

COURT FILE NUMBER 2403-15089

COURT
JUDICIAL CENTRE

Court of King's Bench of Alberta
Edmonton

In the matter of the
Companies' Creditors Arrangements Act,
RSC 1985 c. C-36, as amended
And in the matter of a plan of compromise
or arrangement of Freedom Cannabis Inc.

Clerk's Stamp



DOCUMENT

Minister of National Revenue's Brief of Law
re. paragraphs 7(a) and 43 of
the Amended and Restated Initial Order

ADDRESS FOR SERVICE
AND CONTACT
INFORMATION
OF PARTY FILING THIS
DOCUMENT

Department of Justice Canada
300 EPCOR Tower
10423 – 101 Street NW
Edmonton Alberta T5H 0E7
Counsel: George F. Bódy
Tel: 780-495-7595
Email: George.Body@justice.gc.ca
Counsel: Daniel G. Segal
Tel: 587-335-9341
Email: Daniel.Segal@justice.gc.ca

Overview

1. The Minister of National Revenue (Minister) takes issue with the terms of paragraphs 7(a) and 43 of the proposed Amended and Restated Initial Order ("ARIO"). Due to time constraints at the application before Justice Lema on August 15, 2024, argument on these provisions were reserved over to the following hearing, scheduled for September 18, 2024.
2. Paragraph 7(a) addresses the debtor's obligations on its payroll remittance account to the Canada Revenue Agency (CRA) during these proceedings. The Minister proposes revised language which properly addresses the legal requirements of an employer while under *Companies Creditors' Arrangement Act* ("CCAA") proceedings.
3. Paragraph 43 imposes a broad stay that freezes the "status quo" and denies the CRA and Health Canada the ability to take regulatory action, including for health and safety reasons, with respect to Freedom's cannabis licences. It also purports to compel the Minister to extend the licenses despite the expiration of the terms of the licenses. Such a broad stay is

not necessary for a viable arrangement and freezing the CRA and Health Canada's ability to regulate Freedom is against the public interest. The Minister opposes the inclusion of paragraph 43 in the Order, on the basis that it is contrary to subsection 11.1(2) of the CCAA and cannot be justified pursuant to subsection 11.1(3).

A – Payroll account obligations

4. The current language in paragraph 7(a) and the proposed language for paragraph 7(a) are set out below:

Current paragraph 7(a) language	Proposed paragraph 7(a) language
<p>7. The Applicant shall remit, in accordance with legal requirements, or pay:</p> <p>(a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of:</p> <p>(i) employment insurance,</p> <p>(ii) Canada Pension Plan, and</p> <p>(iii) income taxes,</p> <p>but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court</p>	<p>7. The Applicant shall remit, in accordance with legal requirements, or pay:</p> <p>(a) any amount that becomes due to His Majesty on or after August 8, 2024 and could be subject to a demand under</p> <p>(i) subsection 224(1.2) of the <i>Income Tax Act</i>,</p> <p>(ii) any provision of the <u><i>Canada Pension Plan</i></u> or of the <u><i>Employment Insurance Act</i></u> that refers to subsection 224(1.2) of the <i>Income Tax Act</i> and provides for the collection of a contribution, as defined in the <i>Canada Pension Plan</i>, an employee's premium, or employer's premium, as defined in the <i>Employment Insurance Act</i>, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or</p> <p>(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the <i>Income Tax Act</i>, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum</p> <p>(A) has been withheld or deducted by a person from a payment to another person and is in respect of</p>

	<p>a tax similar in nature to the income tax imposed on individuals under the <i>Income Tax Act</i>, or</p> <p>(B) is of the same nature as a contribution under the <i>Canada Pension Plan</i> if the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the <i>Canada Pension Plan</i> and the provincial legislation establishes a provincial pension plan as defined in that subsection;</p>
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5. The key difference between the provisions lies in the applicant's use of the term "deemed trust amounts". The applicable statutes – the *Income Tax Act*, the *Canada Pension Plan*, the *Employment Insurance Act*, and in Alberta, the *Alberta Personal Income Tax Act*, require employers to withhold prescribed amounts from the wages of their employees. The monies withheld from employees' wages pursuant to these statutes are deemed, by statute, to be held in trust, to form no part of the estate of the employer, and are to be remitted to the CRA on a prescribed periodic basis. These are the "deemed trust amounts" referred to in paragraph 7(a).
6. However, employers are also required to remit additional funds – the employers' own funds – to the CRA for employer contributions mandated by the *Canada Pension Plan*¹ and the *Employment Insurance Act*. Employers are required to remit an amount equal to the amounts withheld from employees wages for the *Canada Pension Plan* (i.e., 1:1 employee: employer) to a maximum of \$3,867.50 for each of the employee and the employer². Similarly, the employee: employer ratio for under the *Employment Insurance Act* is 1:1.4³, to a maximum of \$1,049.12 for employees and \$1,468.77 for employers.⁴

