



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**

AMENDED NOTICE OF APPLICATION

Name of applicant: Hans-Uwe Andresen (the "Applicant")

To: Service List

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smith Street Vancouver, British Columbia on ~~November 18, 2019~~ November 26, 2019 at 10:00 a.m. for the orders set out in Part 1 below.

9:45am

Part 1: ORDER SOUGHT

- 1 Pursuant to section 11 of the *Companies' Creditors Arrangement Act* (R.S.C., 1985, c. C-36) (the "CCAA"), Mr. Andresen be given leave to bring an application under section 36.1 of the CCAA and section 38 of the *Bankruptcy and Insolvency Act* (R.S.C., 1985, c. B-3) (the "BIA") as if he were a creditor.
- 2 Pursuant to section 36.1 of the CCAA and section 38 of the BIA, Mr. Andresen be given leave to commence the following actions on behalf of the Petitioner (collectively, the "Actions"):

- a. An action against 0911368 BC Ltd. ("911") in relation to a loan dated June 1, 2011 from the Petitioner to 911;
 - b. An action against Donald Bergman and ACIC Financial Developments Inc. ("AFDI") in relation to:
 - i. a loan from the Petitioner to AFDI;
 - ii. Breach of a management agreement dated September 18, 2003 between the Petitioner and AFDI (the "**Management Agreement**"); and
 - iii. Breach of fiduciary duty and negligence by Mr. Bergman in his capacity as director for the Petitioner.
- 3 Pursuant to section 36.1 of the CCAA and section 38 of the BIA, Mr. Andresen be given leave to amend and continue the following proceedings that have been commenced by the Petitioner in the name of the Petitioner:
- a. *ACIC et. al. v. Censorio Group (Agnes & Elliot) Holdings Ltd. et. al.*, SCBC Vancouver Registry File H180143 ("**H180143**").
 - b. *ACIC v. Altezza Properties Ltd. et. al.*, SCBC Vancouver Registry File S184595 ("**S184595**"); and
 - c. *ACIC v. Censorio Group (Hastings & Carleton) Holdings Ltd. et. al.*, SCBC Vancouver Registry File S1910311 ("**S1910311**").
- (collectively, the "**Censorio Proceedings**")
- 4 In the alternative, pursuant to section 11 of the CCAA and section 232 of the *Business Corporations Act* (SBC, 2002, c.57) (the "**BCBCA**"), Mr. Andresen be given leave to prosecute the Actions and the Censorio Proceedings in the name and on behalf of the Petitioner.
- 5 Pursuant to the inherent jurisdiction of the Court, the orders for leave to bring the Actions be entered *nunc pro tunc*, as of the day when this Application was filed.
- 6 The Monitor and Petitioner shall execute an assignment assigning all their rights, title, and interest which the Monitor or Petitioner have, had or shall have in the subject matter of the Actions, including any documents in support thereof.
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- 7 Any benefits recovered as the result of the Actions are to be paid out as follows:
- a. First, to pay Mr. Andresen's legal fees, costs, and disbursements relating to the Actions on a solicitor's and own client basis;
 - ~~b. Next, to pay for the redemption of Mr. Andresen's preferred shares in the Petitioner, up to the value of his preferred shares in the Petitioner;~~
and
 - c. Any surplus will be paid to the Petitioner, to be distributed pursuant to the plan of distribution.
- 8 In the further alternative:
- a. pursuant to section 11 of the CCAA, a bankruptcy order under the BIA be made against the Petitioner; and
 - b. Costs of the application be paid by the Petitioner to the Applicant.

Part 2: FACTUAL BASIS

- 1 The applicant is a preferred shareholder of All Canadian Investment Corporation ("ACIC").
- 2 ACIC is subject to proceedings under the CCAA that were commenced on November 8, 2017 (the "CCAA Proceedings")
- 3 Boale, Wood & Company Ltd. has been appointed as monitor in the CCAA Proceedings (the "Monitor").
- 4 Since the outset of the CCAA Proceedings 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, Donald Bergman was managing the wind-down of the business.
- Monitor's Eleventh Report, at paras. 89-90
- 5 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.

- 6 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

- 7 The Monitor estimates full payment of all creditors under both its high and low end recovery estimates, while preferred shareholders will obtain 7% (\$2,556,527) to 34% (\$12,556,527) recovery. These estimates do not include the potential recovery from personal or corporate guarantees.

