IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *All Canadian Investment Corporation (Re),* 2019 BCSC 1488

Date: 20190904
Docket: S1710393
Registry: Vancouver

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., 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

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

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Place and Dates of Hearing:	Vancouver, B.C. June 18-20, 2019
Place and Date of Judgment:	Vancouver, B.C. September 4, 2019

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Introduction

[1] The petitioner in this insolvency proceeding, All Canadian Investment Corporation ("ACIC"), seeks to determine competing priority claims amongst its preferred shareholders. Its application is brought under the statute governing this proceeding, the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*].

[2] ACIC is incorporated pursuant to the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*].

[3] Prior to its insolvency, ACIC carried on business as a registered mortgage investment corporation ("MIC") since 1998. Its business was to loan funds to third party owners of commercial and residential property, mostly to be secured by mortgages, from a pool of funds it received from time to time from individuals and corporations who invested in ACIC by purchasing preferred shares.

[4] Some of ACIC's preferred shareholders delivered redemption notices to the company prior to the commencement of this proceeding in an effort to be paid an amount equal in value to their original share subscription price. Some, but not all of them, are before the Court on this application. I refer to those who are as the "redeeming preferred shareholders", claim to be creditors of ACIC. They assert that all of ACIC's other shareholders, both preferred and common, rank lower in priority since they are equity claimants.

[5] For ease of identification, I collectively refer to to the preferred shareholders who did not deliver redemption notices or did not deliver them prior to the commencement of this proceeding, as the "non-redeeming preferred shareholders".

[6] The core issue on this application is whether the redeeming preferred shareholders are creditors of ACIC as opposed to equity claimants, so as to share rateably in the distribution of proceeds paid under any court-approved plan of arrangement with the company's other creditors, and in priority to the non-redeeming preferred shareholders and ACIC's common shareholders.

[7] The redeeming preferred shareholders' claim is opposed by ACIC, two of its creditors, and the non-redeeming preferred shareholders. The common shareholders did not appear on the application.

[8] ACIC agreed to take the lead in seeking a determination of the priority issue and brought this application seeking declaratory relief.

[9] The priority claim advanced by the redeeming preferred shareholders must be determined before a suitable plan of arrangement, which would include a claims process and plan for distribution of ACIC's assets, can be submitted for court approval.

[10] It will serve no purpose in these reasons to comment on the length of time it has taken to get to this point in the proceeding. It will suffice to say that at this juncture, all stakeholders are anxious to have a plan presented to the court for approval in this liquidating *CCAA*.

[11] The facts set out in these reasons are my findings of fact.

Positions of the Parties

[12] The redeeming preferred shareholders' position on this application is that they were never equity investors. They assert that when the nature of ACIC's business as a MIC is considered, they are properly characterized as lenders from the outset who are debt claimants because their funds were pooled by ACIC and then loaned out to borrowers. They argue that their individual redemption requests should be viewed as akin to demands on a promissory note. In their submissions, they distinguish themselves from the non-redeeming preferred shareholders on the basis of the redemption notices they delivered to ACIC prior to the commencement of this *CCAA* proceeding.

[13] They also advance an alternative position if they are characterized as equity investors when they purchased their preferred shares. They submit that they later became creditors of ACIC. They rely on what they characterize as the purported contractual effect of various communications from ACIC, including its promotional

materials, to potential and existing investors, in an attempt to establish that the nature of their relationship with ACIC changed.The redeeming preferred shareholders acknowledge that ACIC's Articles and various offering memoranda concerning potential subscriptions for preferred shares ("Offering Memoranda") clearly state that ACIC's obligation to honour redemption requests from preferred shareholders is wholly discretionary, resting with ACIC's directors, which throughout was only one, Mr. Donald Bergman. However, they maintain that those communications altered their contractual relationship with ACIC so as to provide for contractually enforceable guaranteed redemption rights that ACIC was obliged to honour at specific points in time. As a result, they say that ACIC can no longer rely on the discretionary provisions in the Articles and the Offering Memoranda and that ACIC contractually bound itself to pay those redemptions as debts. In the result, the redeeming preferred shareholders submit that their relationship with ACIC changed to become creditors.

[14] In the further alternative, those redeeming preferred shareholders whose redemption requests were partially paid before this proceeding was commenced submit that if they were equity claimants at the outset and if ACIC's communications do not constitute an enforceable contractual right to redemption sufficient to change their relationship with ACIC, then the status of their particular claims has changed, such that any redemption amounts owing are debts owed by ACIC.

[15] The redeeming preferred shareholders concede that the right of each of them to recover as a debt claimant depends on ACIC's financial circumstances at the time their individual redemption notices were delivered since a redemption right is unenforceable per s. 79(1) of the *BCA*, if it means that redemption would render ACIC 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.

[16] Language mirroring s. 79 is found in the Offering Memoranda.

[17] The redeeming preferred shareholders acknowledge that at this juncture it is not known which redemption notices were delivered to ACIC at a time when reasonable grounds did not exist to believe that either ACIC was insolvent at the time of the request or that honouring the request would cause it to become insolvent.

