallex*).

[65] This case is different than ***Target Canada*** because the Court order is not as express, and I have not been advised of evidence (if there is any) of the negotiation of the previous Court orders. However, for the reasons I set out earlier, I find that these *CCAA* proceedings have been engaged, continued and approved by the Court to-date on the basis that SNDL would be fully paid out on plan implementation.

[66] In these circumstances, I find that the Plan has not been proposed in a fair and transparent manner. The Delta 9 Group and Fika obtained the benefit of the Court's orders on the premise and proposal that the SNDL Senior Debt would be fully paid out by Fika upon plan implementation.

To allow Fika and Delta 9 Group to materially change their proposal without addressing the impacts on SNDL, without consulting with or giving SNDL prior notice of or obtaining SNDL's consent to the changes, without addressing SNDL's debt acceleration position, and without providing SNDL a voting right at the creditor's meeting, "would run counter to the building block approach underlying these proceedings since the outset": ***Target Canada*** at para 81. It is not appropriate to change the approach to "suit the applicant and the Plan Sponsor, in midstream": ***Target Canada*** at para 84.

[67] I find that the Plan, in its current form, cannot withstand the scrutiny of the test to sanction a plan, namely (i) strict compliance with all statutory requirements; (ii) all materials filed and procedures carried out authorized by the *CCAA*; and (iii) a fair and reasonable plan: ***Target Canada*** 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; ***Laurentian University of Sudbury***, 2022 ONSC 5645 at para 23.

[68] This is a factor against ordering the proposed Creditor Meeting.

2. Other Asserted Impacts on SNDL

[69] SNDL argues that the Plan impacts it in other ways even if SNDL's claim is not accelerated.

[70] First, SNDL argues that section 3.9(b) of the Plan effectively seeks a novation of Fika into the SNDL Credit Agreement because it states that Fika "will service the SNDL Claim in the ordinary course and in accordance with the terms of the SNDL Credit Agreement. The Plan Sponsor will keep the SNDL Credit Agreement in good standing and, if necessary, will provide a guarantee of the outstanding obligations of the Applicants and Bio-Tech under the SNDL Credit Agreement". I am not prepared to find that this provision purports to effect a novation of Fika into the SNDL Credit Agreement. I note that it is not clear what is meant by "if necessary" Fika will provide a guarantee of the outstanding obligations of the Applicants. There is no evidence before me about how that condition might be triggered, or about Fika's assets to support that potential guarantee.

[71] Second, SNDL argues that its collateral is impacted by the way the Bio-Tech sale is treated under the Plan. It points to section 10.5(c) of the Plan and asserts that the sale of Bio-Tech alters the assets over which SNDL has security, and fundamentally changes the SNDL Senior Debt. SNDL also points to the margining conditions in the SNDL Credit Agreement which are to be supported by Bio-Tech's accounts receivables.

[72] Fika argues that SNDL is not affected because a bid to acquire Bio-Tech cannot be designated a bid as the "Successful Bid" unless SNDL approves or, if Fika overrules SNDL, Fika must "pay all amounts owing" by the Delta 9 Group to SNDL in full.

[73] Based on the record before me, I agree with Fika that SNDL's position is not affected in the way SNDL asserts because SNDL has the ability to approve the sale of Bio-Tech or, if Fika overrules SNDL's lack of approval, then the sale cannot proceed unless Fika completely pays out all amounts owing to SNDL (whether accelerated or not).

[74] In isolation, these issues raised by SNDL would have presented matters that could be likely have been addressed with language amendments and would not have been sufficient to refuse to order the proposed Creditor Meeting.

C. Section 6(8) of the *CCAA* – Consideration Paid to Shareholders

[75] SNDL argues that the Plan also violates section 6(8) of the *CCAA* and is not capable of sanction. Its concern is with the Plan's creation of a "Shareholder Equity Pool" of 135,135 Class "A" voting common shares of Fika which are to be distributed to some of the Delta 9 Parent shareholders. The Shareholder Equity Pool is described as having aggregate value of $2,000,000. I note that the concept of the Shareholder Equity Pool was expressly referenced in the Restructuring Term Sheet, and I am not aware of any complaint being made about it previously.

