



FORCE FILED

No. S-245481
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED**

AND

IN THE MATTER OF THE COOPERATIVE ASSOCIATION ACT, S.B.C. 1999, c. 28

AND

**IN THE MATTER OF BC TREE FRUITS COOPERATIVE, BC TREE FRUITS INDUSTRIES
LIMITED and GROWERS SUPPLY COMPANY LIMITED**

PETITIONERS

NOTICE OF APPLICATION

Names of applicant: Amarjit Singh Lalli on his own behalf and on behalf of a majority group of the voting members of the BC Tree Fruits Cooperative (the "BCTFC") who have a claim against the BCTFC.

To: The Service List

TAKE NOTICE that an application will be made by the applicants to the Justice Gropper at the courthouse at 800 Smithe Street, Vancouver, BC on Monday August 26, 2024, at 10 a.m. for the orders set out in Part 1 below.

The applicants estimate that the application will take 20 minutes.

- ☐ This matter is within the jurisdiction of an associate judge.
- ☒ This matter is not within the jurisdiction of an associate judge.

Part 1: ORDERS SOUGHT

1. An Order in the form set out in **Schedule "A"**:
 - (a) appointing Osler, Hoskin & Harcourt LLP ("**Osler**") as representative counsel for Amarjit Singh Lalli, on behalf of 98 of BCTFC's voting members (the "**Ad-Hoc Growers**") who have claims against the BCTFC in the present proceedings; and
 - (b) granting a charge in the amount of \$100,000 over the Property (as defined in the Initial Order granted on August 13, 2024 in these proceedings (the "**Initial Order**")) of the BCTFC for the anticipated legal fees of the Ad-Hoc Growers (the "**Ad-Hoc Growers' Charge**"), to ensure effective participation of the Ad-Hoc

Growers in the present proceedings, ranking in priority over all other security interests trust, liens, charges, encumbrances, or other secured claims in favour of any person other than the Administration Charge, the Interim Lender's Charge, the CIBC Indebtedness, and the Directors' Charge (as each is defined in the Initial Order).

2. Such other orders, directions, and declarations as this Court may deem just and appropriate in the circumstances.

Part 2: FACTUAL BASIS

A. Background

3. The applicant is an orchardist in the Okanagan region of British Columbia and an Ad-Hoc Grower. The Ad-Hoc Growers are 98 of the total 174 voting membership (56%) in the BCTFC (the total voting membership being referred to as the "Growers").
4. The BCTFC operates as a cooperative, meaning it is governed collectively by the Growers, who have equal input in the BCTFC's decisions.
5. BCTFC is subject to proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, that were commenced on August 13, 2024 (the "CCAA Proceedings").
6. Alvarez & Marsal Canada Inc. has been appointed as monitor in the CCAA Proceedings (in such capacity, the "Monitor").

B. The Ad-Hoc Growers

7. The Ad-Hoc Growers are a group of approximately 98 individuals who have a significant interest in the CCAA Proceedings. They are key agricultural producers in British Columbia, specializing in the cultivation of tree fruits such as apples, cherries, and peaches. The Ad-Hoc Growers (and in fact, all of the Growers who are member of the BCTFC) are uniquely and adversely impacted by these proceedings.
8. The Ad-Hoc Growers play a vital role in ensuring that British Columbians have fresh, locally grown produce, which is crucial for provincial food security. Their presence supports the livelihoods of farmers in rural communities and helps sustain local agricultural jobs.
9. The Ad-Hoc Growers, along with all other Growers, are uniquely and adversely impacted by the CCAA Proceedings. The CCAA Proceedings have impacted their production schedules, created uncertainty in the market, and affected their financial stability. This disruption is particularly critical given their central role in the local economy and food supply.
10. The Ad-Hoc Growers are concerned with how that the BCTFC's executives and board of directors (the "Board") have managed the BCTFC. Specifically, the Ad-Hoc Growers are concerned that Board's decision to initiate the CCAA Proceedings has not adequately

considered the differing perspectives of other interested and effective parties. In the *CCAA* materials initially filed by the BCTFC, the Ad-Hoc Growers are of the view that issues of governance were not fully canvassed.

