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

AND

IN THE MATTER OF *THE BUSINESS CORPORATIONS ACT*, S.B.C. 2002

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 "**Current Members**").

THIS IS A RESPONSE TO the notice of application (the "**Application**") of Steve Day, in his capacity as the representative of the former voting members of the BC Tree Fruits Cooperative (the "**Former Members**").

The Current Members estimate that the application will take 2 hours.

Part 1: ORDERS CONSENTED TO

The Current Members consent to the granting of the orders set out in NONE of the paragraphs in Part 1 of the notice of application.

Part 2: ORDERS OPPOSED

The Current Members oppose the granting of the orders set out in ALL of the paragraphs in Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Current Members take no position on the granting of the orders set out in NONE of the paragraphs in Part 1 of the notice of application.

Part 4: FACTUAL BASIS

A. <u>Overview</u>

1. In the Application, Former Members of the BC Tree Fruits Cooperative ("**BCTFC**") seek to prevent the Current Members from meeting and voting on how the BCTFC should govern its affairs.

2. The Former Members criticize a lack of consideration for their interests and assume the rationale for the vote, *before* the Current Members have been allowed to meet and discuss the issues. The Current Members have been seeking, and patiently awaiting, a members' meeting since before the start of these CCAA proceedings.

3. The Former Members' application for oppression relief under Section 156 of the *Cooperative Association Act*, SBC 1999, c 28 (the "***Act***") cannot succeed:

    (a) **The application is fundamentally misconceived** – the law in British Columbia establishes that for an oppression claimant to block an organization from holding a special meeting vote, the claimant must meet the test for an interlocutory injunction. The Former Members have not applied for an injunction and would not meet the test for one.

    (b) In any event, the test for the oppression remedy has not been met:

        (i) **The Former Members' alleged expectations are unreasonable** – the Former Members left the BCTFC voluntarily, fully aware that the BCTFC's rules could change with a vote of the Current Members. The fact that the BCTFC rule in question has not previously changed is irrelevant. This Court has found there can be no reasonable expectation that an organization's past practices will not change.

(ii) **The Current Members do not propose to exercise their voting rights in an oppressive or unfairly prejudicial manner** – rather, the Current Members seek to hold a meeting to discuss and vote on a rule amendment. Even if oppression principles require Current Members to consider the expectations of Former Members, the law does not require them to reach any particular conclusion. The law protects the Current Members' right to exercise their business judgment within a range of reasonable outcomes.

4. Further, the Former Members' application for relief under Section 157 of the *Act* cannot succeed. There is no risk of the BCTFC failing to comply with the *Act* as alleged by the Former Members. The section of the *Act* raised by the Former Members for this argument is not applicable to CCAA proceedings, and the Current Members' proposed meeting is not otherwise improper under the *Act*.

B. The CCAA Proceedings

5. These CCAA proceedings commenced pursuant to an initial order of this Court pronounced on August 13, 2024.

Initial order entered August 13, 2024

6. Contrary to allegations at paragraph 21 of the Application, the BCTFC clearly recognized the departure of Former Members from the cooperative as a contributing factor to the insolvency. The BCTFC's affidavit in support of the initial CCAA order states:

> 5. The Petitioners are currently in the midst of a liquidity crisis that has been building for many years. There are many factors that have led to this crisis, including […] a reduction in contracted BCTFC growers/members […].
>
> First Affidavit of Douglas Pankiw filed August 12, 2024 ("**Pankiw Affidavit #1")**, para 5

7. The Current Members believe the departure of Former Members from the BCTFC was a "significant factor" in the insolvency. In any event, the success of the Current Members' arguments on this Application does not depend on establishing that the Former Members were a contributing cause to the insolvency.

> Fourth Affidavit of Amarjit Singh Lalli filed July 15, 2025 ("**Lalli Affidavit #4**"), para 19

8. Over the past 12 months, substantially all of the BCTFC's property has been sold, and these CCAA proceedings are near an end. The primary remaining issue is the distribution of approximately $12-15M of surplus BCTFC funds.

Fourteenth Report of the Monitor filed August 25, 2025, para 9.4

C. The BCTFC Rules

9. The BCTFC has governing rules established under the *Act* (the "**Rules**").

10. Currently, Rule 125 provides for a distribution of surplus funds to both Current Members and Former Members, based on the volumes of fruit that each grower provided to the BCTFC in the previous six years.

Pankiw Affidavit #1, Exhibit D, pg 66

11. The Rules (and Section 68 of the *Act*) also provide that they can be amended by the Current Members. An amendment requires a special resolution, passed by a 2/3 majority of the Current Members at either an annual general meeting ("**AGM**") or a special meeting. Current Members have the sole power to requisition a special meeting; Former Members have no such authority. The Former Members are not entitled to vote under the Rules or the *Act*.