[76] SNDL argues that Delta 9 Parent shareholders cannot receive any value for their equity interest until the company's creditors are repaid in full, relying on ***Canadian Airlines*** at para 143 and ***Bul River Mineral Corporation (Re)***, 2014 BCSC 1732 at para 65.

[77] It is trite that creditors generally have priority over shareholders in the insolvency context. However, SNDL's argument that the plan is not sanctionable is specifically based on the Plan's alleged non-compliance with section 6(8) of the *CCAA*, which must be interpreted in accordance with ordinary terms of statutory interpretation. The provisions of the *CCAA* and the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*) "should be interpreted in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statutes, the object of the statutes, and the intention of Parliament": ***DGDP-BC Holdings Ltd v Third Eye Capital Corporation***, 2021 ABCA 226 at para 18.

[78] Section 6(8) of the *CCAA* provides:

> (8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[79] Fika argues that the Delta 9 Parent shareholders are not making a claim so there is no equity claim being paid through the Plan and, therefore, the Plan does not offend section 6(8) of the *CCAA*. The argument goes like this:

(a) section 6(8) of the *CCAA* only prohibits court sanction of a compromise or arrangement that provides for the payment of "equity claim" (unless it provides non-equity claims to be paid first);

(b) an "equity claim" is defined in the *CCAA* as a claim "in respect of an equity interest,[5] including a claim for, among others (a) a divided or similar payment; (b) a return of capital; (c) a redemption or retraction obligation; (d) a monetary loss resulting from ownership, purchase or sale of an equity interest or from the

[5] An "equity interest", in the case of a company other than an income trust, is defined as a share in the company – or a warrant or option or another right to acquire a share in the company – other than one that is derived from a convertible debt: *CCAA*, section 2(1).

rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

(c) a "claim" means any "indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*": *CCAA*, section 2(1); and

(d) section 2 of the *BIA* defines "claim provable" as "any claim or liability provable in proceedings under the [*BIA*] by a creditor". Section 121 of the *BIA* provides further context on what are provable claims under the *BIA*.

[80] All of these provisions involve a "claim" made by a claimant against the debtor. The cases the parties referenced in this Application addressing section 6(8) of the *CCAA* involved claims being made and the issue was whether the claim could be characterized as an equity claim: ***Bul River*** at paras 3-4; ***Sino-Forest Corporation (Re)***, 2012 ONCA 816; ***Nelson Financial Group Ltd***, 2010 ONSC 6229 at para 33. See also: ***Return on Innovation v Gandi Innovations***, 2011 ONSC 5018; ***All Canadian Investment Corporation (Re)***, 2020 BCSC 855 at para 45.

[81] In this case, there is no indication that Delta 9 Parent shareholders have made any claim to any payment from the Delta 9 Group. On the assumption that Fika's submission is correct, and that no equity claim is being made, the Plan might not technically offend section 6(8) of the *CCAA* because the Plan does not contemplate payment of an "equity claim". Accordingly, in that instance, there is not a basis to refuse to order a Creditor Meeting on the ground that the Plan is unsanctionable based on non-compliance with section 6(8).

[82] Even so, if there has been no equity claim by shareholders, the Plan structure begs the question of why the Plan "offers value"[6], provides "consideration"[7], or provides "equity recovery"[8] to some Delta 9 Parent shareholders? That is, if Fika is willing to contribute Fika common shares as part of the Plan, why are they not all distributed to creditors? The rationale, purpose or necessity of transferring value to Delta 9 Parent shareholders in the Plan is not explained.

[83] What appears, on the record before me, to be an unexplained *ex gratia* or extra-contractual transfer of something of value to Delta 9 Parent shareholders, when creditors are not likely being fully paid as part of the Plan, raises a concern that the Plan has been structured to avoid the policy behind section 6(8) of the *CCAA* or the well-established principle of equitable subordination, which is used to "keep shareholders away from the table while the claims of other creditors are being sorted out": ***US Steel Canada Inc (Re)***, 2016 ONCA 662 at para 96.

