



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 CORPORATION

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**APPLICATION RESPONSE**

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Application response of: **Those preferred shareholders of All Canadian Investment Corporation (the "Company") who requested the redemption of their shares in the Company at a time when reasonable grounds did not exist to believe that the Company was insolvent at the time of the request, or that honoring the request would cause the Company to become insolvent (the "Redeeming Shareholders")**

THIS IS A RESPONSE TO the notice of application of **the Company** filed **January 25, 2019**.

**Part 1: ORDERS CONSENTED TO**

The application respondent consents to the granting of the orders set out in Part 1 of the notice of application: **NIL**.

**Part 2: ORDERS OPPOSED**

The application respondent opposes the granting of the orders set out in **paragraph 1(a) and (b)** 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 1(c) of Part 1 of the notice of application.

### Part 4: FACTUAL BASIS

1. For the purposes of this application, the Redeeming Shareholders do not dispute the Factual Basis of this application as set out by the Company, but seek to supplement that Factual Basis with the material below.
2. While paragraph 27.4 of the Company Articles (the "**Articles**") invested an absolute discretion in the director of the Company (the "**Director**") to honour or not to honour a request from a preferred shareholder to redeem his or her shares, paragraph 27.6 of the Articles permits the Director to "clarify" the basis upon which the Company would deal with requests from preferred shareholders for redemption of their shares:

*"The Directors may at any time clarify the rights and restrictions of the Preferred Shares that are set out in this Part 27 or elsewhere in these Articles."*

Affidavit #10 of Donald Bergman, Exhibit "B", p. 52.

3. The Articles specify no means by which the "Directors" must "clarify the rights and restrictions of the Preferred Shares".
4. Beginning no earlier than 2006, and from time to time thereafter, the Company sent communications to the public and its preferred shareholders which state, *inter alia*, that the Company *would* honour a preferred shareholder's request for redemption by the end of the quarter following receipt of the request.
  - a. *"Should you wish to withdraw your investment sum you are entitled to do so, once per year by paying a 2% redemption fee."*

Affidavit #2 of H. Andresen, Exhibit "B", at p.10

- b. *"Investors who may wish to make a redemption will therefore be able to do so in a more frequent and timely manner. President Don Bergman says ACIC is pleased to provide its investors with this greater latitude in how they manage their portfolios."*

*"Each investment has its own characteristics, and there are typically trade-offs," Bergman explains. "Until now, one of the trade-offs for the secure and stable income-generation of an ACIC investment was limited liquidity. But that's much less of a consideration with the new policy."*

Affidavit #2 of H. Andresen, Exhibit "C", at p.21

- c. *"Preferred shares can be redeemed quarterly, and payment will be received during the quarter following the one in which the shareholder provided notification"*

Affidavit #2 of H. Andresen, Exhibits "D", at p.23

- d. *"ACIC shares can be redeemed quarterly, with payment provided during the quarter following the one in which notification was provided."*

Affidavit #2 of H. Andresen, Exhibit "E", at p.25

5. In July 2010, the Company advised investors that:

*"The Partnership has introduced a major change this year by adding an annual liquidity clause to the offering. Instead of five years being the holding period investors now have the option to redeem their units annually. This change applies to every existing investor as well as all future investors. Investors will be required to provide written notice to the Partnership of their intent to redeem their units prior to December 31 each year and a 2% redemption fee will apply to all redemptions. This liquidity feature adds a benefit to our existing investors while helping the Partnership attract more working capital."*

Affidavit #2 of H. Andresen, Exhibit "F", at p.28

6. In December 2015, Mr. Bergman, the sole director of the Company (the "**Director**") wrote a preferred shareholder, Mr. Andresen, to state that:

*"I acknowledge your redemption request and your request will be processed along with others when the company has sufficient capital to do so."*

Affidavit #2 of H. Andresen, Exhibit "L", at p.37

7. None of these communications made any reference to the exercise of any discretion by the Director, or rejected a redemption request.

8. The earliest outstanding redemption requests date back to 2013.

Affidavit #10 of D. Bergman, Exhibit "AA", at pp.1032-1043

- a. In 2013, the Company paid \$1,778,585 in dividends.

Affidavit #10 of D. Bergman, Exhibit "W", at p.906

- b. In 2014, the Company paid \$2,310,588 in dividends.

Affidavit #10 of D. Bergman, Exhibit "Y", at p.1015

- c. In 2015, the Company paid \$1,239,669 in dividends.