¹ [Canada Pension Plan, RSC 1985 c. C-8, s. 9.](#)

² [CPP contribution rates, maximums and exemptions – Calculate payroll deductions and contributions - Canada.ca](#)

³ [Employment Insurance Act, SC 1996 c. 23, s. 68.](#)

⁴ <https://canada.ca/en/revenue-agency/services/tax/businesses/topics/payroll/payroll-deductions-contributions/employment-insurance-ei/ei-premium-rates-maximums.html>

CCAA mandates employers remain current with remittance obligations during CCAA proceedings

7. [Subsection 11.09\(2\)](#) of the CCAA provides that any stay of proceedings made under section 11.02 prohibiting the Minister from issuing requirements to pay pursuant to subsection 224(1.2) of the *Income Tax Act* cease to be in effect if an employer defaults on its payroll remittance obligations:

When order ceases to be in effect

11.09(2) The portions of an order made under [section 11.02](#) that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

- (a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under
 - (i) subsection 224(1.2) of the *Income Tax Act*,
 - (ii) any provision of the [Canada Pension Plan](#) or of the [Employment Insurance Act](#) that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or
 - (iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum
 - (A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
 - (B) is of the same nature as a contribution under the [Canada Pension Plan](#) if the province is a province providing a comprehensive pension plan as defined in [subsection 3\(1\)](#) of the *Canada Pension Plan* and the provincial legislation establishes a provincial pension plan as defined in that subsection; or
8. Paragraphs 11.09(2)(a)(i)-(iii) refer to amounts that could be subject to a demand under subsection [224\(1.2\)](#) of the *Income Tax Act*.

Garnishment

(1.2) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act*, any other enactment of Canada, any enactment of a province or any law, but subject to subsections 69(1) and 69.1(1) of the *Bankruptcy and Insolvency Act* and section 11.09 of the *Companies' Creditors Arrangement Act*, if the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment

(a) to another person (in this subsection referred to as the “tax debtor”) who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or

(b) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,

the Minister may in writing require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor’s liability under subsection 227(10.1) or the similar provision, and on receipt of that requirement by the particular person, the amount of those moneys that is so required to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty to the extent of that liability as assessed by the Minister and shall be paid to the Receiver General in priority to any such security interest.

[emphasis added]

9. Subsection 227(10.1) of the *Income Tax Act* sets out the amounts for which the Minister can demand payment under subsection 224(1.2):

227(10.1) The Minister may at any time assess

- (a) any amount payable under section 116 or subsection 227(9), 227(9.2), 227(9.3) or 227(9.4) by any person,
- (a.1) [Repealed, 1997, c. 25, s. 67(7)]
- (b) any amount payable under subsection 227(10.2) by any person as a consequence of a failure by a non-resident person to remit any amount, and
- (c) any amount payable under Part XII.5 or XIII by any non-resident person,

and, where the Minister sends a notice of assessment to the person, sections 150 to 163, subsections 164(1) and 164(1.4) to 164(7), sections 164.1 to 167 and Division J of Part I apply with such modifications as the circumstances require.

- a. Subsection 227(9) imposes a penalty for failing to remit an amount deducted or withheld from an employee’s wages.
- b. Subsection 227(9.2) provides for interest on outstanding amounts.
- c. Subsection 227(9.3) also provides for interest on outstanding amounts.
- d. Subsection 227(9.4) imposes liability on an employer for failing to pay an amount deducted or withheld from an employee’s wages.