Lalli Affidavit #4, para 11

Act, Section 68

12. Rule 17(1) states "[w]hen a member withdraws from membership or a membership is terminated or ceases for any reason, all rights and privileges attached to membership cease" (except for requiring the BCTFC to redeem the Former Members' membership share).

Pankiw Affidavit #1, Exhibit D, pg 47

13. While it is true that Rule 125 has remained unchanged for at least the previous six years (the period when any Former Members who may be entitled to surplus funds under Rule 125 would have left BCTFC), the procedures to amend the Rules, and the fact that Former Members cannot vote on such amendments, have also remained unchanged.

Lalli Affidavit #4, Exhibit A

Pankiw Affidavit #1, Exhibit D

D. <u>The Current Members' Requisition</u>

14. The Current Members have been stayed from holding an AGM or a special meeting since before the commencement of these CCAA proceedings:

    (a) the Current Members requested a special meeting by way of a requisition dated August 3, 2024, which was stayed by order of this Court in the CCAA proceedings; and

    (b) the AGM scheduled to be held on November 21, 2024, was postponed by consecutive orders of this Court in the CCAA proceedings and is currently stayed until at least November 28, 2025.

Lalli Affidavit #4, para 12

15. Despite this, the Current Members have continued to pursue holding an AGM during these CCAA proceedings to meet, confer, and exercise their voting rights, particularly given the expected distribution of surplus funds.

Lalli Affidavit #4, para 13

16. Given the lack of an AGM, the Current Members requisitioned a special meeting (the "**Special Meeting**") by way of a requisition dated July 9, 2025 (the "**Members' Requisition**").

Lalli Affidavit #4, para 17

17. The Members' Requisition states "the object of the Special Meeting is to consider, and if sought fit, to pass" a special resolution to amend Rule 125 (the "**Special Resolution**"). The proposed amendment would limit the distribution of any surplus BCTFC funds to only Current Members.

Lalli Affidavit #4, Exhibit C, pg 47

18. The Special Meeting was stayed by this Court on the application of the receiver (then monitor), Alvarez & Marsal Canada Inc. (the "**Receiver**"), so that Former Members could

have the opportunity to retain counsel. The Receiver agreed the Special Meeting meets the required criteria under the *Act* and the Rules.

Order made after application (SGM deferral) entered July 31, 2025

Supplemental Report to the Thirteenth Report of the Monitor filed July 14, 2025, paras 2.5 and 2.10

Receivership order entered August 27, 2025

E. The Oppression Application

19. The Former Members bring this Application under Sections 156 and 157 of the *Act*, seeking orders:

    (a) prohibiting the BCTFC from holding the Special Meeting; and

    (b) directing the Receiver to distribute any BCTFC surplus funds in accordance with the current drafting of Rule 125.

20. The Former Members have not applied for an injunction.

Part 5: LEGAL BASIS

21. The Application cannot succeed on the basis of alleged oppression under Section 156 of the *Act* because:

    (a) the Application is fundamentally misconceived and does not properly seek injunctive relief; and

    (b) in any event, the two-part test for oppression has not been met.

22. There is also no basis to find that the BCTFC has (or is likely to) contravene the *Act* or the Rules, as contemplated by Section 157 of the *Act*.

A. The Application is fundamentally misconceived

i. The Former Members have not properly sought an injunction

23. Where an oppression claimant seeks to block the holding of a special meeting, this Court has held that the claimant must meet the three-part test for granting an interlocutory

injunction established in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.R. 311.

> *Hardy v. Whistler Film Festival Society*, 2024 BCSC 990 at paras 1-3 and 38
>
> *Shariff v. VI Fitness Centres Inc*., 2016 BCSC 680 at paras 1-2 and 35-36

24. The *RJR-MacDonald* test asks:

(a) is there a serious question to be tried;

(b) will the applicant suffer irreparable harm if the injunction is refused; and

(c) who will suffer the greater inconvenience from the granting or refusal of the remedy?

> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.R. 311 at para 334

25. There are logical reasons for requiring an oppression claimant to seek an injunction in such cases:

(a) the meeting itself is not *per se* oppressive. It is lawfully called, and the special business is properly before the meeting;

(b) the outcome of the meeting has yet to be determined. It is not a foregone conclusion that a resolution will be passed. Nor can it be assumed that it will be passed without having appropriate regard to the required interests. One cannot properly assess whether an act that is lawful is carried out in manner that is oppressive if the act has not yet occurred; and

(c) in such circumstances, this Court should not take the extraordinary step of enjoining a meeting and preventing *any* decision from being made, without first considering whether the high threshold for granting an injunction, including the risk of irreparable harm, has been demonstrated.