Affidavit #10 of D. Bergman, Exhibit "CC", at p.1070

d. In 2016, the Company paid \$749,280 in dividends.

Affidavit #10 of D. Bergman, Exhibit "DD", at p.1088

e. In 2017, the Company did not pay any dividends.

Affidavit #10 of D. Bergman, Exhibit "EE", at p.1105

9. The reason given by the Company for delay in paying out redemption requests was that redemptions would not occur until dividends were paid.

Affidavit #2 of H. Andresen, Exhibit "I", at p.31

Affidavit #2 of H. Andresen, Exhibit "O", at p.41

10. On at least one occasion, the Director suggested that the Company relied on new capital from investors to provide for liquidity to preferred shareholders.

Affidavit #2 of H. Andresen, Exhibit "J", at p.33

11. On at least one occasion, the Director advised a preferred shareholder that it would provide a redemption and that they had been put on a "priority list" for the redemption of his shares.

Affidavit #2 of H. Andresen, Exhibit "N", at p.39

## Part 5: LEGAL BASIS

### Claims under CCAA proceedings

12. "Claims" are defined under s.2 of the **Companies' Creditors Arrangement Act**, RSC 1985, c. C-36 (the "**CCAA**"), as follows:

*claim means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the **Bankruptcy and Insolvency Act**.*

13. A "claim provable" is defined under s.2 and s.121 of the **Bankruptcy and Insolvency Act**, RSC 1985, c. B-3 (the "**BIA**"), as follows:

*2 In this Act,*

*[...]*

*claim provable in bankruptcy, provable claim or claim provable includes any claim or liability provable in proceedings under this Act by a creditor;  
(réclamation prouvable en matière de faillite ou réclamation prouvable)  
creditor means a person having a claim provable as a claim under this Act;  
(créancier)*

*[...]*

*creditor means a person having a claim provable as a claim under this Act;*

### **Claims Provable**

*121 (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.*

### **Contingent and unliquidated claims**

*(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.*

### **Debts payable at a future time**

*(3) A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.*

*(4) [...]*

### **Clarification:**

14. The ability of a Preferred Shareholder to redeem his or her shares is one of the rights of the preferred shares set out in Part 27 of the Articles. The requirement that the Preferred Shareholder be able to redeem his or her shares only if the Directors exercise their discretion to redeem them is a restriction of the preferred shares set out in Part 27 of the Articles.
15. Article 27.6 therefore applies.
16. The Company's frequent, unsolicited representations to its shareholders that they could expect to receive the redemption of their shares within the following quarter constituted a clarification of both the rights of Preferred Shareholders and a restriction upon the ability of those Preferred Shareholders to redeem their shares.

### **Amendment of the Contract:**

17. It is a well-established legal principle that a contract can be modified by promises or agreements that appear outside the four corners of the main contract document. If these promises are sufficiently clear and serious, they are not mere representations

but are terms that are incorporated into the contract between the parties.

18. Promotional materials can form the basis of contractual rights if the promises contained in those materials are an undertaking by one party that is meant to be taken seriously by the other party. This has been the case since ***Carlill v Carbolic Smoke Ball Company***, [1892] EWCA Civ 1.

19. ***Murray v. Sperry Rand Corporation et al.***, 1979 CanLII 2133 (ONSC) is a leading Canadian case on this issue. In ***Murray***, the plaintiff farmer entered into a contract for the purchase of a forage harvester after receiving promotional materials that set out the tonnage of crop that the harvester could process in an hour. The court found that statements about the efficiency of the harvester contained in the promotional materials had become incorporated into the contract as warranties, as they were clear statements that were meant to be taken seriously by purchasers. The manufacturer and distributor were therefore liable for the breach of those warranties.

20. There are other cases in which the court has determined that a party is bound by the promises made in promotional materials distributed to the other party. These promises are often treated as collateral contracts where the parties intend the term to be incorporated into the contract and the promise is supported by consideration.

***Greenough v. Maple Ridge Media Inc.***, 2018 ONSC 660

***Hallmark Pool Corporation v. Storey***, 1983 CanLII 2796 (NB CA)

21. Traditionally, the Court has dealt with enforcing contractual promises arising from promotional material as a collateral contract requiring consideration. Thus, as in ***Murray***, the promises set out in the promotional materials are a collateral contract, the consideration for which was the purchase of the harvester under the main contract.

