



No.S1710393
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 *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, C.57, AS AMENDED

AND

IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985,
C. C-44, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
ALL CANADIAN INVESTMENT COPROATION

NOTICE OF APPLICATION

Name of applicant: Hans-Uwe Andresen and Linda Riesterer (the "**Applicants**")

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smithe Street Vancouver, British Columbia on March 26, 2018 at 9:00 a.m. for the orders set out in Part 1 below.

Part 1: ORDER SOUGHT

- 1 Lakes, Whyte LLP be appointed as representative counsel for preferred shareholders of the Petitioner for these proceedings.
- 2 Lakes, Whyte LLP be granted a charge of \$73,396 over the property of the Petitioner in respect of its anticipated fees (the "**Charge**"), to allow for the effective participation of preferred shareholders at the application currently scheduled for April 24, 25 and 26, 2019 (the "**Hearings**");
- 3 The Charge rank in priority over the claims by all other creditors, including secured creditors.
- 4 Upon receipt of funds subject to the Charge, Lakes, Whyte LLP shall refund its retainer of \$10,000 to Hans-Uwe Andresen from the funds subject to the Charge.

- 5 Lakes, Whyte LLP has leave to apply to the court for a charge over additional funds to allow it to take further steps in these proceedings.
- 6 If this court decides that redeemed preferred shareholders are creditors for the purpose of these proceedings, Lakes, Whyte LLP may apply to change its appointment to represent a subset of the preferred shareholders.
- 7 Alternatively, Lakes, Whyte LLP be granted a charge of \$73,396 over the property of the Petitioner in respect of its anticipated fees to allow for the effective participation of Mr. Andresen and Ms. Riesterer in the Hearings.

Part 2: FACTUAL BASIS

- 1 The applicants are preferred shareholders of All Canadian Investment Corporation (“**ACIC**”).
- 2 Mr. Andreson has requested the redemption of his shares. Ms. Riesterer has not requested the redemption of her shares.

Exhibit AA to Affidavit #10 of Donald Bergman

- 3 ACIC is subject to proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.-36, as amended, that were commenced on November 8, 2017 (the “**CCAA Proceedings**”)
- 4 Boale, Wood & Company Ltd. has been appointed as monitor in the CCAA Proceedings (the “**Monitor**”).
- 5 Since the outset of the CCAA proceeding the intended plan of the Petitioner has been to conduct an orderly wind-down of the business in an effort to maximize the recovery to the stakeholders. Until November 2018, Don Bergman was managing the wind-down of the business.

Monitor's Eleventh Report, at paras. 89-90

- 6 As of November 8, 2018, the court has suspended any and all power and authority of Donald Bergman with respect to the Property or the Business, whether by virtue of being an Officer, Director or Management of the Petitioner. At the same time, the Monitor's powers and authority were expanded.

Exhibit F to affidavit #10 of Joanna Wolska

7 Since November 2018 the Monitor has been managing the wind-down of the business pursuant to expanded powers granted to the Monitor in the Order dated November 9, 2018.

Monitor's Eleventh Report, at para. 90

8 The Monitor is of the opinion that the current structure under a CCAA with additional powers granted to the court appointed monitor is the preferable method of winding down the business.

Monitor's Eleventh Report, at paras. 91-94

9 The Monitor estimates full payment of all creditors under both its high and low end recovery estimates, while preferred shareholders will obtain 19% (\$7,168,020) to 50% (\$18,868,020) recovery. These estimates do not include the potential recovery from personal or corporate guarantees.

Monitor's Eleventh Report, at paras. 83-85

10 By June 7, 2018, it was apparent to Mr. Bergman that ACIC would need to look to its guarantees for further recovery.

Affidavit #6 of Donald Bergman sworn June 7, 2018, at paras. 85-86

11 The wind down plan outlined by the Monitor does not describe any apparent efforts to look to its guarantees for further recovery, nor does it include any consideration of investigation into alternative methods for the Company to seek recovery outside of recovering debt from mortgages and loans.

The April 24-26 Application

12 The Petitioner has brought an application to determine whether preferred shareholders that filed redemptions should be considered creditors or equity holders, for the purpose of the CCAA proceedings.