[18] Consequently, the redeeming preferred shareholders submit that if they succeed in their claim to be creditors, a further, highly specific and lengthy factual inquiry, involving Mr. Bergman's knowledge when each redemption notice was delivered to ACIC, will have to be made to determine whether s. 79 of the *BCA* is engaged.

[19] The non-redeeming preferred shareholders disagree that the redeeming preferred shareholders are debt claimants. Their position is that all preferred shareholders are equity claimants from the outset and that nothing has changed to alter their status.

[20] Included within the non-redeeming preferred shareholders' submissions is the argument that mirroring the common law, the *BCA* establishes a presumption of equality amongst all shareholders. Each share of a class of shares (in this case, preferred shares) "must have attached to it the same special rights or restrictions as are attached to every other share": ss. 59(4); see also ss. 59(3), 61. Rights related to a share attach to the share, and not to the shareholder: Gower's *Principles of Modern Company Law*, 4th ed. (London: Stevens and Sons, 1979), at 403; *Bowater Canadian Ltd. v. R.L. Crain Inc.* (1987), 46 D.L.R. (4th) 161 at 16 (Ont. C.A.). The presumption is even stronger, they argue, in a *CCAA* proceeding given the broad and flexible authority conferred on the supervising judge to determine a fair and efficient resolution of competing claims in circumstances where there are insufficient financial resources to meet all of them: *CCAA*, s. 11.

[21] In addition, and relying on *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 13-15 and *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732, at paras. 100-101, the non-redeeming preferred shareholders

submit that if the redeeming preferred shareholders' position is correct, the inquiry called for would be unduly protracted and further delay this *CCAA* proceeding, so as to impede any realistic prospect to achieve the statutory objective of an efficient resolution of competing claims.

[22] The non-redeeming preferred shareholders also say that they will be significantly prejudiced because they will recover little to nothing if the redeeming preferred shareholders' claim to be debt claimants prevails.

[23] Some of ACIC's creditors attended the hearing of the application and opposed the redeeming preferred shareholders' claim as well, since there are insufficient assets to pay them out in full if the latter are treated as debt claimants.

[24] ACIC's position on this application is that regardless of any redemption requests, whether paid or unpaid in whole or in part, all preferred shareholders are equity claimants within the meaning of s. 2(1) of the *CCAA*. ACIC seeks a declaration to that effect plus ancillary relief.

[25] For the reasons that follow, I reject the claim advanced by the redeeming preferred shareholders. I have determined that they, along with all of ACIC's preferred shareholders, are equity claimants.

Background Facts

[26] ACIC's shareholders are divided into two groups: common voting shareholders and preferred shareholders. There are currently outstanding four issued common shares and approximately 37,277 preferred shareholders and 15,647 warrants attached to the preferred shares. The preferred shares are stated to be non-voting, "unless otherwise provided for" (and none was).

[27] ACIC issued preferred shares and attached warrants between 1998 and 2015, all in accordance with its articles in force throughout the material time ("Articles").

[28] Draft subscription agreements for the purchase of preferred shares are contained in the various Offering Memoranda issued by ACIC over the years.

[29] Each preferred shareholder acquired units comprised of one preferred share and one warrant (referred to by ACIC by the singular term, “Unit”) by signing a subscription agreement. I refer to them collectively as “Subscription Agreements”. The subscription price for each Unit was fixed at $1,000. Each warrant granted a preferred shareholder a non-transferable option to acquire additional preferred shares for the same price. The total capital value for all issued Units is approximately $37,277,000.

[30] ACIC’s preferred shares contain numerous rights, including a right of redemption (also known as a right of retraction) to receive a return of the purchase price paid for shares, as well as the right to receive dividends so long as an investing subscriber remains a preferred shareholder.

[31] Preferred shareholders were paid dividends from time to time. Between 2005 and 2014, ACIC issued dividends with annual returns ranging between 6.25% and 8%. The return on dividends reduced in 2015 to approximately 2.5%, and to 1% in 2016. ACIC has not issued dividends since 2016.

[32] The redeeming preferred shareholders advise that the earliest redemption requests in issue on the application date back to 2013.

[33] Approximately 540 of ACIC’s preferred shareholders, comprising 27,587 preferred shares with a capital value of $27,587,000, issued redemption notices to ACIC before this *CCAA* proceeding was commenced. As mentioned, not all of those who did are before the Court on this application.

[34] Some redeeming preferred shareholders requested redemption of all of their shares prior to the commencement of this *CCAA* proceeding, while others only requested partial redemptions. Some of those who delivered redemption notices were paid in full, others only in part, and some were not paid at all.

[35] According to ACIC, preferred shares to the value of $1,380,500 were redeemed and paid out prior to the initial order in this proceeding, issued by Madam

Justice Adair on November 10, 2017, leaving a balance of unsatisfied share redemptions of $26,207,000.

[36] Sadly, many of ACIC's preferred shareholders are elderly individuals who invested most if not all of their life's savings with ACIC.

[37] Due to defaults on loans it made to certain third parties, ACIC was unable to pay all of the redemption notices it received from preferred shareholders. It sought protection under the *CCAA*.

[38] In addition to the claims asserted by the redeeming preferred shareholders, when ACIC commenced this proceeding on November 8, 2017, it faced approximately $1.785 million in secured claims and $3.96 million in unsecured claims.

