



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

APPLICATION RESPONSE

Application Response of: the voting members of the BC Tree Fruits Cooperative (collectively, the "**Members**").

THIS IS A RESPONSE TO the notice of application of the Monitor, Alvarez & Marsal Canada Inc. (the "**Monitor**").

The application respondent estimates that the application will take 1.5 hours

Part 1: ORDERS CONSENTED TO

The application respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: NONE

Part 2: ORDERS OPPOSED

The application respondent opposes the granting of the orders set out in paragraphs 1 to 3 of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of the orders set out in paragraphs NONE of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

The Sexsmith Property

1. BC Tree Fruits Cooperative (“**BCTFC**”) owns the real property located at 3335 & 3345 Sexsmith Road, and 3670 Highway 97, in Kelowna, B.C. (collectively, the “**Sexsmith Property**”). The property has been listed for sale with HM Realty.

First Report of the Monitor dated August 22, 2024, at para 8.6 (page 25).

2. In September 2024, the Monitor reported that it had entered into an Agreement of Purchase and Sale (and a short-term lease agreement) with Novem Pharmaceuticals Inc. (“**Novem**”) for the Sexsmith Property (the “**First Sexsmith Deal**”). The sale was subject to conditions to be fulfilled or waived by October 31, 2024, with expected court approval by November 15, 2024.

Second Report of the Monitor dated September 27, 2024, at paras 6.4-6.6 (pages 9-10).

3. Novem actively publicized the First Sexsmith Deal, issuing a press release and holding a media event.

Affidavit #2 of Amarjit Singh Lalli, made on February 26, 2025 (“**Lalli Affidavit #2**”) at para 3.

4. Conditions were not met on the First Sexsmith Deal and the sale did not go forward as expected. In December 2024, the Monitor informed counsel to the Members that the Sexsmith Property would continue being marketed through HM Realty.

Lalli Affidavit #2 at para 4.

5. On February 21, 2025, the Monitor filed a notice of application seeking to approve a sale of the Sexsmith Property to Novem for approximately \$19.25 million (the “**Second Sexsmith Deal**”).
6. The Sexsmith Property has a 2025 assessed value of approximately \$33.4 million.

Lalli Affidavit #2 at para 6.

The Members Concerns

Inadequacy of Marketing

1. The Members oppose the Second Sexsmith Deal due to the low price compared to the assessed value, the inadequacy of marketing of the Sexsmith Property after the First Sexsmith Deal did not proceed, and the short time period between when the first Sexsmith Deal did not proceed and this second offer is being brought before the Court.
2. The Members:
 - (a) are not aware of the efforts by the Monitor or HM Realty to publicize the re-marketing of the Sexsmith Property after the First Sexsmith Deal did not proceed; and
 - (b) are concerned that re-marketing of the Sexsmith Property was ineffective after the First Sexsmith Deal did not proceed, given that the proposed Second Sexsmith Deal is significantly below the assessed value for the Sexsmith Property.

Lalli Affidavit #2 at paras 7 and 8.

3. HM Realty's marketing report for the Sexsmith Property (the "**Marketing Report**") attached as Appendix A to the Tenth Report of the Monitor dated February 25, 2025 (the "**Tenth Monitor's Report**") lacked sufficient detail regarding the Sexsmith Property that would have been beneficial for prospective purchasers.

Lalli Affidavit #2 at para 9.

4. For example, the Marketing Report did not disclose several key features of the Sexsmith Property that prospective purchasers would likely consider important, including:
 - (a) the Sexsmith Property could be sold with 39,772 bulk wooden bins (the "**Bulk Bins**") and other machinery and equipment as particularized at Schedule "D" of the accepted offer for the Second Sexsmith Deal attached as Appendix B to the Tenth Monitor's Report (the "**Sexsmith Accepted Offer**");
 - (b) any potential lease revenue associated with the Sexsmith Property; and
 - (c) the total controlled atmosphere capacity of the Sexsmith Property. The Marketing Report only specifies that the combined total of controlled atmosphere, cold storage, and office space is 148,888 square feet, but does not delineate proportions

(i.e. controlled atmosphere square footage vs. cold storage square footage vs. office space square footage) or specify total controlled atmosphere capacity as measured in bin capacity.