Exhibit A to Affidavit #1 of Joanna Wolska, Part 1

13 The total capital for all preferred shares in ACIC is \$37,277,000 owned by 627 preferred shareholders. ACIC has received requests for the redemption of preferred shares totalling \$27,587,500. Of that amount, \$1,380,500 worth of preferred shares have been redeemed, leaving \$26,207,000 in preferred shares with outstanding redemption notices.

Affidavit #10 of Donald Bergman, at paragraph 10

Exhibit AA to Affidavit #10 of Donald Bergman

14 If redeemed shareholders are determined to be creditors, the Monitor will need to pursue additional sources for recovery in order to satisfy the debts of all creditors of the Petitioner.

15 The Petitioner's application does not outline any reason why redeemed preferred shareholders might be creditors.

16 To date, the Monitor has not filed any response indicating that it has turned its mind to the issue of whether or not redeemed shareholders should be considered creditors of the Petitioner.

17 The Monitor has a duty to act impartially for the benefit of all stakeholders.

Preferred Shareholders in these proceedings

18 The Preferred Shareholders are a financially vulnerable group of 627 shareholders who have no access to a collective \$37M investment. This group currently anticipates recovering 19-50% of this investment.

19 There is a significant interest from within this group for there to be active engagement on behalf of the preferred shareholders to pursue recovery of investment more vigorously than the Monitor's approach.

20 Following an outreach by Mr. Andresen and Gerald Parfeniuk, 341 preferred shareholders representing over \$24 million invested in ACIC preferred shares indicated to Mr. Andresen and Mr. Parfeniuk that they were interested in pro-actively pursuing recovery from their investments.

21 Despite this clear interest, there are numerous examples of these shareholders describing their difficulty or hesitation to bear cost directly retaining counsel.

22 There is no risk that any secured creditor's recovery will be impacted by the orders sought.

23 Unless the redeemed Preferred Shareholders are determined to be creditors, there is no risk that any creditor will be affected by this application.

Part 3: LEGAL BASIS

Representation Order

24 Section 11 of the CCAA 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.

25 The Court can make an order under section 11 of the CCAA to make a representation order under Rule 20-3 of the *Supreme Court Civil Rules*.

Nortel Networks Corp. (Re), [2009] O.J. No. 2166, at paras. 10-16

26 The factors that have been considered by the courts in granting the appointment of representatives in a CCAA case 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

Urbancorp Inc. (Re), 2016 ONSC 5426, at para. 11

27 The issue of whether to appoint a representative counsel is one of equity, there can be no hard and fast rules governing any particular case, but the above factors need be considered.

Urbancorp Inc. (Re), 2016 ONSC 5426, at para. 12

- 28 Vulnerability is a subjective factor that is relevant to a representation and payment order, and cannot be reduced to a consideration of impecuniosity.

Arrangement relatif à Les Investissements Hexagone inc., 2016 QCCS 6792

Funding for representative counsel and its related charge on ACIC's estate

- 29 This is an application pursuant to section 11.52(1)(c) of the CCAA for an order that a charge be placed on the petitioner's assets to secure payment of the legal fees and disbursements required to ensure the effective participation by the applicants in these proceedings.

- 30 Section 11.52 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

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(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.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

- 31 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

- 32 Factors to consider in approving an administrative 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.

Canwest Publishing Inc., 2010 ONSC 222, at para. 54.

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

- 33 Before incurring, or continuing to incur fees and expenses to be claimed from a debtor in a CCAA restructuring, the interested person must first take appropriate steps to set up with the monitor and the debtor the rules applicable to the “effective participation” of its experts, subject to the Court’s approval. Such rules must take into consideration the following factors:
- a. a court officer is already involved, namely the court appointed monitor and, as such, he is the “eyes and ears” of the Court, and he must, at all times, remain independent and act impartially for the benefit of all stakeholders;
 - b. therefore, services already rendered or to be rendered by the monitor must not be duplicated by the interested person’s financial, legal or other experts, at least, not for the debtor’s account;
 - c. an “effective participation” has to be pro-active and constructive, never losing sight of the global picture of the restructuring and the interests of all stakeholders;
 - d. an “effective participation” shall not include challenging the merits per se of the restructuring proceedings; the debtor need not fund the opponent of its restructuring;
 - e. “time is of the essence”: the monitor must be in a position to assess appropriately, and budget for, the fees and expenses to be incurred in