[39] It is now evident that this proceeding is in effect a liquidating *CCAA* as there is no reasonable prospect that ACIC's business can be saved. Its primary asset is its loans portfolio. ACIC maintains an office in this province in Salmon Arm, with two staff members. It is also evident that at the moment, ACIC's creditors and shareholders are better off under the *CCAA* as opposed to a bankruptcy under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*].

[40] Although ACIC has yet to submit a plan of arrangement, the Monitor has been actively engaged in pursuing loan recoveries and operating ACIC's business as per court appointed powers akin to those of a super monitor. Although the Monitor expects to recover a substantial amount of ACIC's loan portfolio, possibly to a maximum of approximately $37.277 million, the Monitor advises that there will be insufficient funds to pay the amounts owed to ACIC's creditors and to return the capital invested by its preferred shareholders.

Overview: Equity vs. Debt Claimants

[41] In a proposed plan of arrangement or compromise submitted for court approval under the *CCAA*, a debtor company may divide its creditors into different

classes. Equity claimants are treated as a single class, unless otherwise ordered: ss. 22(1), 22.1. They rank behind creditors.

[42] Historically, in insolvency matters debt claimants have taken priority to equity claimants. The reasoning behind this approach was explained by Justice Morawetz (as he then was) in *Sino-Forest Corporation (Re)*, 2012 ONSC 4377 at paras. 23-25, aff'd 2012 ONCA 816:

> 23 … Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise… [citations omitted]
>
> 24 The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited upside potential when purchasing shares. Creditors have no corresponding upside potential… [citations omitted]
>
> 25 As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement… [citations omitted]

[43] Because of the superior position of debt claimants over equity claimants, it has become necessary for courts to distinguish between the two. The general approach for determining whether a party was a debt or equity claimant was set out in *Canadian Deposit Insurance Corp. v. Canadian Commercial* Bank, [1992] 3 S.C.R. 558 [*CDIC*], which was helpfully summarized by Madam Justice Fitzpatrick in *Bul River* at para. 69:

> … In [*CDIC*], the issue was whether money advanced to the debtor bank was in the nature of a loan or a capital investment for the purpose of determining whether the creditors advancing the funds ranked *pari passu* with other unsecured creditors in a winding-up proceeding. Mr. Justice Iacobucci stated that the approach was to determine the "substance" or "true nature" of the transaction (563, 588). His oft quoted statements are found at 590-91, the relevant principles of which can be summarized as follows:
>
> a) the fact that a transaction contains both debt and equity features does not, in itself, determine its characterization as either debt or equity;
>
> b) the characterization of a transaction under review requires the determination of the intention of the parties;
>
> c) it does not follow that each and every aspect of a "hybrid" debt and equity transaction must be given the exact same weight when addressing a characterization issue; and

> d) a court should not too easily be distracted by aspects of a transaction which are, in reality, only incidental or secondary in nature to the main thrust of the agreement.

[44] The reference to a "hybrid" debt and equity transaction in the above noted excerpt includes preferred shares, which are one form of investment that has proven particularly challenging for courts to categorize. Preferred shares are regarded in the case authorities as hybrid instruments that may contain rights and conditions attributable to both equity and debt: *Royal Bank of Canada v. Central Capital Corp.* [1996] O.J. (3d) No. 359 at para. 127 (C.A.).

[45] The Ontario Court of Appeal said in *Sino-Forest*, at para. 53, that the 2009 amendments to the *CCAA* significantly expanded the definition of equity claims in a manner that "altered" common law. The Court of Appeal determined that the definition extends beyond a holder of an equity interest, and now includes persons that might not otherwise be within its plain meaning (such as advancing claims for contribution or indemnity against the company).

[46] In *Sino-Forest*, shareholders made claims within the *CCAA* proceeding against the company's auditors who in turn sought indemnity from the company. Even though the auditors were never shareholders, their indemnity claim was characterized as an equity claim. I have excerpted what I consider to be guiding language in the Court of Appeal's reasons:

> [1] In 2009, the [*CCAA*] was amended to expressly provide that general creditors are to be paid in full before an equity claim is paid.
>
> [2] This appeal considers the definition of "equity claim" in s. 2(1) of the CCAA. More particularly, the central issue is whether claims by auditors and underwriters against the respondent debtor, Sino-Forest Corporation ("Sino-Forest"), for contribution and indemnity fall within that definition. The claims arise out of proposed shareholder class actions for misrepresentation.
>
> …
>
> [37] We agree with the supervising judge that the definition of equity claim focuses on the nature of the claim, and not the identity of the claimant. In our view, the appellants' claims for contribution and indemnity are clearly equity claims.
>
> …
>
> [39] The definition [of equity claim] incorporates two expansive terms.