10. Subsection [23\(2\)](#) of the *Canada Pension Plan* and [section 99](#) of the *Employment Insurance Act* adopt and apply specified provisions of the *Income Tax Act*, and specifies that subsection 224(1.2) of the *Income Tax Act* applies to employer's premiums, employee's premiums and related interest, penalties or other amounts.
11. To summarize, the Minister can use subsection 224(1.2) of the *Income Tax Act* to collect:
 - (a) Source deductions for federal income tax;
 - (b) Source deductions for provincial income tax;
 - (c) Source deductions for *Canada Pension Plan* contributions;
 - (d) Source deductions for *Employment Insurance* premiums;
 - (e) Employer contributions mandated by the *Canada Pension Plan*;
 - (f) Employer premiums mandated by the *Employment Insurance Act*;
 - (g) Penalties assessed under each statute; and
 - (h) Interest payable on outstanding amounts under each statute.
12. Items (a)-(d) are protected by statutory deemed trusts; items (e)-(h) are not.
13. Thus, subsection 11.09(2) of the CCAA requires an employer under the protection of the CCAA to remain compliant and remit all amounts that could be subject to a demand under ITA ss. 224(1.2) – i.e., all of items (a)-(h).
14. Paragraph 7(a) of both the Initial Order (pronounced 8 August 2024) and the Amended and Restated Initial Order (pronounced 15 August 2024) require Freedom Cannabis to remit only the deemed trust amounts – i.e., items (a) to (d) only – but not items (e) to (h).
15. The Minister understands paragraph 7(a) is based on from template orders ([Alberta Court of King's Bench template](#)). However, templates, while useful, do not have the force of law. That is, they are not prescribed by statute or regulation.
16. Insofar as template paragraph 7(a) requires the debtor to remit “deemed trust amounts” as and when required by law, that language goes halfway but does not fully comply with subsection 11.09(2) of the CCAA or paragraphs [69\(3\)\(a\)](#) and [69.1\(3\)\(a\)](#) of the *Bankruptcy and Insolvency Act* requirements upon the filing of a Notice of Intention to file a proposal or the filing of a proposal, respectively. (The *Bankruptcy and Insolvency Act* does not provide for a stay of proceedings in a receivership. The Court nevertheless imposes a general stay of proceedings, presumably pursuant to BIA subsection 183(1) or BIA subsection. 243(1)(c).)
17. The risk to a debtor relying on the template language is two-fold.

18. First, if the debtor complies with the order but not subsection 11.09(2), the Minister is not bound by the stay and may issue requirements to pay pursuant to ITA subsection 224(1.2) to collect both the outstanding amount for the post-Initial Order liability as well as any pre-Initial Order liability of the debtor.
19. Second, [CCAA subsection 6\(4\)](#) prohibits the Court from sanctioning any compromise or arrangement if, at the time of the sanctioning application, the Crown satisfies the Court that the debtor is in default of its payroll account obligations (i.e., the full scope of items (a)-(h), above). Thus, a debtor, relying on the order, may find itself unable to have its plan or arrangement sanctioned by the court.
20. For the reasons set out above, the Minister submits the Court should use the proposed language, set out above, rather than the language in the template order to ensure the debtor's compliance with its obligations under both the payroll statutes (*Income Tax Act, Canada Pension Plan, Employment Insurance Act, Alberta Personal Income Tax Act*) and the CCAA.

B- Court's authority to extend cannabis licenses.

21. As noted in the applicants' materials, in order to sell cannabis products, producers must hold valid licenses under both the Health Canada Act (the "**Health Canada License**") and the Excise Act, 2001 (the "**Excise License**").
22. Paragraph 43 of the ARIO is contrary to section 11.1(2) of the CCAA and cannot be justified pursuant to subsection 11.1(3). Paragraph 43 is a broad stay that freezes the "status quo" and denies the CRA and Health Canada the ability to take regulatory action, including for health and safety reasons, with respect to Freedom's cannabis licences. Such a broad stay is not necessary for a viable arrangement and freezing the CRA and Health Canada's ability to regulate Freedom is against the public interest.
23. Paragraph 43 imposes a broad stay that appears to prevent the CRA and Health Canada from taking any regulatory action, including for health and safety reasons, with respect to Freedom's cannabis licences. Clause 43 freezes the "status quo" as follows:

“STATUS QUO” OF APPLICANT’S LICENCE

para. 43. The status quo in respect of the Applicant’s Health Canada licenses and the cannabis excise license (collectively, the “Licenses”) shall be preserved and maintained during the pendency of the Stay Period, including the Applicant’s ability to sell cannabis inventory in the ordinary course under the Licenses, and to the extent any Licenses may expire during the Stay Period, the term of such License shall be deemed to be extended by a period equal to the Stay Period.

24. Paragraph 43 violates section 11.1 of the CCAA, which severely limits jurisdiction of the Court to stay the actions of regulators. The rationale for adding section 11.1 to the CCAA is set out in the clause-by-clause analysis for Bill C-55 as follows:

The intention of the reform is to ensure that regulatory bodies, exercising powers for the benefit and well-being of all Canadians, should not be restricted by an insolvency situation from properly carrying out their duties.