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

The Loans

- 8 As of April 26, 2018, the Petitioner's loan portfolio involved the following loans:
- a. Eight loans to the Censorio Group of Companies, guaranteed by, *inter alia*, a personal guarantee of Peter Censorio (collectively, the "Censorio Loans").
 - b. A loan to Meridian Resource Accommodations Inc. secured by a Registered 1st Mortgage over properties in Blenfait, Saskatchewan (the "Meridian Loan").
 - c. A loan to 911 secured by an equitable mortgage over a 40 acre property located in Lac La Biche County, Alberta (the "911 Loan").
 - d. A loan to AFDI arising from non-arm's length debt restructuring between the Petitioner and AFDI, secured by AFDI's 37.5% interest in a joint venture with Seamount Investments Ltd. (the "AFDI Loan").
 - e. A personal loan to Wayne Blair, an employee on ACIC's payroll.
 - f. A loan to Karl Buchmann secured by a registered mortgage over a land parcel in Salmon Arm, BC (the "Buchmann Loan").
 - g. A personal loan to Robert and Katherine Frederick without security (the "Frederick Loan").
 - h. A loan to Michael Lensen without security (the "Lensen Loan").
 - i. A loan to Stonewater secured by a registered mortgage and assignment of rents over a motel, campsite and RV park at Madeira
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Park, BC, personal guarantees from the Teresa Gail Griffin, and Scott Jefferson Barras, the principals of Stonewater, and a registered mortgage against the personal residence of Ms. Griffin and Mr. Barras (the "Stonewater Loan").

- j. A loan to Ron Weninger secured by an equitable mortgage over a property in Beaverdell, BC (the "Weninger Loan").

Exhibit C to affidavit #6 of D. Bergman

Legal Proceedings to date

9 The Petitioner has commenced legal proceedings in relation to:

- a. Each of the Censorio Loans;

Exhibit C to Affidavit #4 of J. Wolska

Exhibit D to Affidavit #4 of J. Wolska

Exhibit A to Affidavit #2 of K. Record, at p. 1

- b. The Lensen Loan;

Exhibit B to Affidavit #3 of K. Record, at p. 12

- c. The Meridian Loan;

Exhibit C to Affidavit #3 of K. Record, at p. 17

- d. The Blair Loan;

Exhibit D to Affidavit #3 of K. Record, at p. 23

- e. The Frederick Loan; and

Exhibit E to Affidavit #3 of K. Record, at p. 29

- f. The Weninger Loan.

Exhibit F to Affidavit #3 of K. Record, at p. 34

10 The proceedings in relation to the Censorio Loans are not all pleaded in a manner such that judgment is sought as a remedy against the principals of each loan or their guarantors.

Exhibit C to Affidavit #4 of J. Wolska

Exhibit A to Affidavit #2 of K. Record, at p. 1

- 11 The Petitioner has not commenced legal proceedings in relation to:
- a. The 911 Loan;
 - b. The AFDI Loan;
 - c. The Buchmann Loan; or
 - d. The Stonewater Loan.

Exhibit A to affidavit #4 of J. Wolska

- 12 The Monitor advises that it is commencing a lawsuit against AFDI for the recovery of the monies owed to the Petitioner.

Monitor's Seventeenth Report, at para. 64

The Stonewater Loan

- 13 The Monitor advises that the Stonewater Loan was repaid in full on December 7, 2018.

Monitor's Seventeenth Report, at para. 53

The Buchmann Loan

- 14 In relation to the Buchmann Loan, the Monitor advises that:
- a. \$345,938.66 remains outstanding;
 - b. Mr. Buchmann has continued making payments under the Buchmann Loan, including two payments in October 2019;
 - c. The Monitor has requested the Petitioner's counsel to proceed with a notice of intention to enforce security and if necessary, commence foreclosure proceedings; and
 - d. The Monitor expects full recovery of the Buchmann Loan by May 2020.

Monitor's Seventeenth Report, at paras. 56-59

The 911 Loan

- 15 Several of Mr. Bergman's affidavits indicate that the 911 Loan was forgiven as part of a restructuring agreement (the "Restructuring Agreement").

Affidavit #6 of D. Bergman, at paras. 102-107

Exhibit C to Affidavit #6 of D. Bergman

Affidavit #9 of D. Bergman, at paras. 48-50

Exhibit E to Affidavit #4 of J. Wolska

- 16 Nothing in the Restructuring Agreement indicates that any portion of the 911 Loan was forgiven, aside from interest payable by 911 pursuant to the 911 Loan from and after April 30, 2014.

Exhibit E to Affidavit #4 of J. Wolska

Potential Claims against AFDI and Mr. Bergman

- 17 At all material times, Mr. Bergman was the sole director and the president of the Petitioner.

Affidavit #1 of D. Bergman, at para. 1.

Investment Guidelines

- 18 The Petitioner established investment guidelines for mortgage loans and other loans and investments (the "Investment Guidelines").