> [40] First, Parliament employed the phrase "in respect of" twice in defining equity claim: in the opening portion of the definition, it refers to an equity claim as a "claim that is in respect of an equity interest", and in para. (e) it refers to "contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)"…
>
> [41] The Supreme Court of Canada has repeatedly held that the words "in respect of" are "of the widest possible scope", conveying some link or connection between two related subjects. …
>
> …
>
> [46] "Equity claim" is not confined by its definition, or by the definition of "claim", to a claim advanced by the holder of an equity interest. Parliament could have, but did not, include language in para. (e) restricting claims for contribution or indemnity to those made by shareholders.
>
> …
>
> [53] In our view, the definition of "equity claim" is sufficiently clear to alter the pre-existing common law…

[47] Taking the same approach as the Court of Appeal and Mr. Justice Morawitz (as he then was) in the court below (at paras. 86-90) in *Sino-Forest*, Fitzpatrick J. noted in *Bul River*, following a most helpful and thorough discussion of case authorities and the relevant 2009 amendments to the *CCAA*, that in one sense, the amendments codified previous case law concerning equity claims, but also provided for a broader yet more concrete definition of equity claims.

[48] Relying on the reasons of Laskin J.A. in *Central Capital*, Fitzpatrick J. also pointed out that in the context of a *CCAA* proceeding, particularly in light of the 2009 amendments, the mere existence of redemption rights does not equate preferred shareholders as creditors:

> [105] In the same manner, the new equity provisions in the *CCAA* reinforce that it remains an important policy objective that equity claims be subordinated to debt claims. In *Sino-Forest Corporation*, the Court of Appeal focused on the purpose of the 2009 amendments and stated:
>
> > [56] In our view, in enacting s. 6(8) of the *CCAA*, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest not diminish the assets of the debtor available to general creditors in a restructuring. If a shareholder sues auditors and underwriters in respect of his or her loss, in addition to the debtor, and the auditors or underwriters assert claims of contribution or indemnity against the debtor, the assets of the debtor available to general creditors would be

> diminished by the amount of the claims for contribution and indemnity.
>
> [106] This same recognition of the sound policy objectives of insolvency legislation was noted by Laskin J.A. in *Central Capital* (ONCA). He commented at 546 that "[p]ermitting preferred shareholders to be turned into creditors by endowing their shares with retraction rights runs contrary to this policy of creditor protection."
>
> [107] I see no principled basis upon which a different approach should be taken in respect of an equity claimant who has had the foresight, energy or just plain luck to seek and obtain a judgment prior to the filing date.
>
> [Emphasis added.]

[49] Accordingly, while the 2009 amendments did represent in part a codification of the previous case law concerning equity claims, they also represent a more concrete definition of "equity claims" and by such definition a broadening and more expansive definition of such claims: *Sino-Forest* (ONCA) at paras. 24, 34-60. Parliament has now clearly cast the net widely in terms of the broad definition of equity claims such that claims that might previously escaped such characterization will now by caught by the *CCAA*.

CCAA

Introductory Remarks

[50] The provisions of the *CCAA* greatly assist in the analysis. The expanded definition of equity claim and the definition of equity interest clearly suggest that ACIC's preferred shares, which include rights of redemption and to receive dividends, constitute equity interests and provide strong support for the position taken by ACIC and the non-redeeming shareholders that all preferred shareholders in this *CCAA* proceeding must be treated as equity claimants.

[51] An appropriate starting point in the analysis is with a brief discussion of the key provisions and objectives of the *CCAA*, particulary in light of ACIC's submission that the priority issue is easily resolved in favour of its position on the application from the broad definition of "equity clamant" and "equity interest" in the statute without the need for a detailed analysis of the underlying transaction documents.

Statutory Definition of Equity Claim

[52] As a result of the 2009 amendments to the *CCAA*, an "equity claim" is defined in s. 2(1) and includes redemption claims:

> 2(1)
>
> …
>
> **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)…
>
> [Emphasis added.]

[53] An "equity interest" is also defined, and includes a share in the company and a warrant to acquire additional shares:

> **2(1) equity interest** means
>
> **(a)** in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and
>
> **(b)** in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

No Statutory Definition of Creditor

[54] Unlike the *BIA*, there is no definition of creditor in the *CCAA*. In the *BIA*, a creditor is defined in s. 2 as "a person having a claim provable as a claim".

[55] The *CCAA* contains a broad definition of "claim" in s. 2, which incorporates the definition in the *BIA*:

> **claim** means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the [*BIA*].

[56] A "provable claim" is defined in s. 2 of the *BIA* as follows:

> **claim provable in bankruptcy, provable claim** or **claim provable** includes any claim or liability provable in proceedings under this Act by a creditor.

[57] Section 121 of the *BIA* speaks to the meaning of a "provable claim". It provides that all debts and liabilities, including those payable at a future date, to which the bankrupt is subject on the date of bankruptcy by reason of an obligation incurred before bankruptcy.

[58] In *Bul River*, Madam Justice Fitzpatrick points out, at para. 39, that the definition of "claim" found in s. 2 of both statutes "represents a point of convergence consistent with the harmonization of certain aspects of insolvency law under both the *CCAA* and *BIA*: *Century Services* at para. 24.

[59] In the past, the claims and rights of shareholders have not been treated as provable claims and ranked behind creditors of an insolvent corporation in liquidation: *Nelson Financial Group Ltd.*, 2010 ONSC 6229 at para. 25. That remains the case under the current *CCAA*. No plan or arrangement may be sanctioned by the court where equity claimants have priority to creditors. Section 6(8) of the *CCAA* states:

> **Compromises to be sanctioned by court**
>
> **6** …
>
> **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.

