



**IN THE SUPREME COURT OF BRITISH COLUMBIA**

ALL CANADIAN INVESTMENT CORPORATION

**PLAINTIFF**

AND:

BDO CANADA LLP

**DEFENDANT**

AND:

DONALD BERGMAN

**THIRD PARTY**

**APPLICATION RESPONSE**

**Application response of:** the Plaintiff, All Canadian Investment Corporation ("ACIC") and the Third Party, Donald Bergman, (the "application respondents")

THIS IS A RESPONSE TO the notice of application of the Defendant, BDO Canada LLP ("BDO") filed 20 July 2018.

**Part 1: ORDERS CONSENTED TO**

The application respondents consent 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 respondents oppose the granting of the orders set out in paragraphs 1 through 5 of Part 1 of the notice of application.

**Part 3: ORDERS ON WHICH NO POSITION IS TAKEN**

The application respondents take 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**

### **Preliminary**

1. The Notice of Application is contrary to Rule 8-1(4) in that it exceeds ten pages in length.
2. Although the Notice of Application names the Third Party, Donald Bergman, no order sought is directed to Mr. Bergman.

### **Relevant Facts**

3. On March 1, 2018, the Plaintiff filed a Notice of Civil Claim against the Defendant, BDO Canada LLP.
4. The Plaintiff is a mortgage investment corporation pursuant to the provisions of s. 130.1 of ***Income Tax Act***. It raises, from time to time, funds for members of the investment public and issues preferred shares.
5. Preferred shares issued by the Plaintiff are an eligible investment for retirement registered savings plan or registered retirement investment fund.
6. Pursuant to Part 7 of the ***Business Corporations Act***, SBC 2002, c. 57, the Plaintiff is required to have an auditor for its financial statements.
7. The Defendant was the auditor for the Plaintiff for the financial statements of the Plaintiff for the years ending September 30, 2009 through 2014.
8. The Defendant was engaged to perform the independent audit for the Plaintiff's 2015 Financial Statements and was to deliver its independent audit report on or before March 30, 2016.
9. On March 29, 2016, without notice or without warning, the Defendant wrongly resigned from its role as auditor effective immediately.
10. The lack of audited financial statements caused shareholders and security holders in the Plaintiff to lose faith in the viability of the Plaintiff and to request the redemption of their investments.
11. The Defendant knew at the time it resigned as auditor on March 29, 2016, the Plaintiff was required to file its 2015 tax return with the Canada Revenue Agency by March 31, 2015, only two days later.
12. The Plaintiff was unable to file its 2015 tax return on time as it could not file audited financial statements.

13. The Defendant knew that by reason of its resignation, the Plaintiff would no longer be able to raise capital as audited financial statements were essential to that capability.
14. The Plaintiff alleges that by its act of resignation, the Defendant caused the insolvency of the Plaintiff.
15. As a result, the Plaintiff applied for and was granted creditor protection pursuant to the ***Companies' Creditor Arrangement Act***.
16. The Third Party, Donald Bergman, is a director of the Plaintiff, but is not a direct beneficiary of the Plaintiff. Those persons having the beneficial interest in the Plaintiff are members of the investment public who have invested in the preferred shares of the Plaintiff.

## **Part 5: LEGAL BASIS**

### **Application to Strike**

1. The Defendant does not enumerate upon which basis it is applying to strike the proceedings pursuant to Rule 9-5. It appears to be proceeding under subrule 9-5(1)(a). As such, no evidence is admissible under such an application.
2. The test for striking pleadings is whether the pleadings as they stand or as may be amended do not disclose a cause of action. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial.

(see for example: ***Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)***, 2015 BCCA 163 CanLII)
3. There is a high onus to be met before an action will be struck.
4. The Defendant contends that the Plaintiff was required to obtain the consent of the Petitioner (the Plaintiff) or the monitor before proceeding with this action.
5. The Plaintiff disputes that it was required to obtain permission of the Monitor to initiate this lawsuit.
6. Even if the position of the Defendant is correct that consent of the Monitor was to be obtained, that is a curable defect and is not a fatal defect.
7. Mr. Bergman has deposed that the Monitor was aware of the intention to file the lawsuit before it was filed. The Monitor did not object.

8. Even if the Plaintiff was required to obtain the consent of the Monitor and has not yet done so, such a defect is an irregularity and does not render the proceeding a nullity.

(see for example: ***South Coast British Columbia Transportation Authority v. BMT Fleet Technology Ltd.***, 2017 BCSC 1683 (CanLII), ***Larson Estate v. Schaber***, 1995 CanLII 3358) and ***Hayes Forest Services Ltd. v. Krawczyk***, 2005 BCCA 17 (CanLII)

### **Security for Costs**

9. Alternatively, the Defendant seeks an order for security for costs.
10. The Plaintiff does not contest the fact that ACIC is insolvent.
11. Indeed, the Plaintiff claims, both in this action and in the CCAA proceeding, that it is insolvent as the direct result of the action of the Defendant that it was required to seek creditor protection.
12. The Plaintiff submits that this court should exercise its discretion and decline to order that the Plaintiff be required to post security for costs.
13. Decided case authority provides guidance on some of the factors that a court may consider on an application for security for costs.

(see for example: ***Kropp v. Swanset Bay Golf Course Ltd. (1997)***, 29 BCLR (3d) 252 and ***Bronson v. Hewitt***, 2007 BCSC 1751)

14. While the courts have stated on occasion that corporate plaintiffs, because of their limited liability status do not enjoy the same consideration as individual plaintiffs, the principle remains that impecuniosity should not deprive a party access to the courts.
15. This is not a situation where the court needs to concern itself with protecting against "litigious abuses by artificial persons manipulated by natural persons".