25. Specifically, subsection 11.1(2) provides that no order may under section 11.02 stay the actions of a regulator’ except with respect to “the enforcement of a payment ordered by the regulatory body or the court. Subsection 11.1(2) states:

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body’s investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

26. In *Nortel Networks Corporation (Re)*⁵ the Ontario Court of Appeal considered section 11.1. In the context of the “untidy intersection” between the CCAA and Ontario’s Minister of the Environment (Ont. MOE), the Court found that the CCAA struck a balance between stakeholders in the CCAA process and the public.⁶ When “the Minister is solely acting in its regulatory capacity, it can do so unimpeded” by any stay under section 11.02 of the CCAA.⁷ The Ontario Court of Appeal, consequently, allowed the appeal and found that certain remediation orders sought by the Ontario MOE were non-monetary, and that their

⁵ [2013 ONCA 599 \(CanLII\) | Nortel Networks Corporation \(Re\) | CanLII](#)

⁶ *Ibid.* at para 33

⁷ *Ibid.* at

enforcement by the Ontario MOE was not impeded by the general stay granted under subsection 11.02 the CCAA.

27. Section 11.1 has also been found to prevent the general stay in section 11.02 from applying to regulators in the following cases. In *Labourers' International Union of North America, Local 183 v Roniso Corporation*⁸ the Ontario Labour Relations Board found that a summons by the board was not stayed. In *Laurentian University (Re)*⁹ Ontario Privacy Commissioner found that a request to a university under the Freedom of Information and Protection of Privacy Act was not stayed. In *Sears Canada Inc. v International Brotherhood of Electrical Workers, Local 213*¹⁰ the BC Labour Relations Board held that a determination of grievances was not stayed.

28. In order to receive a stay broader than simply a stay of the “enforcement of a payment ordered by the regulatory body or the court,” Freedom must bring an application pursuant to subsection 11.1(3) and demonstrate that (1) a viable compromise or arrangement could not be made in respect of the company without the stay and (2) it is not contrary to the public interest that the regulatory body be so stayed. Specifically, subsection 11.1(3) states:

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

29. In the present case, (and leaving aside that it does not appear that CRA has taken any action, suit or proceeding that would require an application under subsection 11.1(3)), Freedom has not met either of these requirements of section 11.1(3).

⁸ [2022 CanLII 52332 \(ON LRB\) | Labourers' International Union of North America, Local 183 v Roniso Corporation | CanLII](#)

⁹ [2021 CanLII 103994 \(ON IPC\) | Laurentian University \(Re\) | CanLII](#)

¹⁰ [2017 CanLII 69395 \(BC LRB\) | Sears Canada Inc. v International Brotherhood of Electrical Workers, Local 213 | CanLII](#)

30. First, Freedom has provided no evidence that a broad stay freezing the “status quo” and preventing the CRA and Health Canada from taking any regulatory action, including for health and safety reasons, with respect to the cannabis licences is necessary to make a viable compromise. It is, in fact, difficult to imagine a circumstance where the freezing of all of the CRA and Health Canada’s statutory powers rather than, for example, simply staying their ability to enforce their rights as creditors, would be necessary for a viable compromise.
31. Second, Freedom has also not demonstrated that such a broad stay, which freezes the “status quo” and prevents the CRA from taking any regulatory action, is in the public interest. Instead, such a freeze is *prima facie* not within the public interest. The cannabis industry is heavily regulated for important public policy reasons, including the public’s health and safety. It is obviously against the public interest to, for example, prevent the CRA from immediately suspending Freedom’s licence because it sold unstamped marijuana illicitly. The clause-by-clause analysis for Bill C-55 notes that clause 11.1(3)(b) was included to ensure that any power to stay was limited by the public interest and that “it would be inconceivable that a court would stay a regulator charged with public health and safety even if it meant the restructuring would fail.”
32. The present case can be distinguished from *Re Just Energy Corp.*¹¹ where the Ontario Supreme Court considered subsection 11.1(3) and allowed ten-day stay prohibiting regulatory bodies from terminating the licences Just Energy required for its participation in utility markets. Just Energy had fallen into a liquidity crisis because unusually intense winter storms in Texas led to a breakdown of equipment used to generate and transmit electricity. This led Texas regulators to impose radical and immediate price increases for the power Just Energy buys. Just Energy’s inability to pay this sudden sharp increase in costs potentially put its licences at risk.