Exhibit F to Affidavit #1 of D. Bergman, at pp. 101-103

- 19 Pursuant to the Investment Guidelines, all mortgage loans were, *inter alia*, obligated to be secured and registered in the appropriate land title office as a charge against the real property subject to the mortgage.
- 20 Contrary to the Investment Guidelines, Mr. Bergman caused or allowed the Petitioner to enter into numerous mortgage agreements that were not secured by mortgages registered against the real property subject to the mortgage. As a result of the failure to register mortgages, the Petitioner faced shortfalls on its loans, was unable to fund its redemption requests, and commenced these proceedings.

Exhibit C to Affidavit #8 of D. Bergman

AFDI Loan

- 21 The Petitioner is managed by AFDI under the Management Agreement. Mr. Bergman is the sole director and officer of AFDI.

Petition filed November 8, 2017, Part 2, at para. 13

- 22 The AFDI Loan arises from a restructuring agreement between the Petitioner and AFDI wherein the Petitioner assigned two or three

promissory notes totalling \$2.2M to AFDI in exchange for a secured loan from AFDI. This was a non-arm's length transaction for the benefit of AFDI which may have contravened the rule against self-dealing.

Exhibit C to Affidavit #6 of D. Bergman

Monitor's Seventeenth Report, at paras. 62

- 23 The restructuring agreement between the Petitioner and AFDI was necessary so that the Petitioner was in compliance with the lending requirements of a mortgage investment corporation.

Monitor's Seventeenth Report, at para. 62

- 24 The restructuring agreement involving the 911 Loan is another example of Mr. Bergman's use of the Petitioner in transactions involving his other companies and may contravene the rule against self-dealing.

Exhibit E to Affidavit #4 of J. Wolska

The Management Agreement

- 25 Under the Management Agreement, AFDI was, *inter alia*, obligated to assist the Company in taking all such actions pertaining to loans and the enforcement of all security granted in respect of the loans as may be requisite and providing instructions to and liaising with the Company's legal counsel in that regard.

Exhibit E to Affidavit #1 of D. Bergman, at pp. 86-95

- 26 The Petitioner failed to take reasonable, or any, steps to enforce loans and mortgages which had fallen into default until these proceedings were commenced. AFDI failed to take reasonable steps to ensure these steps were taken.

Exhibit A to Affidavit #4 of J. Wolska

Failure to enforce security

- 27 The failure to take steps to enforce security granted in respect to defaulting loans in a timely manner meant that the Petitioner did not commence proceedings until a decline in the market had occurred, decreasing the available security for the defaulting loans.

- 28 There are concerns regarding the judgment exercised by Mr. Bergman and AFDI in relation to the loans and security they obtained. In particular, the Meridian Loan:
- a. May have been a non-recourse loan;
 - b. Involves a loan where funds advanced far exceeded the value of the land based on speculation of a potential redevelopment;
 - c. The proposed redevelopment was never a realistic possibility; and
 - d. The principal of Meridian is William Leslie Allen, the principal of 911.

Monitor's Seventeenth Report, at paras. 48-52

Exhibit D to Affidavit #4 of J. Wolska

Request for the Monitor and Petitioner to commence litigation

- 29 Lakes, Whyte LLP, in its capacity as representative counsel, requested that:
- e. the Petitioner and the Monitor commence actions in respect of
 - i. The 911 Loan;
 - ii. The AFDI Loan;
 - iii. Breach of the Management Agreement by AFDI; and
 - iv. Breach of fiduciary agreement and negligence by Mr. Bergman;
 - f. the Petitioner and Monitor amend the Censorio Proceedings to pursue judgments in each of the Censorio Proceedings, and to pursue judgment against Peter Censorio personally in each of the Censorio Proceedings.

Exhibit F to Affidavit #4 of J. Wolska, at pp. 40-44

- 30 To date, the Petitioner has not taken any steps to commence the above-noted actions or to amend the Censorio Proceedings. As mentioned, the Monitor advises that it is commencing a lawsuit against AFDI for the recovery of the monies owed to the Petitioner under the AFDI Loan.
- 31 The relevant limitation periods in respect of the above-noted actions are not obvious to the Applicant. However, there is a concern that if the Petitioner does not commence these actions in a timely manner, some or all of these claims will be barred by the *Limitation Act*.

Part 3: LEGAL BASIS

Representation Order

1 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.

2 Section 36.1 of the CCAA provides:

36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

(a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";

(b) to "trustee" is to be read as a reference to "monitor"; and

(c) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

3 Section 38 of the BIA provides:

38 (1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.

(2) On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in

the chose in action or subject-matter of the proceeding, including any document in support thereof.

(3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

(4) Where, before an order is made under subsection (1), the trustee, with the permission of the inspectors, signifies to the court his readiness to institute the proceeding for the benefit of the creditors, the order shall fix the time within which he shall do so, and in that case the benefit derived from the proceeding, if instituted within the time so fixed, belongs to the estate.