[60] The rationale is that equity claimants (commonly thought of as investors) are considered to take a higher degree of risk in a company's economic fortunes than creditors who do not share in any upside in the profits or value of the company and the risk of failure.

[61] The following excerpt from *Nelson Financial* aptly describes the distinction between debt and equity claimants:

> [25] … As noted by Laskin J.A. in *Re Central Capital Corporation*, on the insolvency of a company, the claims of creditors have always ranked ahead

> of the claims of the shareholders for the return of their capital. This principle is premised on the notion that shareholders are understood to be higher risk participants who have chosen to tie their investment to the fortunes of the corporation. In contrast, creditors choose a lower level of exposure, the assumption being that they will rank ahead of shareholders in an insolvency. Put differently, amongst other things, equity investors bear the risk relating to the integrity and character of management.

[62] Creditors' claims, including repayment terms and any rates of interest are typically governed by specific, fixed terms: *Bul River* at paras. 65-66; *Nelson Financial* at para. 25; *Sino-Forest* (ONCA) at para. 30.

[63] Although not a *CCAA* case, the Court of Appeal's discussion of the nature of a debt relationship in *Coast Capital Savings Credit Union v. British Columbia (Attorney General)*, 2011 BCCA 20 provides guidance for the issues in this case, particularly in the absence of a statutory definition. At para. 57, Madam Justice Newbury adopted the following definition, which she noted was also found in numerous Canadian and English authorities:

> A debt is defined to be a sum of money which is certainly, and at all events, payable without regard to the fact whether it be payable now or at a future time.

[64] At para. 23, Newbury J.A. also referred to a definition of debt in a case authority cited by the chambers judge in that case - *A. Valin Petroleums Ltd. v. Imperial Oil Ltd.*, 2007 ABQB 134 at paras. 39-40:

> 39 The word "equity" is not ambiguous. It is a word of ordinary use, particularly in the commercial context….
>
> 40 Debt and equity are distinct concepts. Debt is a claim on the assets of the corporation and is created when money is borrowed. With it arises an obligation on the corporation to repay that money. Corporate equity, however, is comprised of the corporation's total assets unencumbered by debt or other liabilities. It is the "residual economic interest in the corporation's assets, after all outstanding debts have been satisfied." See C. Nicholls, *Corporate Finance and Canadian Law* (Toronto: Carswell, 2000 at page 9).
>
> [Emphasis added.]

[65] Similar definitions, drawn from *Black's Law Dictionary*, *Jowitt's Dictionary of the English Language*, and *The Shorter Oxford Dictionary*, are referred to by the

Ontario Court of Appeal in *Central Capital* at 508, which again involved a *CCAA* proceeding.

[66] There is some conflict in the case authorities as to whether a claim can be considered a debt claim where it is unenforceable: see, e.g. *Bul River* at para. 40; *Central Capital* at 531-534. However, I do not need to decide that issue in order to determine the status of the redeeming preferred shareholders' claims.

Further Analysis is Required

[67] As I said at the outset of this section, the *CCAA* provides considerable guidance in determining the claim of the redeeming preferred shareholders. I agree with ACIC that the 2009 amendments show Parliament's intention to broaden the scope of equity claimants to include shareholders with redemption claims.

[68] However, redeemable preferred shares are viewed in the case law to be "somewhat different than conventional equity capital": *Central Capital* at para. 128; *Coast Capital* at para. 49. In *Central Capital,* Mr. Justice Laskin, in his reasons (concurring with Madam Justice Weiler in the majority), described preferred shares as "compromise securities" and "financial mongrels" with rights analogous to rights of creditors:

> 127 Preferred shares have been called "compromise securities" and even "financial mongrels: Grover and Ross, *Materials and Corporate Finance* (1975), at p. 49. Invariably the conditions attaching to preferred shares contain attributes of equity and, at least in an economic sense, attributes of debt. Over the years financiers and corporate lawyers have blurred the distinction between equity and debt by endowing preferred shareholders with rights analogous to the rights of creditors. One example is the right of redemption -- the right of the corporation to compel preferred shareholders to sell their shares back to the corporation. Another example, and it is the case before us, is the right of retraction -- the right of shareholders to compel the corporation to buy back their shares on a specific date for a specific price.
>
> 128 I acknowledge, therefore, that redeemable or retractable preferred shares are somewhat different from conventional equity capital. What makes the appeals before us difficult is that although the appellants appear to hold equity, their right of retraction appears to be a basic characteristic of a debtor-creditor relationship: see Grover and Ross, supra, at pp. 47-49; Buckley, Gillen and Yalden, *Corporations: Principles and Policies*, 3d ed. (1995), at pp. 938-40.