26. In this case, the Former Members seek to prevent Current Members from having a forum where, as stated in the Members' Requisition, they can "consider" the proposed amendment to Rule 125. The Current Members' conduct cannot be properly assessed until that meeting has occurred. This issue is amplified by the fact that Current Members have been denied any form of members' meeting since before the start of these CCAA proceedings.

27. The extraordinary relief sought by the Former Members requires an interlocutory injunction under the *RJR-MacDonald* test, and the Former Members have failed to seek one. The Application should be denied on this basis alone.

ii. The Former Members would not meet the test for an injunction

28. Even if the Former Members had properly sought an injunction, they cannot meet the requirements of the *RJR-MacDonald* test, and the injunction ought to be denied. Among other factors:

(a) there is no risk of irreparable harm; this case is purely about claims to economic entitlements which will not be lost if the meeting is allowed to proceed. If the special meeting proceeds, the Special Resolution passes, and it is subsequently challenged as oppressive on the basis of the full record from the meeting, any potential economic harm to the Former Members can be remedied by withholding a distribution of BCTFC's surplus funds, or by means of appropriate reserves pending resolution of the oppression challenge; and

(b) the balance of convenience favours the Current Members – an injunction would prevent Current Members from ever having the opportunity to formally and collectively consider the interests of Former Members before voting on whether to amend Rule 125.

> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.R. 311 at para 334

29. This Court has denied interlocutory injunctions where an oppression claimant seeks to prevent a special meeting on the basis that:

(a) the Court has broad remedial powers in the circumstances; and

(b) to the extent the claimant may be able to prove the result of the meeting was prejudicial, the Court could craft the appropriate remedy.

Shariff v. VI Fitness Centres Inc., 2016 BCSC 680 at paras 56-57

B. <u>In any event, there is no oppression</u>

30. Even if this Court determines that the Applicants' failure to seek or to satisfy the test for an injunction is not fatal to this Applicant, the test for oppression has not been met.

31. The Current Members agree the proper test for oppression under Section 156 of the *Act* is:

(a) does the evidence support the reasonable expectation asserted by the claimant; and

(b) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

BCE Inc v. 1976 Debentureholders, 2008 SCC 69 at para 68

Potter v. Vancouver East Cooperative Housing Association, 2019 BCSC 871 at para 93

i. The Former Members assert an unreasonable expectation

32. It is unreasonable for a party to expect that rules which may be amended will not change, particularly where the party has voluntarily surrendered their vote.

33. The starting point for determining the content of "reasonable expectations" in the oppression context is the legal framework and organizational structure surrounding the expectations.

Safarik v. Ocean Fisheries Ltd., 1995 CanLII 6269 (BCCA) at para 15

Hui v. Hoa, 2015 BCCA 128 at para 51

34. The British Columbia Court of Appeal has found that where a shareholder voluntarily surrendered her voting control in a company, took no steps to legally protect her interests, and then claimed oppression for the loss of her company income:

(a) "her expectations of continued income from the company were no longer anchored to the corporate structure"; and

(b) the new controlling shareholder could terminate the income stream without violating any reasonable expectations, as her expectations were no longer "reflected by corporate reality".

Hui v. Hoa, 2015 BCCA 128 at paras 51-53

35. Further, this Court has stated that "[w]hile past practice may create reasonable expectations, practices and expectations can change over time and there can be no reasonable expectation that there will not be a change in past practice […]. The expectations that count are those that are reasonable and which are in existence at the time of the challenged decision".

Boffo Family Holdings Ltd. v. Garden Construction Ltd., 2011 BCSC 1246 at para 112

36. Even if Rule 125 entitlements to Former Members are viewed as contractual entitlements as alleged at paragraph 36 of the Application, the *full* terms of the contract are that it may be amended. "[T]he contractual force of conduct permitted by a company's articles of association cannot be ignored when determining if conduct is oppressive".

Walker v. Betts, 2006 BCSC 128 at para 81

37. In the Application, Former Members ignore that Rule 125 may be amended, and instead argue their expectations regarding Rule 125 are reasonable due to:

(a) the fact that Rule 125 has not changed since 2008; and

(b) a broad suggestion that the "nature" of the BCTFC is "premised on mutual understanding and respect".

Application, paras 46-52

38. These arguments must fail:

(a) the proper starting point for the analysis is the legal framework of the BCTFC, which permits amendments to Rule 125, but gives the Former Members no vote on amendments;

(b) this Court stated it is unreasonable to expect that past practices will not change; and

(c) the Former Members' optimistic picture of the BCTFC is undermined by the reality of an organization afflicted by serious longstanding discord between Current Members and Former Members. The BCTFC's own evidence is that in the years leading up to the insolvency, significant discord over BCTFC issues led to "an increase in growers electing to resign their membership and/or send their fruit to competitors".