Lall Affidavit #2 at paras 11-13.; Tenth Monitor's Report at pages 15-18, 57-59.

5. The Members are concerned that Novem, having leased the Sexsmith Property since September 2024, was aware of these key features that were not disclosed to other prospective purchasers.

Lalli Affidavit #2 at para 10.

6. Finally, given that the First Sexsmith Deal was publicized by Novem and given significant news traction, the Members are also concerned that there has been insufficient time since December 2024 the termination of the First Sexsmith Deal to effectively re-market the Sexsmith Property. Particularly, Members are concerned that prospective purchasers may not have been aware that the First Sexsmith Deal did not go forward and therefore, would not have known that the Sexsmith Property was back on the market.

Lalli Affidavit #2 at para 14.

The Structure of the Sexsmith Accepted Offer

7. The Members also oppose the Second Sexsmith Deal due to the deal structure of the Sexsmith Accepted Offer.
8. Given that the Sexsmith Accepted Offer is already \$14.15 million below the Sexsmith Property's assessed value, several incentives and offsets to the Purchase Price (as defined in the Sexsmith Accepted Offer) reduce the effective Purchase Price to even lower than \$19.25 million. Specifically:
 - (a) Section 6.1 and Section 10.15 of the Sexsmith Accepted Offer specify that previous Bin Sale Proceeds received by Novem (as defined in the Sexsmith Accepted Offer) can, at the option of the purchaser, comprise part of the Purchase Price. This

arrangement also benefits Novem, as it provides a financial advantage not available to other prospective purchasers.

- (b) The Bulk Bins and other machinery and equipment received by Novem as part of the Sexsmith Accepted Offer also dilute the purchase price given that these items can be easily sold for profit to offset the \$19.25 million offer.

Lalli Affidavit #2 at paras 16-19.; Tenth Monitor's Report at pages 31, 40, 57-59

- 9. The Members also oppose the structure of the deposit as contemplated in the Sexsmith Accepted Offer. Paragraph 4.11 of the Tenth Monitor's Report indicates that \$600,000 of the \$1,600,000 deposit will be composed of a payment made in connection with a September 5, 2024 lease agreement entered into between the Monitor and Novem with respect to the Sexsmith Property. The Members are concerned that a payment tied to a separate lease agreement – related to valid rent owed to the BCTFC and unrelated at the time to the Second Sexsmith Deal – dilutes the Purchase Price, as after the termination of the First Sexsmith Deal, this \$600,000 was to be used as rent money and not intended as a credit against the Purchase Price on a future sale.

Lalli Affidavit #2 at paras 20-21.; Tenth Monitor's Report at para 4.11 (page 8).

- 10. Finally, the Members oppose the Warren Sarafinchan will receive \$48,125 commission in connection with the Sexsmith Accepted Offer. Warren Sarafinchan is the ex-Chief Executive Officer of BCTFC, and pursuant to an employment contract that Mr. Sarafinchan would have signed, Mr. Sarafinchan would be required to the use of confidential information relating to BCTFC in trust for BCTFC. The Members are concerned that by acting as advisor to Novem in its purchase of the Sexsmith Property from BCTFC, Mr. Sarafinchan has placed himself in a direct conflict of interest with the contractual obligations of his employment contract.

Lalli Affidavit #2 at paras 22-24.; Tenth Monitor's Report at para 4.14 (page 8).

Conclusion

11. In addition to the Member's concerns relating to the inadequacy of re-marketing and structure of the Second Sexsmith Deal, BCTFC's primary secured creditor, CIBC, is effectively paid out for full satisfaction of BCTFC's indebtedness to it. This means that BCTFC's unsecured creditors, including the Members, are the primary remaining stakeholders.

Tenth Monitor's Report at para 5.2 (page 9).

12. Further, it is unlikely that any new apples will be added to the controlled atmosphere storage at the Sexsmith Property until the fall. The Summerland and Keremeos properties also have controlled atmosphere storage and the Sexsmith Property's controlled atmosphere storage is not at full capacity, with only 5000 bins currently in controlled atmosphere storage as February 26, 2025.

Lalli Affidavit #2 at para 26.