[69] The fact that a hybrid instrument contains elements of both equity and debt is not an obstacle to determining its true nature: *CDIC* at 590. In *Central Capital*, Laskin J.A. described the nature of the inquiry in this way:

> 129 If the certificate or instrument contains features of both equity and debt – in other words if it is hybrid in character - then the court must determine the "substance" of the relationship between the holder of the certificate and the company. …
>
> 130 In determining the substance of the relationship, as in any other case of contract interpretation, the court looks to what the parties intended. In *CDIC v. CCB*, *supra*, Iacobucci J. put this proposition as follows at p. 588:
>
> > As in any case involving contractual interpretation, the characterization issue facing this Court must be decided by determining the intention of the parties to the support agreements. This task, perplexing as it sometimes proves to be, depends primarily on the meaning of the words chosen by the parties to reflect their intention. When the words alone are insufficient to reach a conclusion as to the true nature of the agreement, or when outside support for a particular characterization is required, a consideration of admissible surrounding circumstances may be appropriate.

[70] Consequently, the focus of the inquiry is to determine whether in substance the redeeming preferred shareholders' claims are debt or equity. They cannot be both.

Determining the Substance of the Relationship

Overview

[71] The inquiry focuses on the transaction documents at the time the relationship was created. It is, generally speaking, informed by the words chosen by the parties to reflect their intentions in conjunction with the principles underpinning insolvency legislation, which in this case includes the remedial purposes of the *CCAA*. Where the words are insufficient to determine the true nature of the agreement, admissible evidence of surrounding circumstances may be considered: *CDIC* at 588, 590; *Central Capital* at paras. 38, 67, 126, 129-130, 135-136.

[72] Section 2(1) of the *CCAA* is clear that in the context of a *CCAA* proceeding, a redemption claim is not indicative of a debt relationship. As well, redemption rights on their own do not create a debtor-creditor relationship. They are to be considered, along with risk-taking, profit sharing, and the right to participate in the assets of the company on liquidation after creditors are paid, as "hallmarks" of a shareholder relationship and an equity interest. To establish a debt relationship, either or both the company's articles or the transaction documents must make it clear that a shareholder's redemption is repayment of a loan: *Central Capital* at paras. 70, 97, 135-136; *Bul River* at para. 109; *Dexior Financial Inc. (Re)*, 2011 BCSC 348 at paras. 12-13,16.

[73] As Weiler J.A. explained in *Central Capital*, language consistent with a debt obligation upon redemption must be reflected in the transaction documents:

> 97 Looked at another way, after the retraction date and at the time of the reorganization, the common features of a debtor-creditor relationship are not in evidence in Central Capital's articles. The agreements between the parties contain no express provision that the redemption of the shares is in repayment of a loan. The corporation was not obliged to create any fund or debt instrument to ensure that it could redeem the shares on the retraction date. There is no indemnity in the event that the money is not repaid on the retraction date. There is no provision for the payment of any interest after the retraction date in the event that the money is not repaid on the retraction date. There is no provision that after the retraction date and in the event of insolvency, the appellants would have the right to have the company wound up. (See *R v. Imperial General Properties Ltd.*, [1985] 2 S.C.R. 288, 21 D.L.R (4th) 741, for a case where the articles of the company contained this right.) There is no provision that upon a winding-up or insolvency the parties are entitled to rank pari passu with the creditors as was the case in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank, supra*.

[74] In *Central Capital*, the parties' intention was (according to the two concurring reasons in the majority) reflected "mainly" in the share purchase agreements, conditions attaching to the shares, the company's articles, and the manner in which Central Capital recorded the shares in its financial statements. They did not establish a debt obligation on the part of the company: see, e.g., para. 131.

[75] Incidental or secondary aspects of a transaction, such as mechanisms for enforcement, should not distract the inquiry: *CDIC* at paras. 46-54; *Earthfirst Canada Inc. (Re)*, ABQB at para. 5.

Examples

[76] Useful guidance for the inquiry into the true nature or substance of the relationship between preferred shareholders and ACIC can also be drawn from some of the cases cited by the parties in submissions.

[77] In *Bul River*, Fitzpatrick J. rejected the claim of certain preferred shareholders that their equity claims converted into debt claims simply because they had obtained (default) judgment for their redemptions against one of the insolvent companies: paras. 85-98, 103-117.

[78] In *Return on Innovations Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 5018, it did not matter that a claim by a shareholder seeking recovery of share purchase proceeds in the amount USD $50 million was founded on breach of contract and fraud. The legal basis for the claim was not the “deciding factor”. Nor were the “legal tools” used by the claimant, because, Mr. Justice Newbould said, at para. 59, they were being used to recover an equity investment.

[79] In *Nelson Financial*, which was a *CCAA* proceeding, Madam Justice Pepall (as she then was) disagreed that the preferred shareholders were debt claimants. In that case, the company raised money by two different means: from lenders to whom it issued promissory notes with an annual rate of return of 12% and from investors to whom it issued non-voting preferred shares with an annual dividend of 10%. The company’s articles provided the company with unilateral redemption rights on payment of the purchase price plus accrued dividends. At least one investor negotiated a right of redemption and two redemption requests were outstanding as of the *CCAA* filing date. The company’s financial statements also treated the shareholders as equity investors and distinguished them from its creditors.