Safarik v. Ocean Fisheries Ltd., 1995 CanLII 6269 (BCCA) at para 15

Hui v. Hoa, 2015 BCCA 128 at para 51

Boffo Family Holdings Ltd. v. Garden Construction Ltd., 2011 BCSC 1246 at para 112

Pankiw Affidavit #2, para 7

39. The Former Members left the BCTFC voluntarily over the past six years and forfeited their vote on BCTFC issues, knowing the Rules could change, but taking no steps to protect their interests before leaving. They did so while in some level of conflict with the Current Members. In these circumstances, the Former Members cannot reasonably assert an expectation that Rule 125 would not ever change after their departure.

ii. There is no oppressive or unfairly prejudicial conduct

40. Even if the Former Members do have a reasonable expectation that Rule 125 will not change, the Current Members do not propose to improperly violate those expectations with oppressive or unfairly prejudicial conduct.

41. Where a controlling or majority party is required to consider another party's reasonable expectations when exercising its powers, the decision makers are not required to reach any

particular outcome. They must have "appropriate regard" for minority interests, but minority interests are not a veto power.

BCE Inc v. 1976 Debentureholders, 2008 SCC 69 at paras 102-104

Goetz Investments Inc. v. Partners in Motion Pictures Inc., 2015 BCSC 547 at paras 68-69

42. If a "decision is found to have been within the range of reasonable choices [that] could have [been] made in weighing conflicting interests, the court will not go on to determine whether [the] decision was the perfect one".

BCE Inc v. 1976 Debentureholders, 2008 SCC 69 at para 112

43. The Current Members do not propose to amend Rule 125 without considering the interests of Former Members. Rather, the Current Members have requisitioned the Special Meeting with the express purpose to "consider" the amendment before voting, and to pass the amendment if deemed fit. Until now, the Current Members have not had the forum to hold this discussion.

44. The significance of various factors contributing to the BCTFC's insolvency can be debated; however, both the BCTFC and Current Members have deposed that the departure of Former Members was a factor to at least some extent.

45. Given this fact (and other facts or rationales which may be raised or debated at the Special Meeting), it is possible that after fairly considering all required interests, an amendment to Rule 125 is within the range of reasonable outcomes.

46. To find that an amendment to Rule 125 is oppressive or unfairly prejudicial *before* the Current Members have had the opportunity to consider and vote on the amendment would be giving the Former Members the veto power they clearly do not have.

C. <u>The BCTFC is not in contravention of the *Act* or the Rules</u>

47. There is no basis to the argument that the BCTFC is (or is likely to be) in contravention of the *Act* or the Rules. As such, any relief pursuant to Section 157 of the *Act* is unwarranted.

48. The Former Members argue the proposed Special Resolution would contravene Section 194.24 of the *Act*. This is false:

    (a) Section 194.24 is part of a detailed scheme for winding up a cooperative in a liquidation under the *Act*. None of this scheme is applicable to a CCAA; and

    (b) even if Section 194.24 of the Act does apply to the Special Resolution (which is firmly denied), that section restricts a cooperative from "carry[ing] on its business", not from exercising its governance powers.

Act, Sections 194.1 to 194.39

49. The Former Members also argue the *Act* and the Rules would require the BCTFC to refuse to call the Special Meeting because the meeting is requisitioned for an alleged improper purpose. This is false:

    (a) there are no grounds for the BCTFC to refuse to call the meeting. The Special Meeting was called for the legitimate purpose of voting on a proposed amendment to the Rules; and

    (b) the Receiver agreed in its application to initially stay the Special Meeting that the meeting meets the required criteria under the *Act* and the Rules.

Act, Section 151

Pankiw Affidavit #1, Exhibit D, pg 52

Part 6: MATERIAL RELIED ON

1. First Affidavit of Douglas Pankiw filed August 12, 2024;

2. Fourth Affidavit of Amarjit Singh Lalli filed July 15, 2025;

3. Supplemental Report to the Thirteenth Report of the Monitor filed July 14, 2025

4. Fourteenth Report of the Monitor filed August 25, 2025;

5. Initial Order entered August 13, 2024;

6. Order made after application (SGM deferral) entered July 31, 2025;

7. Receivership order entered August 27, 2025; and

8. Such further and other material as counsel may advise and this 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: [insert address]

Dated: September 26, 2025

Mary Buttery, K.C.
Counsel for the Current Members