[84] Fika argues that creditors are unaffected by the transfer of Fika shares to Delta 9 Parent shareholders. It focusses on the fact that the Shareholder Equity Pool does not come from the Delta 9 Group assets or diminish the debtor's assets, relying on ***Sino-Forest*** at para 56 (emphasis added):

[6] Fika Reply Brief para 13.
[7] Fika Reply Brief para 13.
[8] Third Monitor's Report para 67.

> In our view, in enacting s. 6(8) of the CCAA, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest **not diminish the assets of the debtor available to general creditors in a restructuring**. If a shareholder sues auditors and underwriters in respect of his or her loss, in addition to the debtor, and the auditors or underwriters assert claims of contribution or indemnity against the debtor, the assets of the debtor available to general creditors would be diminished by the amount of the claims for contribution and indemnity.

[85] See also ***SFC Litigation Trust v Chan***, 2019 ONCA 525 at para 129.

[86] Even if it is true that the Plan does not diminish the assets *of the debtors* available to creditors, Fika is willing to contribute the value of its shares in the Shareholder Pool to the Plan. By providing some of that contributed value to shareholders instead of creditors, the Plan arguably reduces the *total value* that otherwise appears to potentially be available for distribution to creditors as part of the Plan. If this aspect of the Plan is ultimately considered in a plan sanctioning hearing, the Court will have to carefully consider whether a plan that includes a transfer of value to shareholders, in all the circumstances, is "fair and reasonable". I make no further comments at this stage.

D. Section 22.1 and 6(1) of the *CCAA* - Equity Voting

[87] Finally, SNDL argues that the Plan permits shareholders to vote on the Plan in breach of section 6(1) and 22.1 of the *CCAA*. Section 22.1 of the *CCAA* provides:

> 22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

[88] Section 22.1 means that creditors having equity claims are put into an equity class in relation to those claims and are not entitled to vote unless the court orders otherwise.

[89] SNDL's argument is based on section 3.4(b) of the Plan, which provides that each "Affected Creditor" with an "Allowed Affected Claim" is entitled to vote on the Plan, and on the interconnecting definitions in the Plan, namely: "Allowed Affected Claim" includes an "Affected Claim", which includes a "Claim" that is not an Unaffected Claim, which includes "Pre-Filing Claims", which includes any "Equity Claim", which includes any Claim that meets the definition of "equity claim" in section 2(1) of the *CCAA* (noted above). "Equity Claimant" is a person with an Equity Claim or holding "Existing Equity", in such capacity. SNDL argues that these provisions together allow creditors that are "Equity Claimants" having equity claims the right to vote, in breach of section 22.1 of the *CCAA*.

[90] Fika points to section 2.4 of the Plan which provides that "Equity Claimants, including the Existing Common Shareholders, shall not be entitled to vote on the Plan in respect of their Equity Claims or Existing Equity or attend the Meeting".

[91] I agree with Fika on this point. Section 3.4(b) of the Plan and its definitional sections are general sections which must be read in light of the more specific prohibition of section 2.4 of the Plan, which prohibits Equity Claimants from voting on the Plan in respect of any Equity Claim.

[92] SNDL has not established that section 3.4(b) of the Plan violates section 22.1 of the *CCAA* or renders it incapable of sanction. This is not a factor supporting refusal to order a Creditor Meeting.

E. Other Considerations

[93] While sanctioning the Plan is not before me, some of the submissions about the Plans overall effects on the restructuring are relevant to the exercise of my discretion in the Application.

[94] The Monitor supports the Court ordering the proposed Creditor Meeting. It is of the opinion that the Plan is a good result for Affected Creditors. The CRO believes the Plan preserves the value of the Plan Entities and is in the best interests of the Delta 9 Group's stakeholders.