[80] After referring to the distinction between debt and equity claimants, Pepall J. discussed the broad scope ascribed to the meaning of an equity claim or interest:

> [26] This treatment also has been held to encompass fraudulent misrepresentation claims advanced by a shareholder seeking to recover his investment: *Re Blue Range Resource Corp.* In that case, Romaine J. held that the alleged loss derived from and was inextricably intertwined with the shareholder interest. … *National Bank of Canada v. Merit Energy Ltd*. and *Earthfirst Canada Inc.* both treated claims relating to agreements that were collateral to equity claims as equity claims. These cases dealt with separate indemnification agreements and the issuance of flow through shares. The separate agreements and the ensuing claims were treated as part of one integrated transaction in respect of an equity interest. The case law has also recognized the complications and delay that would ensue if *CCAA* proceedings were mired in shareholder claims.

[81] In addition to reviewing the articles of the company and the share certificates, Pepall J. considered the following evidence of surrounding circumstances at para. 31:

(a) investors' right to receive dividends (said to be "a well recognized right of a shareholder");

(b) investors were given the option of investing in promissory notes or preference shares and opted for the latter;

(c) on liquidation, dissolution, or winding up, preferred shareholders ranked ahead of common shareholders; and

(d) shares were treated as equity in the company's financial statements and in its books and records.

[82] In the result, and although she found characteristics of both debt and equity claims in the relationship, she concluded that the substance of the relationship between the preferred shareholders and the company was equity, not debt: paras. 31-32.

[83] In the *CCAA* case of *JED Oil Inc. (Re),* 2010 ABQB 295, the analysis focused on the relationship at the time the shares were issued when considering the true nature of the claims of preferred shareholders for unpaid dividends. Madam Justice Kent rejected the shareholders' claim as creditors of debt claims. There was no language in the share certificates to establish that dividends were declared and

owing on the date the shares were issued. She found that the substance of the relationship at the time the shares were purchased was not creditor-debtor. The shareholders, she said at para. 16, "are risk-takers, not creditors. For them to become creditors from the time they are issued the shares would require more explicit wording than is contained in these shares."

[84] Lastly, in *Dexior Financial*, which involved a *BIA* proceeding, the fact that a redemption notice was issued prior to bankruptcy "does not change the original intention or substance of the claim": para. 16.

Summary

[85] To summarize, courts take into account a number of factors when determining the substance of the relationship when assessing the status of preferred shareholders. Examples include:

(a) The specific language contained in the company's articles and the transaction documents.

(b) The right of a shareholder to redeem their shares. The absence of this right is inconsistent with a creditor relationship. A right of redemption is particularly compelling as an *indicia* of a creditor relationship where the articles or transaction documents expressly provide that the redemption is for the repayment of a loan.

(c) Whether the shareholder had upside potential in the return of their investment, which indicates an equity relationship and also shared in the downside risk of a lower return.

(d) Whether the shareholder had the right to receive dividends, which is a strong *indicia* of an equity relationship.

(e) Treatment on liquidation, dissolution, or winding up.

(f) Whether the shares are treated as equity or debt in the financial statements of the corporation.

[86] The mechanism used to enforce redemption rights is irrelevant. The legal basis for any claim brought to collect on a redemption request is as well.

The Relationship between ACIC and Its Preferred Shareholders

Overview

[87] As mentioned at the outset of these reasons, I reject the redeeming preferred shareholders' claim that they are debt creditors of ACIC. None of ACIC's preferred shareholders are debt claimants. The redeeming preferred shareholders were not lenders *ab initio* as opposed to investors. They are equity claimants and rank together with all other preferred shareholders and are to be treated as such in the same class in this *CCAA* proceeding.

[88] The relationship between ACIC and its preferred shareholders is comprised of the Articles, the various Subscription Agreements, Offering Memoranda, and applicable legislation such as the *BCA*. The inquiry in this particular case is also governed by the *CCAA*. From them those sources, the substance of the relationship between ACIC and its preferred shareholders, including those who have delivered redemption requests, can be readily ascertained.

[89] The Articles, Offering Memoranda, and Subscription Agreements are clear that the relationship between ACIC and its preferred shareholders is an equity relationship. The preferred shareholders are clearly identified as investors who purchased non-voting preferred shares with rights to receive dividends at various rates dependent on ACIC's financial performance and with redemption rights which throughout may or may not be honoured as determined by ACIC's directors in their sole discretion.

[90] There is no language in the Articles suggesting, directly or indirectly, that a share redemption is in respect of a repayment of a debt. There is also no language, direct or indirect, in the Articles suggesting that preferred shareholders are lenders or that their investment is secured by a promissory note or something akin to it. Article 27.1 defines preferred shares as "without par value in the capital of the Company".

[91] Prefered shareholders took the advantages of the potential upside in ACIC's earnings obtained from increasing lending rates as well as the risk of loss of their entire investment.

[92] The risks of the investment are clearly outlined to potential investors. The Offering Memoranda characterized the "investment" as both "risky" and "speculative". Each Offering Memoranda contains a detailed discussion (including warnings) of numerous risk factors associated with an investment with ACIC, including its speculative nature, the absence of a market to transfer or assign shares and warrants, and no guarantee that dividends would be declared or paid. The Offering Memoranda also advise that their contents had not been reviewed by any regulatory authority.