13. The Members oppose the Second Sexsmith Deal and ask this Court to allow more time for a proper re-marketing of the Sexsmith Property, maximizing the potential value for the remaining stakeholders.

Part 5: LEGAL BASIS

14. Canadian insolvency courts refer to well-known *Soundair* factors when assessing the efficacy and result of a sales process:
 - (a) whether the seller made sufficient effort to get the best price and has not acted improvidently;
 - (b) the interests of all parties;
 - (c) the efficacy and integrity of the process by which offers are obtained; and
 - (d) whether there has been unfairness in the working out of the process.

Good Natured Products Inc. (Re), 2024 BCSC 2126 at 31

Royal Bank of Canada v. Soundair Corp., 1991 CanLII 2727 (ON CA) at 6

15. When assessing why a court might *not* approve a sale, particularly given the interests of all parties and whether efforts were made to obtain the best price, the British Columbia Court of Appeal and other Canadian courts have considered:
- (a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic;
 - (b) whether the circumstances indicate that insufficient time was allowed for the making of bids;
 - (c) whether inadequate notice of sale by bid was given; or
 - (d) whether it can be said that the proposed sale is not in the best interest of either the creditors or the owner.

QRD (Willoughby) Holdings Inc. v. MCAP Financial Corporation, 2024 BCCA 318 at 70

River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa, 2010 ABCA 16 at 13

16. In this case, the Second Sexsmith Deal should not be approved:
- (a) **There has been insufficient time to re-market the Sexsmith Property after the failed First Sexsmith Deal the Marketing Report did not disclose several key features of the Sexsmith Property.** Given Novem's publication of the First Sexsmith Deal (and the subsequent lack of publication that the Sexsmith Property was back on the market), it is likely that potential purchasers were not aware the Sexsmith Property was still available. Further, the Marketing Report did not disclose the inclusion of Bulk Bins and other equipment and machinery associated with the Sexsmith Property, potential lease revenue of the Sexsmith Property, or total controlled atmosphere storage capacity.

- (b) **Novem's offer of \$19.25 million is significantly below the assessed value of the Sexsmith Property and certain deal terms dilute the purchase price even further.** Even if taking market and other conditions into account, it is unrealistic and unfair to the Members to approve the sale of property for approximately 42% below its assessed value. When considering the associated benefits Novem receives from the deal including inclusion of the Bulk Bins, the rights to use Bin Sale Proceeds to offset a portion of the Purchase Price, and the right to apply a \$600,000 lease payment to its deposit, the total amount paid is even lower than \$19.25 million with various associated benefits to Novem that other prospective purchasers would not have been aware of.
- (c) **There is no urgency to accept the Second Sexsmith Deal.** As noted above, BCTFC's primary secured creditor, CIBC, has been repaid. BCTFC's remaining stakeholders are its unsecured creditors and the Members. There is no urgency to accept a lowball offer for the Sexsmith Property. Instead, it is in the best interests of the remaining stakeholders to maximize the value obtained for the property.
17. Given the foregoing, the marketing of the Sexsmith Property and the proposed Second Sexsmith Deal are unfair to the Members. This Court should reject the Second Sexsmith Deal, providing the parties with more time to maximize the value obtained from the property.

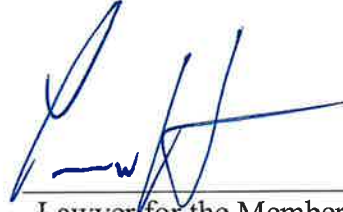
QRD (Willoughby) Holdings Inc. v. MCAP Financial Corporation,
2024 BCCA 318 at 72

Part 6: MATERIAL RELIED ON

1. First Report of the Monitor dated August 22, 2024;
2. Second Report of the Monitor dated September 27, 2024;
3. Tenth Report of the Monitor dated February 25, 2025; and
4. Second Affidavit of Amarjit Sing Lalli affirmed February 26, 2025;
5. such further and other material as counsel may advise and this Honourable Court may permit.

- ☒ The application respondent has filed in this proceeding a document that contains the application respondent's address for service.
- ☐ The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is:

Dated: February 26, 2025

A handwritten signature in blue ink, appearing to be 'Mary Buttery' or similar, written over a horizontal line.

Lawyer for the Members
Mary Buttery, K.C. / Lucas Hodgson