11. As part of the *CCAA* Proceedings, the BCTFC's real estate properties face liquidation, and have all been shut down. The Growers depend on these properties for storing, processing and marketing their harvests. Several of these properties are crucial for the Growers to process and market their annual harvests. These properties are:
 - (a) 3335 & 3345 Sexsmith Road, Kelowna, BC;
 - (b) 9718 Bottom Woodlake Road, Lake Country, BC;
 - (c) 327, Co-op Ave, Oliver, BC; and
 - (d) 334 Packing House Lane, Oliver, BC(collectively, the "**Key Properties**").
12. Most of the Ad-Hoc Growers' production is processed through the Key Properties annually, and the Key Properties provide essential services such as fruit sorting, packing, and controlled atmosphere storage, which are critical for preserving the quality of their produce and stabilizing market prices.
13. The processing facilities at the Key Properties enable the Ad-Hoc Growers to efficiently manage their large volumes of harvest, prevent spoilage, and maintain the supply of fresh fruit to local and regional markets. The facilities also stabilize market prices by storing and preserving large quantities of harvested tree fruits for extended periods.
14. The Ad-Hoc Growers estimate that if the *CCAA* Proceedings were allowed to proceed, approximately 50% of the Growers' remaining 2024 harvest will spoil due to lack of processing facilities. Further, the Ad-Hoc Growers face significant uncertainty regarding the prospects of future harvest years.
15. If the BCTFC and the Key Properties shut down, the Growers will have severely limited options to process and pack their fruits. Although some tree fruit growers own private facilities for processing and packaging (the "**Private Packers**"), the Growers can only use the Private Packers' facilities to a limited extent, as Private Packers:
 - (a) do not have the capacity to handle the entire volume of the Growers' production;
 - (b) are situated on Agricultural Land Reserve zoned properties, limiting their ability to expand processing capabilities beyond certain thresholds;
 - (c) do not offer controlled atmosphere storage, which is essential for many Growers to adequately preserve certain tree fruits (primarily apples) before they are processed and released to the market.
16. A shutdown of the BCTFC, especially the Key Properties, and subsequent loss of storage and processing capacity would cause substantial financial strain to the Growers. The

Growers rely on the Key Properties for processing and preserving their harvests, and a shutdown of the BCTFC would be irreversibly devastating.

Part 3: LEGAL BASIS

A. Granting the Representative Order is Appropriate in these Circumstances

17. The Petitioners rely on Section 11 of the *CCAA*, which provides:

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Companies' Creditors Arrangement Act (R.S.C., 1985 c. C-36)

18. The Court can make an order under Section 11 of the *CCAA* to make a representation order under Rule 20-3 of the British Columbia *Supreme Court Civil Rules*.

Nortel Networks Corp. (Re), 2009 CanLII 26603, at paras. 10-16

Supreme Court Civil Rules, BC Reg 168/2009

19. The factors that have been considered by the Courts in granting the appointment of representatives in *CCAA* cases are the following:

- (a) the vulnerability and resources of the group sought to be represented;
- (b) any benefit to the companies under *CCAA* protection;
- (c) any social benefit to be derived from representation of the group;
- (d) the facilitation of the administration of the proceedings and efficiency;
- (e) the avoidance of a multiplicity of legal retainers;
- (f) the balance of convenience and whether it is fair and just including to the creditors of the estate;
- (g) whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- (h) the position of other stakeholders and the monitor.

Canwest Publishing Inc., 2010 ONSC 1328, at para. 21

1057863 B.C. Ltd. (Re), 2020 BCSC 1359 at para. 125

20. The Ad-Hoc Growers meet each of the criteria set out in *Canwest Publishing Inc.*, and as cited in *1057863 B.C. Ltd.*

