



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**

APPLICATION RESPONSE

Application response of: Those preferred shareholders of All Canadian Investment Corporation (the "Company") who did not request redemption of their shares in the Company (the "application respondents" or the "Non-Redeeming Shareholders")

THIS IS A RESPONSE TO the Notice of Application of the Petitioner filed 25/01/2019.

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: Paragraph 1(a), (b), and (c).

Part 2: ORDERS OPPOSED

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

Part 4: FACTUAL BASIS

1. The application respondents agree with the facts set out in Part 2: Factual Basis of the notice of application.
2. The application respondents take note of the additional facts contained in the Application Response of the Redeeming Shareholders filed April 10, 2019 (the "Redeeming Shareholders' Response") and will refer to such facts as required.
3. Terms that are not defined herein shall otherwise have the meaning as set out in the notice of application.
4. The applicant respondents wish to emphasize some of the facts contained in the Factual Bases of the notice of application and the Redeeming Shareholders' Response.

Terms of Redemption of Preferred Shares

5. All preferred shareholders bought preferred shares from the Company following receipt of an Offering Memorandum setting out terms, including terms of redemption, of the preferred share offerings.
6. The various amended and restated Offering Memoranda (collectively, the "Offering Memoranda") state the terms and conditions of the process of redemption of preferred shares. All Offering Memoranda refer to restrictions on redemption, including the restriction of insolvency, the requirement to maintain a certain level of cash reserves, the limit on the amount of preferred shares the Company may redeem in any fiscal year and the maintenance requirements of its asset portfolio.

Affidavit #10 of Donald Bergman made on January 24, 2019, Exhibits F to Y.

7. The Offering Memoranda state a redemption request is subject to the exercise of director's discretion. They also advise, in bold print, that the adoption of the Company's redemption policy does not fetter the discretion of the directors to amend or cancel such policy in whole or in part, to adopt an alternative policy regarding redemption of shares or to refuse to consent to a redemption.
8. The Offering Memoranda also refer to a Policy (the "Policy") adopted by the Company regulating the redemption of preferred shares. They state that a copy of the Policy is available from the Company on request. The Policy sets out restrictions on redemption of preferred shares including that the Company's director must consent to redemption pursuant to terms and conditions set by the director in his sole discretion.
9. All preferred shares were issued by the Company pursuant to its Articles. Section 27.4 sets out the terms of redemption of preferred shares, including that the directors in their sole discretion must consent to redemption.

Part 5: LEGAL BASIS

(A) Common Law Presumption of Equality

1. There is a presumption at common law (referred to by L.C.B. Gower as the "initial presumption") that there is equality among shareholders, analogous to the presumption of equality among partners in a partnership.

Gower's Principles of Modern Company Law, 4th ed
(London: Stevens and Sons, 1979), at 403.

2. The equality among shareholders arises from equality among shares. Rights related to a share attach to the share, not the shareholder.

Bowater Canadian Ltd. v. R. L. Crain Inc. (Ont C.A.),
62 O.R. (2d) 752) at p. 3

(B) Statutory Treatment of Share Equality

3. The common law presumption of share equality is now included in compulsory legislation governing British Columbia corporations.
4. The Company was incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57 (the "BCA"). Pursuant to ss. 11(h) and 58 of the BCA, all special rights and restrictions attached to each class of shares must be set out in the notice of articles of a company.
5. The articles of a company "must... set out, for each class... of shares, all of the special rights or restrictions that are attached to the shares of that class".

BCA, s 12(2)(b).

6. S. 54(3) of the BCA requires a change in the share structure of a company to be made by altering the company's notice of articles to effect the change or that the change be made by a form of resolution specified by the articles or by a special resolution.
7. S. 58(2) of the BCA states that special rights or restrictions attached to a share are not varied or deleted until the articles have been altered to reflect the variation or deletion.
8. The presumption of equality among shares is reflected in ss. 59 (3) and (4) of the BCA:

"(3) Every share must be equal to every other share, subject to special rights or restrictions attached to any such share under the memorandum or articles.

"(4) Subject to subsection (6), each share of a class of shares must have attached to it the same special rights or restrictions as are attached to every other share of that class of shares."