- a restructuring; therefore, interested persons claiming the right to be indemnified or secured for their financial, legal or other experts' "effective participation" must act quickly to obtain confirmation of said right and set up the applicable rules;
- f. once the rules are established by the claimant, the monitor and the debtor, they must be authorized by the Court, including whether or not fees and expenses already incurred ought to be included; and
- g. as authorizing the payment of fees and expenses before any distribution to a debtor's stakeholders is tantamount to granting prior ranking security, the Court has endorsed Judge Gascon's comments on the principles governing the granting of a CCAA administration charge in the matter of *Mecachrome International Inc.* :

« **LA CHARGE D'ADMINISTRATION**

[...]

[77] Les critères déjà énumérés confirment qu'une charge prioritaire établie en vertu de la LACC se veut exceptionnelle. Le Tribunal se doit de l'accorder avec parcimonie, en la limitant seulement à ce qui est essentiel au succès d'une restructuration.

[78] Dans cette perspective, le Tribunal est d'avis qu'à moins de circonstances particulières bien appuyées par une preuve convaincante, une charge d'administration ne devrait pas inclure des conseillers juridiques ou financiers autres que ceux du contrôleur et des débitrices.

[...]

[80] Rien n'explique en quoi leur demande est essentielle au succès de la restructuration envisagée. Rien n'établit que leurs interventions placent les intérêts des Débitrices Canadiennes ou le succès de la restructuration avant la protection de leurs clients respectifs.

[...]

[89] L'objectif de la Charge d'Administration n'est pas de protéger le maximum de professionnels possible. C'est plutôt de mettre en place une charge qui facilite le but d'en arriver à un arrangement au meilleur coût possible pour les créanciers qui en feront, en dernière analyse, les frais.

[90] Que chacun des acteurs retienne ses conseillers juridiques ou financiers est légitime. Que tous le fassent aux frais des Débitrices Canadiennes, et partant des créanciers les moins protégés, est, de l'avis du Tribunal, exagéré. »

(the Court underlines)

Homburg Invest Inc. (Arrangement relatif à), 2014 QCCS 980, at paras. 99-102

Arrangement relatif à Les Investissements Hexagone Inc., 2016 QCCS 6792

Analysis - Representation Order

Vulnerability and resources of the group sought to be represented:

- 34 The Preferred Shareholders are a financially vulnerable group of 627 shareholders who have no access to a collective \$37M investment. This group currently anticipates recovering 19-50% of this investment.
- 35 There are numerous references by these members throughout the supporting affidavits about how they would have difficulty bearing the cost of legal counsel, were afraid of pursuing recovery due to the cost of litigation, or were unwilling to incur legal fees.

Affidavit #1 of Gerald Parfeniuk at paras. 4 and 15-17;

Affidavit #1 of Hans-Uwe Andresen, at paras. 4, 22-24

Exhibit C to affidavit #1 of H. Andresen, at pp. 50, 65-66, 68-69, 81, 92, 121, 129-130, 133, 139, 169, 195, 220, 267, 272, 281, 300, 313, 321, and 346.

Benefit to the companies under CCAA protection:

- 36 ACIC is in the process of winding up, and all creditors will obtain a full recovery. The only remaining issue is the extent to which the preferred shareholders can recover on their shares.
- 37 There is no benefit or cost to ACIC regarding having representative counsel appointed for preferred shareholders.

Social benefit to be derived from representation of the group:

- 38 The preferred shareholders appear to largely be elderly individuals who purchased the preferred shares as part of their retirement planning. These individuals have stopped receiving dividends they expected, and stand to lose a substantial portion of the principal of their investment. There are numerous examples of this throughout the materials.