22. In light of ***Rosas v. Toca***, 2018 BCCA 191 and ***NAV Canada v. Greater Fredericton Airport Authority Inc.***, 2008 NBCA 28, which provide that the parties to a contract do not need to provide further consideration to support modifications to a contract, it is no longer necessary or appropriate to look at the promises contained in promotional materials as collateral contracts. The appropriate approach is to consider whether the representations contained in the promotional materials constituted a variation of the contract.

23. To approach this as a matter of collateral contract would require the court to undertake what was criticized as a “fictional attempt to find consideration in the

sense of a bargained exchange” where a promisee acted in good faith and to their detriment in relying on the enforceability of the contractual modification.

***NAV Canada v. Greater Fredericton Airport Authority Inc.***, 2008 NBCA 28, at para. 29

24. We note that in this case, if consideration were necessary, the preferred shareholders provided consideration by refraining from asking for redemption of shares, and by making investments in ACIC in response to promotional material.

**Result of clarification of rights or amendment of the contract:**

25. Once the Director no longer had the discretion to honour or not to honour a preferred shareholder’s redemption request, preferred shareholders had a contractual right to redeem their shares.

26. If a preferred shareholder has a contractual right to redeem his or her shares, then his or her claim is a claim provable in bankruptcy,

27. If a preferred shareholder has a claim against the Company provable in bankruptcy, then he or she is a claimant in debt and is a creditor of the Company:

***Fallin v. OFM Holdings Ltd.***, 2014 BCSC 1777 at para. 17, 21 and 26.

**Effect of this determination upon the rights of the Redeeming Shareholders:**

28. This determination does not itself decide the Application.

29. The Company has anticipated the above argument at paragraph 50 of its Notice of Application, but argues that a shareholder will not have a claim in debt against the Company *if* that claim conflicts with the Company’s statutory obligations, in this case, not to redeem shares when it is insolvent or the redemption will render it insolvent.

30. Under s.79 of the ***Business Corporations Act***, SBC 2002, c.57 (the “***BCA***”), a company may not redeem shares while insolvent:

**Redemption prohibited when insolvent**

*79 (1) A company must not make a payment or provide any other consideration to redeem any of its shares if there are reasonable grounds for believing that*

*(a) the company is insolvent, or*

*(b) making the payment or providing the consideration would render the company insolvent.*

*(2) On the application of a director of a company, the court may declare whether a redemption of shares by the company would contravene subsection (1).*

*(3) A redemption of shares is not invalid merely because it is in contravention of subsection (1).*

31. Insolvency, in the context of *BCBCA* is defined under s.1(1) as follows:

**"insolvent"**, except in section 313,

*(a) in relation to a company other than a financial institution, means unable to pay the company's debts as they become due in the ordinary course of its business, or*

*(b) in relation to a financial institution, includes unable to pay the company's debts as they become due in the ordinary course of its business;*

32. In that regard the decision of this Court in *Fallin*<sup>1</sup> stands for the propositions that:

- a. s. 79 of the *BCA* provides that a company cannot honour a preferred shareholder's redemption request at a time when there are reasonable grounds for the director(s) to believe that the company is already insolvent, or that honouring the request will cause it to become insolvent.
- b. If a company is legally unable to honour a request for redemption at the time at which it is made, then a preferred shareholder has no right to *enforce* payment, the company's promise to pay is not one that can be proved as a claim, and the promisee (the preferred shareholder seeking to redeem) is not a creditor.

33. The question of whether any particular preferred shareholder can *enforce* his or her contractual right to redeem therefore depends on whether the Director had reasonable grounds to believe that the Company was insolvent, or that the requested payment would render it insolvent, at the time of the request for redemption. This question will need to be decided on the appropriate evidence at a subsequent hearing.

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

1. Affidavit #2 of Hans-Uwe Andresen, sworn April 10, 2019.
2. Those materials relied upon by the Petitioner.

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<sup>1</sup> A decision cited by the Company at paragraph 51 of its Notice of Application.

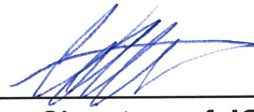


The application respondents estimate that the application will take **1 day**.

[ X ] The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Date: **April 10, 2019**.

For



Signature of **JOHN D. WHYTE**

[ ] application respondent

[ X ] lawyer for application respondent,  
**the Redeeming Shareholders**