(a) The Ad-Hoc Growers are a vulnerable group with limited individual resources

21. The Ad-Hoc Growers are a financially vulnerable group within the BCTFC. They have been deeply impacted by recent management issues and the potential shutdown of Key Properties.
22. The Growers face considerable financial strain due to their dependence on Key Properties, which are crucial for processing and preserving their harvests. A shutdown of the Key Properties would lead to a substantial loss in their ability to manage their production effectively, causing potential spoilage of their crops and severe economic consequences. The lack of alternative processing options exacerbates their vulnerability.
23. Individually, the Ad-Hoc Growers have limited financial resources to defend their interests or engage in lengthy legal proceedings. Their financial constraints are compounded by the current poor 2024 harvesting season, making it difficult for them to seek out or afford adequate representation. This financial limitation puts them at a disadvantage compared to other stakeholders who may have more resources and legal expertise at their disposal.
24. Many Ad-Hoc Growers may not fully understand their legal rights or potential claims within the bankruptcy proceedings, increasing their risk of being inadequately represented. Without proper legal counsel, they may be unable to fully navigate the complexities of the proceedings or secure the protections and recoveries to which they are entitled. The disparity in resources and knowledge between the Ad-Hoc Growers and more sophisticated parties highlights the need for equitable representation to ensure fairness in the process.

(b) The participation of the Ad-Hoc Growers is beneficial to these CCAA proceedings

25. Appointing representative counsel for the Ad-Hoc Growers benefits the BCTFC as it addresses key concerns for a significant portion of its membership.
26. The Ad-Hoc Growers are integral to the BCTFC's operations, as they supply a significant portion of produce to British Columbia's food market. Thus, ensuring their interests are represented is vital not only to the BCTFC's restructuring process, but also for continuing to provide fresh, local produce to consumers throughout the province.
27. Furthermore, by addressing the Ad-Hoc Growers' issues with specialized counsel, the BCTFC can prevent potential conflicts and delays, leading to a more organized and efficient restructuring process.

(c) There is significant benefit to be gained from the Ad-Hoc Grower's participation

28. Representation of the Ad-Hoc Growers helps to ensure that British Columbians have access to fresh, locally grown produce, which is essential for provincial food security and supports a healthy diet.

29. Further, the Ad-Hoc Growers are often located in rural, agricultural communities in British Columbia. Effective representation helps sustain these communities by protecting local agricultural jobs and maintaining the livelihoods of farmers in these regions.

(d) The Representative Order will facilitate the efficient administration of the Ad-Hoc Grower's position

30. To date, the Ad-Hoc Growers have not been involved (with legal counsel) in these proceedings. Furthermore, they have not been provided with timely advice about the proceedings which relate directly to their interests.

31. Coordinating the Ad-Hoc Growers' common concerns through a single representative entity ensures a more focused and cohesive approach to the CCAA Proceedings, leading to a streamlined resolution that benefits both the BCTFC, the Ad-Hoc Growers, and all other stakeholders.

(e) The Representative Order will avoid multiple legal retainers

32. If a representative is not appointed, then either the Ad-Hoc Growers will not be represented, or there will likely be a mixture of multiple legal counsel and unrepresented litigants. With approximately 98 Ad-Hoc Growers with interest in the CCAA Proceedings, this could be unmanageable. Alternatively, the Ad-Hoc Growers would have to self-organize and enter into a complex and impractical joint retainer arrangement.

33. Requiring the Ad-Hoc Growers to self-organize or enter into a complex joint retainer arrangement would be administratively burdensome and impractical, especially given the distances involved and the risk of under inclusion. Therefore, it is neither practical nor fair to proceed without appointing representative counsel.

(f) On the balance of convenience, it is fair and just to grant The Representative Order

34. It is fair and just that the Ad-Hoc Growers be provided adequate representation in the CCAA Proceedings. Each of the approximately 98 Ad-Hoc Growers have a direct interest at stake. Granting a representative counsel is the only way in which to ensure the Ad-Hoc Growers' claims are determined in the most fair, consistent and efficient manner possible.

35. With numerous overlapping issues, it is essential that the legal claims are advanced by an officer of the court with a view to process, efficiency and the best interests of the Ad-Hoc Growers. The alternative would invite a cumbersome, piecemeal, and unfocused adjudication of the outstanding legal and factual issues.

(g) No similar representative counsel has been appointed

36. No other representative counsel has been appointed in this matter.

(h) Position of other stakeholders and the Monitor

37. Counsel has given notice to both the BCTFC and the Monitor of this application and is awaiting confirmation of the Monitor's position on the application.