Exhibit C to affidavit #1 of H. Andresen, at pp. 85, 109, 214, 236, 254, 285, 292

Facilitation of the administration of the proceedings and efficiency:

39 To date, no preferred shareholders have been involved with legal counsel in these proceedings. However, there have been numerous self-represented preferred shareholders in attendance at hearings, making submissions to the court.

Avoidance of a multiplicity of legal retainers;

40 There are 627 preferred shareholders, of whom, to date, 340 have expressed an interest in being active in actively pursuing recovery. If a representative is not appointed, then either interested preferred shareholders will not be represented, or they will need to enter into a complex and impractical joint retainer arrangement which will be administratively difficult for all parties involved.

Balance of convenience and whether it is fair and just

41 The preferred shareholders stand to be the primary losers in the winding up of the Petitioner. Based on the Monitor's most recent estimates, there is a \$7M safety cushion before any creditors are impacted, and there needs to be \$28M in unanticipated recovery above the high end estimate before common shareholders will obtain any recovery.

42 It is fair and just that these primary stakeholders be provided adequate representation in these proceedings.

No similar representative counsel has been appointed

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

Position of other stakeholders and the Monitor

44 To date, the applicant is unaware of the position of other stakeholders and the Monitor regarding the involvement of representative counsel on behalf of the preferred shareholders.

Analysis - Funding for representative counsel and its related charge on ACIC's estate

Size and complexity of the businesses being restructure

45 ACIC appears to have involved a complex financial arrangement which, to date, has been in the process of winding down for 16 months and remains in the process of pursuing recovery from mortgages.

The proposed role of the beneficiaries of the charge

- 46 The primary proposed role of the beneficiaries of the charge is to represent the preferred shareholders for the Creditor/Equity Application.

No unwanted duplication of roles

- 47 While the Monitor is a representative of the Court and has an obligation to all stakeholders, it has not engaged with the application on behalf parties who might oppose the position taken by the Petitioner.

Quantum of the proposed charge is fair and reasonable

- 48 Given the complexity of these proceedings, which includes thousands of pages of affidavit evidence already, the proposed charge is fair and reasonable.
- 49 Counsel for the applicants have provided a reasonable estimate for the time to review prior materials in these proceedings, advise their clients, and prepare for and attend the Creditor/Equity Application.
- 50 From November 27, 2017 to December 31, 2018, counsel for the Monitor have incurred \$90,189 and counsel for the Petitioner have incurred \$441,179 in legal fees and disbursements which have been paid from ACIC's assets.

Monitor's Eleventh Report, at para. 9

Position of the secured creditors likely to be affected by the charge

- 51 Based on the most recent Monitor's report, no secured creditor is likely to be affected by the proposed charge.
- 52 Based on the Petitioner's application materials for the Creditor/Equity Application, it appears likely that any charge will impact only the interest of preferred shareholders.

Position of the Monitor

- 53 To date, the Monitor has not responded to the applicant's request for the proposed charge.

Part 4: MATERIAL TO BE RELIED ON

- 1 Affidavit #1 of Hans-Uwe Andresen dated March 14, 2019
- 2 Affidavit #1 of Gerald Basil Parfenuik dated March 14, 2019

- 3 Affidavit #1 of Joanna Wolska dated March 14, 2019
- 4 Affidavit #6 of Donald Bergman dated June 7, 2018 (body only)
- 5 Affidavit #10 of Donald Bergman dated January 24, 2019 (body and Exhibits D and AA only)
- 6 Monitor's Eleventh Report to the Court dated January 21, 2019

The applicant(s) estimate(s) that the application will take 60 minutes.

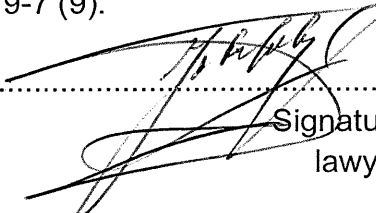
This matter is within the jurisdiction of a master.

This matter is not within the jurisdiction of a master.

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).

Date: March 15, 2019

.....

Signature of John D. Whyte
lawyer for the Applicants

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/mmm/yyyy].....

.....
Signature of [] Judge [] Master

Appendix

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

- 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