¹¹ [2021 ONSC 1793 \(CanLII\)](#) | [Re Just Energy Corp.](#) | [CanLII](#)

33. In *Just Energy*, the Court first acknowledged that:

[T]he CCAA automatically stays enforcement of any payments of money ordered by the regulator. It does not, however, automatically stay other steps that a regulator may take against a regulated entity.¹²

34. The Court then found that the ten-day stay met the requirements of section 11.1(3). The Court state that, in those circumstances, it would be unjust for regulators to take steps to shut down *Just Energy* without allowing a “window of opportunity to work out its liquidity crunch:

It would appear to me to be unjust to take regulatory steps that might shut down entire business when the financial concerns that prompt those steps may turn out to be unjustified if PUCT and ERCOT adjust some or all of the price increases they imposed during the storm. Even if PUCT and ERCOT are unable or unwilling to adjust their price increases, it may be appropriate for regulators to consider whether *Just Energy* should be shut down because of a temporary liquidity crisis and whether *Just Energy* should be given a window of opportunity to work out its liquidity crunch. That will obviously need to be measured against the objectives the regulator was created to further. It strikes me, however, that the circumstances of this case warrant at least a 10 day period to allow all parties to assess the issue with the benefit of more reflection than the instant application of a regulatory policy may afford.¹³

The Court also found that the ten-day stay was not contrary to the public interest:

One of the primary goals of regulators is to ensure that providers of electrical power are paid and that customers receive electrical power on competitive business terms. A stay does not offend these policy objectives. The goal of the stay and the financing associated with it is to be able to continue to pay providers of power to *Just Energy* and to continue to service *Just Energy* customers according to their existing contracts.¹⁴

35. *Just Energy* can be distinguished from the present case because it was a very short stay primarily intended to allow *Just Energy* to deal with the sudden unexpected liquidity crunch. This was not a long stay that prevented the regulators from taking action to protect the public from dangerous and illicit activity.

¹² *Ibid.* at para. 79

¹³ *Ibid* at para. 82

¹⁴ *Ibid* at para. 83

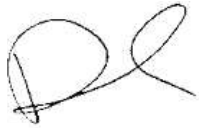
36. Paragraphs 13 and 14 of the ARIO already provide the stay of proceedings that the CCAA allows. Paragraph 14 of the ARIO specifically recognizes the statutory limitation set out in subsection 11.1(2) of the CCAA. As such the additional stay sought in paragraph 43 is either redundant or alternatively seeks to extend the scope of the stay to activities that are neither warranted on the evidence nor supported by the CCAA legislation.

Extension of License

37. The portion of paragraph 43 of the ARIO that extends an otherwise expiring license to the period of the stay granted by the CCAA court is unnecessary and ought not to be granted. This extension circumvents the prescribed process and requirements for a license holder who wishes to renew its CRA cannabis license.
38. There is a prescribed process for a license holder who wishes to renew an expiring CRA cannabis license. This process is applicable to all license holders throughout the Cannabis industry, as licenses are not automatically renewed. The process is neither onerous nor complicated.
39. The stay of proceedings imposed by the court in paragraphs 13 and 14 of the ARIO is imposed to prevent creditors from taking steps to collect outstanding debts that could impair the ability of the companies under CCAA protection from pursuing their attempt at restructuring. The stay is not intended to suspend or otherwise impair the obligations of those same companies from meeting its ongoing regulatory requirements nor alter ongoing business operations.
40. It is not disputed that maintaining valid CRA and Health Canada licenses is integral to the ongoing business operations of Freedom Cannabis, as it is with any other company in the cannabis business in Canada. Meeting its ongoing regulatory requirements, including taking steps to apply for a renewal of a cannabis license is simply part of Freedom's ongoing regular business operations. There is no evidence before the Court that suggests that Freedom is unable to apply for a renewal of its license within the usual times to do so.

41. The portion of paragraph 43 that directs that an otherwise expiring license to be renewed for the period of the stay imposed in the CCAA proceeding is also problematic because it is essentially a *mandamus* against the Minister. Section 11.1 does not grant the Court the jurisdiction to compel the CRA and Health Canada to extend the cannabis licenses. Instead, section 18 of the *Federal Courts Act* confers the supervisory jurisdiction of such federal administrative decisions exclusively on the Federal Courts.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



ATTORNEY GENERAL OF CANADA

Department of Justice
Prairie Region
National Litigation Sector
300, 10423 101 Street NW
Edmonton, AB T5H 0E7

Per: Daniel Segal/George Body
Tel: 587-335-9341/ 780-495-7595
Facsimilie: 780-495-3319
Email: Daniel.segal@justice.gc.ca/ george.body@justice.gc.ca