9. S. 61 of the BCA states as follows:

"61. A right or special right attached to issued shares must not be prejudiced or interfered with under this Act or under the memorandum, notice of articles or articles unless the shareholders holding shares of the class or series of shares to which the right or special right is attached consent by a special separate resolution of those shareholders."

(C) CCAA on Equity Claims

10. S. 2(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), defines "equity claim" as follows:

"equity claim means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); "

11. S. 22.1 of the CCAA states the following with respect to priority among equity claims:

"Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise."

12. In most instances of companies filing for protection under the CCAA, there are insufficient assets with which to pay debt claims. Section 6(8) of the CCAA codifies the common law rule that in insolvency situations, debt claims must be paid in full before equity claims:

"Payment-equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid."

(D) Characterization of Debt and Equity Claims during Insolvency Proceedings

13. There appears to be insufficient assets of the Company to pay its creditors in full if shareholders are considered to be debt claimants rather than equity claimants.
14. Putting preferred shareholders in the same class as creditors would also leave a lower or perhaps no return for other preferred shareholders than if all preferred shareholders remain equity claimants.
15. Claims made in a CCAA or other insolvency proceedings by a shareholder, or a former shareholder, are scrutinized to determine whether in substance the claims are in debt or in equity. To do this, the courts try to find the "true nature of the transaction" by looking at the words chosen by the parties to reflect their intentions. If the words prove

inadequate to support a conclusion, then the admissible surrounding circumstances are reviewed for assistance.

Canada Deposit Insurance Corp. v. Canadian Commercial Bank, [1992] 3 SCR 558 at paras 46 and 51 ("*Canadian Commercial*").

16. In *Royal Bank of Canada v. Central Capital Corp.*, [1996] O.J. No. 359 (Ont C.A.) ("*Central Capital*"), the majority stated at para. 126:

"Although the relationship between each appellant and the company has characteristics of debt and equity, in substance both... are shareholders, not creditors of Central Capital. Neither the existence of their retraction rights nor the exercise of those rights converts them into creditors."

17. Central Capital was followed in *Nelson Financial Group Ltd.*, 2010 ONSC 6229 ("*Nelson Financial*").

18. In *Earthfirst Canada Inc. (Re)*, [2009] A.J. No.749 ("*Earthfirst*"), a case where shareholders in a CCAA proceeding advanced debt claims, the court held that the claims were in equity, saying at para. 5:

"Counsel for the appellant stresses the express indemnity covenant here, but in our view, it is ancillary to the underlying right, as found by the Chambers Judge. Characterization flows from the underlying right, not from the mechanism for its enforcement, nor from its non-performance."

19. In *JED Oil Inc. (Re)*, [2010] A.J. No. 512, the court characterized claims of preferred shareholders as equity claims, stating at para. 11 that a "corporation cannot issue shares that in effect make the shareholders creditors".

20. A claim of indemnity advanced by a shareholder for the recovery of a share purchase price on account of alleged breach of contract and fraud inducing a share purchase is an equity claim, not a claim in debt. The legal tools used are not the important thing. It is the fact they are being used to recover an equity investment that is important.

Return On Innovation v. Gandi Innovations, 2011 ONSC 5018, at para 59 ("*Return On Innovation*").

21. The definition of "equity claim" added to the CCAA in 2009 should be broadly interpreted to include instances that might not otherwise be within its plain meaning. An "equity claim" is not confined to a claim advanced by the holder of an equity interest; the definition is sufficiently clear to alter the pre-existing common-law by bringing into play a more expansive approach to what an equity claim is.

Sino-Forest Corp. (Re), 2012 ONCA 816.

22. The expansive definition of equity claim in the CCAA appears intended to preserve the original status of claimants who started their relationship with a company as shareholders, as opposed to allowing them to transform into debt claimants as easily as they might outside of the CCAA context.

23. Claims of shareholders who issue notice of redemption prior to bankruptcy or a CCAA filing, even having obtained default judgement for the unpaid redemption amount, are claims in equity, not in debt.

Bul River Mineral Corporation (Re), 2014 BCSC 1732 at para 109 ("Bul River");
Dexior Financial Inc. (Re), 2011 BCSC 348 at para 12.