(see for example: para. 22, ***Bronson v. Hewitt***, 2007 BCSC 1751)

16. If the action is successful, the beneficiaries of any award will be the preferred shareholders of ACIC who are members of the investing public and not Mr. Bergman.
17. An order for security of costs is a discretionary order. Factors a court will consider are:

- i) the court's complete discretion whether to order security;
  - ii) the possibility or probability that the Plaintiff will be deterred from pursuing its claim;
  - iii) the balance of injustices between use of security to stifle the Plaintiff's legitimate claim and the use of impecuniosity as a means of putting unfair pressure on the Defendant. As part of this balancing exercise, the court considers whether it is the Defendant's conduct that rendered the corporate plaintiff impecunious;
  - iv) a consideration of the merits of the action which the court should not go into in detail unless success or failure looks obvious;
  - v) the amount of security to be ordered, which can be up to the full amount claimed as long as it is more than nominal;
  - vi) if the court refuses to order security because it would unfairly stifle a valid claim, it must be considered that it is probable that the claim will be stifled;
  - vii) the lateness of the application for security, especially where the Plaintiff has been lulled into a false sense of safety.
18. In the circumstances of this case, factor (vii) does not apply.
19. An order for security for costs is an order that may be made. It does not follow that it must be made if the party seeking costs demonstrates that the other side will be unable to pay costs if unsuccessful.
20. In ***Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)***, 2016 BCSC 500 CanLII, the court considered these factors and declined to order security for costs. In dismissing the application for security for costs, Hinkson C.J.S.C. stated that he was satisfied that the Plaintiff's claim would be stifled if it was ordered to pay security for costs.
21. In turning to the injustice of stifling a legitimate claim against the use of impecuniosity as a means of putting unfair pressure on the Defendant, the court considered the nature of the claim brought by the Plaintiff against ***Canada***, Mr. Justice Hinkson stated:
- I am unable to resolve the issue at this stage, but I am far from satisfied that the Plaintiff's position on this point is not meritorious.
22. In terms of the merits of the claim, the court considered whether it was plain and obvious that the Defendant did not owe a duty to the Plaintiff.

23. The test is whether the Plaintiff's claim is doomed to failure and in considering the allegations the court concluded that it was not doomed to failure.

24. At paragraph 53 of the Reasons for Judgment, Chief Justice Hinkson stated:

The Plaintiff's claim is that Canada is responsible for its impecuniosity because it failed to fairly consider the Plaintiff's application for an exception under the Act within a reasonable time, thus rendering it incapable of pursuing its planned development by the time that the qualified exemption was granted. I have found that this claim is not obviously without merit. If the Plaintiff's claims can be made out, any order for security for costs will enable Canada to avoid facing the claim on its merits.

25. The application for security for costs was dismissed.

26. The Defendant's conduct is the very subject matter of the action and upon which the Plaintiff seeks damages.

27. Furthermore, it matters little whether or not the Defendant's acts are the single cause of the Plaintiff's loss so long as the Defendant's actions are a cause of the harm.

(see for example: **Athey v. Leonati** [1996] 3 SCR 458, paras. 17-20)

28. In the instant case, if security is ordered it could not be posted.

29. The Plaintiff is insolvent.

30. An order for security for costs will stifle the Plaintiff's claim. In such circumstances the court should decline to order security for costs.

(See for example: **Gray v. Powerassist Technologies**, 2001 BCSC 1208 (CanLII) and **D'Vine v. Henderson**, 2003 BCSC 1473 (Can LII))

31. The Defendant has demonstrated that the Plaintiff has no assets. It will not be able to post security if ordered to do so.

32. If the court orders security for costs as sought by the Defendant, the Plaintiff would be unable to pursue this cause of action.

33. The only basis on which the Plaintiff is able to pursue his claim is on the basis of a contingency agreement with its counsel.

#### **Discretion as to Amount**

34. The court retains an inherent discretion as to the amount to be posted as security.
35. In *Apex Mountain Resort Ltd. v. British Columbia*, 1998 CanLII 3921, the defendant sought security for costs in an amount ranging between \$390,000 and \$540,000.
36. The court acknowledged it was not to engage in a dollar for dollar exercise and should also apply an arbitrary discount for the possibility of settlement. Initially, the court ordered the plaintiff to post security for costs in the amount of \$100,000.
37. It is to be noted that before the order was entered, Mr. Justice Bauman again reconsidered the quantum of costs to be ordered as security. On January 22, 1999, Mr. Justice Bauman concluded the claim would be stifled if the current order for security for costs remained in place and reduced the amount of security to \$10,000.

#### **Summary**

38. In all of the circumstances, it is neither just nor equitable to order that the Plaintiff post security for costs. An order for security for costs will unfairly stifle a valid claim and mean the Defendant wins by default.

#### **Part 6: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Donald Bergman.
2. Affidavit #1 of John McEown.
3. Notice of Civil Claim.
4. Petition in Supreme Court Registry Action No. S 1710393.

The applicant respondent estimates that the application will take 2 hours

The application respondent has 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 respondent's ADDRESS FOR SERVICE is:

SHIELDS HARNEY  
Litigation Counsel  
Suite 490 - 1177 West Hastings Street  
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Date: August 3, 2018

  
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Alastair Wade  
Counsel for Application Respondents

This APPLICATION RESPONSE is given by Alastair Wade of the firm of Shields Harney, Solicitors for the respondent, whose place of business and address for service is 490 - 1177 West Hastings Street, Vancouver, B.C. V6E 2K3 Telephone (604) 682-7770; Fax (604) 682-1822.