Derivative Actions

4 Section 232 of the BCBCA provides:

232 (1) In this section and section 233,

"complainant" means, in relation to a company, a shareholder or director of the company;

"shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

(2) A complainant may, with leave of the court, prosecute a legal proceeding in the name and on behalf of a company

(a) to enforce a right, duty or obligation owed to the company that could be enforced by the company itself, or

(b) to obtain damages for any breach of a right, duty or obligation referred to in paragraph (a) of this subsection.

(3) Subsection (2) applies whether the right, duty or obligation arises under this Act or otherwise.

(4) With leave of the court, a complainant may, in the name and on behalf of a company, defend a legal proceeding brought against the company.

5 Section 233 of the BCBCA provides:

233 (1) The court may grant leave under section 232 (2) or (4), on terms it considers appropriate, if

(a) the complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding,

(b) notice of the application for leave has been given to the company and to any other person the court may order,

(c) the complainant is acting in good faith, and

(d) it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.

(2) Nothing in this section prevents the court from making an order that the complainant give security for costs.

(3) While a legal proceeding prosecuted or defended under this section is pending, the court may,

(a) on the application of the complainant, authorize any person to control the conduct of the legal proceeding or give any other directions for the conduct of the legal proceeding, and

(b) on the application of the person controlling the conduct of the legal proceeding, order, on the terms and conditions that the court considers appropriate, that the company pay to the person controlling the conduct of the legal proceeding interim costs in the amount and for the matters, including legal fees and disbursements, that the court considers appropriate.

(4) On the final disposition of a legal proceeding prosecuted or defended under this section, the court may make any order it considers appropriate, including an order that

(a) a person to whom costs are paid under subsection (3) (b) repay to the company some or all of those costs,

(b) the company or any other party to the legal proceeding indemnify

(i) the complainant for the costs incurred by the complainant in prosecuting or defending the legal proceeding, or

(ii) the person controlling the conduct of the legal proceeding for the costs incurred by the person in controlling the conduct of the legal proceeding, or

(c) the complainant or the person controlling the conduct of the legal proceeding indemnify one or more of the company, a director of the company and an officer of the company for expenses, including legal costs, that they incurred as a result of the legal proceeding.

(5) No legal proceeding prosecuted or defended under this section may be discontinued, settled or dismissed without the approval of the court.

(6) No application made or legal proceeding prosecuted or defended under section 232 or this section may be stayed or dismissed merely because it is shown that an alleged breach of a right, duty or obligation owed to the company has been or might be approved by the shareholders of the company, but evidence of that approval or possible approval may be taken into account by the court in making an order under section 232 or this section.

Backdate limitation date

- 6 In a derivative action, the limitation period is not suspended by the plaintiff's application to the court for leave to bring a derivative action. However, if the plaintiff applies for leave before the end of the limitation period, the court may apply the doctrine of *nunc pro tunc* to allow the plaintiff to file the action after the limitation period.
- 7 The Supreme Court of Canada laid out this principle in relation to class action certification applications in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60. In that case, the court found that an action is commenced only when leave to commence the action has been granted and the action has been filed; if the action is commenced after the

limitation period, a limitation defence would apply. However, as the court states at paras 90 – 94, courts have inherent jurisdiction to issue orders *nunc pro tunc*, meaning that a court can backdate the effective date of its order if it is appropriate to do so. This means that, in cases where leave to file an action is sought before the expiry of the limitation period, the court can grant a nunc pro tunc order so that the commencement of the action falls within the limitation period (paras 92 – 93).

- 8 This does not apply only to certification applications under the Class Proceedings Act but also applies to other Acts where the plaintiff must seek leave of the court to file an action, including derivative actions (*1186708 Ontario Inc. v Gerstein*, 2017 ONSC 1217).
- 9 The following non-exhaustive factors guide the courts in determining whether to exercise their inherent jurisdiction to grant:
 - (1) the opposing party will not be prejudiced by the order;
 - (2) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity;
 - (3) the irregularity is not intentional;
 - (4) the order will effectively achieve the relief sought or cure the irregularity;
 - (5) the delay has been caused by an act of the court; and
 - (6) the order would facilitate access to justice.

Canadian Imperial Bank of Commerce v. Green, 2015 SCC 60, at para. 90

Part 4: MATERIAL TO BE RELIED ON

- 1 Affidavit #1 of Donald Bergman dated November 7, 2017.
- 2 Affidavit #6 of Donald Bergman dated June 7, 2018.
- 3 Affidavit #9 of Donald Bergman dated November 5, 2018.
- 4 Affidavit #1 of Joanna Wolska dated March 14, 2019
- 5 Affidavit #4 of Joanna Wolska dated November 5, 2019
- 6 Monitor's Eleventh Report
- 7 Monitor's Seventeenth Report

The applicant estimates that the application will take 120 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: November 18, 2019

..... For 

Signature of John D. Whyte
lawyer for the Applicant

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:

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.....
.....

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