(E) Altering the Contract

24. The agreement, understanding or contract (defined for present purposes as the "Contract") created between the Company and the preferred shareholders consists of the Articles of Incorporation (the "Articles") of the Company, the Offering Memoranda and, if received by a shareholder, the Policy. All of those refer to the element of directors' discretion in the process of the redemption of shares.
25. The rigidly formal and regulated process of creating detailed rights and restrictions on redemption, including the role of directors' discretion, in the Articles is incompatible with generally worded advertising statements of the Company that mention the redemption of shares having the effect of amending or even "clarifying" elements of the Contract.
26. Allowing advertisements to override the wording of the Contract, in particular the Articles, raises public policy concerns of undermining the certainty created by specific, accessible and generally known corporate legislation and its required procedures to create and modify rights and restrictions attached to shares. To do so would permit different "contracts" between a company and its shareholders of the same class. This would in turn encourage litigation based on alleged differences created among shares of the same class.
27. The Articles state that redemption of shares is subject to the exercise of directors' discretion. The directors of the Company are allowed to clarify the rights and restrictions pursuant to Article 27.6. However, the ability to informally clarify restrictions attached to shares set out in the Articles, such as the exercise of directors' discretion, cannot be presumed to include the ability to eliminate that restriction.
28. Advertising material is generally understood by its nature to be less deliberate and formal in its wording - often referred to as 'puff' - than language used in the documents comprising the Contract. All purchasers of preferred shares were required to confirm, pursuant to the Offering Memoranda, that they were sophisticated purchasers.
29. To form a collateral contract alongside the Contract, formal elements of contract creation must exist, including certainty of terms and an intention to enter into a binding agreement.
- G.H.L. Fridman, *The Law of Contract*, (4th ed.)
(Thomson Canada Limited 1999) at pp. 535-6.
30. If the management of the Company misrepresented the process of redemption in advertisements to certain shareholders, damages may be claimed for those misrepresentations, but such damages would still be "equity claims". In any event, other shareholders and the Company's creditors should not be thereby prejudiced.

*Nelson Financial;
Return on Innovation;
Earthfirst.*

(F) Directors' Discretion

31. There is more, not less, need in properly managing a corporate business for the exercise of director's discretion in the processing of redemption requests in a company that is undergoing difficult financial circumstances.
32. The Offering Memoranda, from 2003 until 2015, state in bold print the following:

"Redemption of Preferred Shares: The adoption of its policy regarding the redemption of Preferred Shares does not fetter the discretion of the Directors of the Company from time to time to amend or cancel such policy in whole or in part or to adopt an alternative policy with respect to the redemption of Preferred Shares, or to refuse to consent to a Requesting Shareholders request to have their Preferred Shares redeemed by the Company." (p.10)

(G) Fairness

33. Fairness is a fundamental objective of CCAA proceedings. The CCAA seeks to recognize legitimate expectations to the extent possible and not to allow those expectations to be unexpectedly subverted. The preferred shareholders started their relationship with the Company with the legitimate expectation of being treated as preferred shareholders on a winding up; creditors dealing with the Company held the legitimate expectation that their financial recovery would not be diluted on a winding up by shareholders transforming into creditors. Similar claims should be treated in a similar fashion.

Bul River, at paras 55 and 109.

34. Shareholders are entitled to assume that the articles of a company will prevail and that their priority position established by the articles will not be altered except through formally established procedures.
35. Presenting advertising statements to some present or future shareholders that have the effect of clarifying the element of directors discretion in the redemption process so as to eliminate the role of directors discretion is unfairly prejudicial to other shareholders who relied on the Contract for the safeguards allowed by the exercise of discretion in considering redemption requests.

Part 6: MATERIAL TO BE RELIED ON

1. Materials that have been filed by the Petitioner and the Redeeming Shareholders in this proceeding.

The application respondents estimate that the application will take two days.

- 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: c/o 700 - 401 West Georgia Street, Vancouver, BC, V6B 5A1.

Date: 22 May, 2019



Signature of **Mark Davies**, lawyer for the
application respondents

THIS RESPONSE is filed by Mark Davies, of the firm of Richards Buell Sutton LLP, whose place of business and address for service is 700 - 401 West Georgia Street, Vancouver, BC V6B 5A1, Telephone 604.682.3664.