[95] No Affected Creditors objected to the Creditor Meeting. The largest unsecured creditor supports the application and voiced its concerns for the interests of Delta 9 Group employees. Canada Revenue Agency raised some concerns about its inability to receive payments by way of shares, noted that there have been constructive discussions on that issue, and counsel advised he did not have instructions to oppose the application.

[96] The Monitor's analysis shows that if this matter proceeds to liquidation, the senior secured debt is greater than the estimated net proceeds of liquidation. The CRO believes that the Plan will enable substantially greater recoveries for creditors than bankruptcy or a liquidation. On the current record, I find that the Affected Creditors being unsecured will likely receive a greater recovery under the Plan that liquidation, in part because the Plan contemplates business continuing as a going concern.

[97] However, on the record before me, I am not satisfied at this stage that there is currently a toggled choice between either the Plan or liquidation / bankruptcy, based on whether the Creditor Meeting is ordered for the specific Plan proposed. As was the case in ***Crystallex***, the evidence and argument suggest that the parties appear willing to continue negotiations to find a resolution that can permit Delta 9 Group's restructuring without liquidation. The Monitor indicates that it has been in discussions with both Fika and SNDL, and appears ready and willing to continue to facilitate discussions. In argument, Fika noted its heavy investment in the process. It suggested additional terms to the order and the Plan that could help address some of SNDL's concerns. Fika reassured the Court that it was never intended that the Plan affect SNDL.

[98] Based on Fika's response to the Monitor's concerns as reflected in paragraph 71 of the Third Monitor's Report, I am concerned that Fika pushed through this Application notwithstanding the concerns raised by the Monitor and when Fika knew (or should have known) SNDL would object to the changed approach. Parties are encouraged to resolve issues with a *CCAA* plan prior to court approval of the meetings order if possible: ***CannTrust*** at para 26.

[99] Rather than attempting to hastily patch together material revisions to the proposed form of Creditor Meeting order or the Plan, which may have unintended consequences or may not address

all issues, in my view it is appropriate that the parties are given an opportunity to negotiate resolution of the uncertainties and disputes in this matter before a creditor meeting is ordered.

F. Summary

[100] In summary, in the unique circumstances of this case, I am not satisfied it is appropriate to exercise my discretion to order a Creditor Meeting as proposed for the Plan at this time.

[101] The resolution of the dispute about whether SNDL's secured debt validly accelerated may have a significant effect on SNDL's interests and the viability of the Plan in these proceedings. I disagree that the resolution of the acceleration issue can or should be dealt with in parallel or immediately before a plan sanction hearing. In my view, given its potential impact on these proceedings, it is appropriate for that issue to be resolved before the Plan is proposed to creditors to save a potentially wasteful process.

[102] Further, and in any event, the Plan is currently inconsistent with the Court's orders and the Restructuring Term Sheet upon which the Court and SNDL relied on. It would be inappropriate to allow Fika and Delta 9 Group to materially change SNDL's treatment under the Plan midstream without one or more of resolving or addressing the status of SNDL's claim, attempting to address SNDL's concerns, obtaining SNDL's consent, or providing SNDL a vote.

IV. Conclusion

[103] Fika's Application is dismissed, without prejudice to its right to re-apply again. The parties are encouraged, if possible, to resolve issues with any plan before it is brought back before the Court for a creditor meeting order.

[104] If the parties cannot agree on costs, they may address costs of the Application in writing to me within 30 days of these Reasons.

Heard on the 1st day of November, 2024.
Dated at the City of Calgary, Alberta this 8th day of November, 2024.

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

Appearances:

Ryan Zahara 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, Matthew Cressati and Larry Ellis, Miller Thomson LLP
for 2759054 Ontario Inc. operating as Fika Herbal Goods

Sean Collins and Ashley Bowron, McCarthy Tetrault LLP
for SNDL Inc.

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

Howard A. Gorman, K.C., Norton Rose Fulbright Canada LLP
for the directors of Delta 9

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

Adam Pollock, Duboff Edwards Schachter Law Corporation
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