B. Granting the Ad-Hoc Grower's Charge is Appropriate in these Circumstances

38. Section 11.52(1)(c) of the *CCAA* allows the court to place a charge on the petitioner's assets to secure payment of the legal fees and disbursements required to ensure the effective participation by the Ad-Hoc Growers in these proceedings.

39. Section 11.52(1)(c) of the *CCAA* provides:

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of:

[...]

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Companies' Creditors Arrangement Act (R.S.C., 1985 c. C-36)

40. The necessity of such a charge in a restructuring is warranted to ensure the involvement of professionals and achieve the best possible outcome for the stakeholders.

U.S. Steel Canada Inc. (Re), 2014 ONSC 6145, at para. 22

41. Factors to consider in approving a charge include:

- (a) The size and complexity of the businesses being restructured;
- (b) The proposed role of the beneficiaries of the charge;
- (c) Whether there is an unwanted duplication of roles;
- (d) Whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) The position of the secured creditors likely to be affected by the charge; and,
- (f) The position of the monitor.

Walter Energy Canada Holdings, Inc. (Re), 2016 BCSC 107, at para. 42

42. The Ad-Hoc Grower's Charge meets the legal factors necessary to obtain a charge, as:

- (a) The size of the BCTFC and the intricate nature of its business operations are compounded by the diverse claims of the Ad-Hoc Growers, who, as voting members, have significant stakes in the outcome. This adds a layer of complexity to the restructuring proceedings, as their varied claims and interests must be carefully managed and coordinated. The \$100,000 Ad-Hoc Growers' Charge is essential to ensure that the legal and administrative support required to navigate

these complexities is available, facilitating a comprehensive and effective restructuring process.

- (b) The primary proposed role of the beneficiaries of the charge is to represent the Ad-Hoc Growers in a manner that ensures each of their claims is fully accounted for. Osler will be able to provide accurate and timely advice on the process. Osler will be able to properly define the outstanding issues, consolidate the issues, come to agreement on certain claims and facilitate a claims process that will orderly and efficiently resolve any disputes between the BCTFC and representative counsel.
- (c) While the Monitor is a representative of the Court and has an obligation to all stakeholders, it does not have the time or resources to properly advise the Ad-Hoc Growers. Similarly, while the BCTFC no doubt has an interest in the well-being of the Ad-Hoc Growers, it is a direct counterparty to the specific legal interests at stake in the claims process. The proposed role of representative counsel is to specifically advocate for the statutory and contractual rights of the Ad-Hoc Growers. No party is presently attending to these interests.
- (d) Given the number of Ad-Hoc Growers involved, the communication and coordination to understand the underlying facts and to represent the unique needs of these stakeholders, the Ad-Hoc Growers submit that a \$100,000 charge is fair and reasonable. The quantum accounts for the time needed to address various and complex legal issues arising from the Ad-Hoc Growers' claims.
- (e) The secured creditors will be materially unaffected by the Ad-Hoc Grower's Charge, and the Ad-Hoc Grower's Charge is proposed to rank behind all other Court Ordered charges in these proceedings.
- (f) The Ad-Hoc Growers have provided advanced notice to the Monitor and is awaiting confirmation of the Monitor's position.

43. Therefore, the Ad-Hoc Growers submit it is appropriate in these circumstances to grant the Representative Order and the Ad-Hoc Grower's Charge sought.

MATERIAL TO BE RELIED ON

1. First affidavit of Amarjit Singh Lalli, filed August 23, 2024.
2. Such further and other material as counsel may advise and this Court may allow.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that:

- (i) you intend to refer to at the hearing of this application, and
- (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Dated: August 23 , 2024

Emma Newbery

Signature of ☐ Applicant(s)
☒ Lawyer for applicant(s)
Emma Newbery

To be completed by the court only:

Order made

[] in the terms requested in paragraphs of Part 1 of this notice of application

[] with the following variations and additional terms:

.....
.....
.....

Date:[dd/mm/yyyy].....

.....
Signature of [] Judge [] Associate Judge

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts
- ☒ none of the above

Schedule "A"

Draft Order

(see attached)