[93] The Offering Memoranda also describe the purchase of preferred shares as a speculative risk that should be considered only by subscribers who are able to withstand the loss of their total investment:

> ***Item 8 Risk Factors***
>
> The purchase of Units involves a number of significant risk factors. **Any or all of these risks, or other as yet unidentified risks, may have a material adverse effect on the Company's business, the value of the Preferred Shares and/or the return to Preferred Shareholders.**
>
> (a) **Investment Risk**
>
> **(i) Speculative Nature of Investment**
>
> **This is a speculative offering. The purchase of Units involves a number of significant risk factors and is suitable only for Subscribers who are aware of the risks inherent in mortgage investments and the real estate industry and who have the ability and willingness to accept the risk of the total loss of their invested capital and who have no immediate need for liquidity.**
>
> [All emphasis in original.]

[94] In some of the Offering Memoranda, ACIC's capital structure is described and shown to be comprised of common and preferred shares and is specifically distinguished from debt.

[95] The Subscription Agreements also contain language making it clear that each subscriber for preferred shares is making an investment, e.g.:

> **2. REPRESENTATIONS, ACKNOWLEDGMENTS AND CONVENANTS**
>
> 2.1. The Subscriber acknowledges represents and covenants that:
>
> …
>
> (j) the Subscriber is purchasing the Units as principal for investment only and not with the view to the resale or distribution thereof;
>
> [Bold in original]

[96] A subscriber for preferred shares is required to sign a Form 20A per the *Securities Act*, R.S.B.C. 1996 c. 418 confirming, *inter alia*:

> 4. I acknowledge that:
>
> …
>
> (c) I may lose all of my investment; …

[97] There is no language in the Subscription Agreements suggesting that a subscriber for preferred shares is a lender or creditor through any other capacity.

[98] I disagree with the redeeming preferred shareholders' submission that a key *indicia* of an equity investor is defined in part by the word "unlimited" in respect of the opportunity to participate in the financial upside of the company if "unlimited" signifies there can be no possible limit on the rate of return.

[99] They rely on a reading of the reasons in *Sino-Forest* (ONSC) at para. 30 and argue that given the exigencies of the mortgage lending market, it was never possible for them to participate in an "unlimited financial upside" of ACIC. They point to what they characterize as a cap on their highest rate of return for dividends and say that in effect, their relationship with ACIC was akin to creditor and debtor.

[100] In my opinion, "unlimited upside" refers to the possibility of enjoying the benefits of ongoing and potentially increasing profits of the company.

[101] For ACIC, the rates of return, and hence its revenues and profits, depended on market conditions and were not fixed to any maximum. Preferred shareholders always retained the opportunity to share in higher rates of return if market conditions changed to allow for higher lending rates. Conversely, they also took the risk of lower rates of return resulting from potential adverse market conditions and

impediments to ACIC's ability to collect on its loan portfolio (both of which have occurred). I agree with the submission of the creditors who appeared on the application that the investment made by the preferred shareholders is akin to an investment in a fluctuating commodity.

[102] I also disagree with the redeeming preferred shareholders that the fact that ACIC pooled investors' funds indicates a debt relationship or establishes the preferred shareholders as lenders. Pooling from investors is the means by which a MIC such as ACIC is able to carry on business to lend funds to third party borrowers.

[103] I will conclude this section with this observation. If the redeeming preferred shareholders' position that the nature of their relationship from the outset is one of creditor is correct, then it would defeat their claim to be contrasted from the non-redeeming preferred shareholders since all of ACIC's preferred shareholders would be debt as opposed to equity claimants and rank alongside ACIC's other creditors.

Redemption Rights Do Not Affect the Outcome

[104] The redeeming preferred shareholders place significant reliance on their redemption rights (to seek the return of their principal investment amount) as *indicia* of a debt relationship.

[105] In this case, when considered in context, the mere presence of redemption rights do not establish a debt relationship. The intention of ACIC and the preferred shareholders expressed in the Articles and the transaction documents does not establish a debt relationship. There is no language in the Articles, the various Offering Memoranda, and the Subscription Agreements that indicates that the redemption is in repayment of a debt. Furthermore, preferred shareholders were advised throughout that their redemption rights were not guaranteed.

[106] The redemption provisions do not state or suggest that subscribers for preferred shares are lenders. Nor do they state or suggest that preferred shares are given as security akin to a promissory note. Unlike a promissory note, which typically contains a promise to pay by a certain date or the happening of a certain event(s), ACIC's obligation to honour redemption requests was always in the sole discretion of

its directors, who may also clarify or establish terms and conditions for redemption should they consent to a request.

[107] The *BCA* requires that all rights attached to shares be set out in a company's articles: ss. 11(h), 12(2)(b), 48. The Articles state that redemption is in the sole discretion of ACIC's directors. As noted in the previous section, the redemption provisions in the Articles are found in article 27.4. According to Mr. Bergman, ACIC's sole director throughout, ACIC's redemption policy remained unchanged since it began issuing preferred shares in 1998.

[108] Article 27.4 specifically deals with redemption requests from preferred shareholders. Mr. Bergman's sole discretion to consent to or reject redemption requests is clear:

> **27.4 Redemption of Preferred Shares**
>
> A Preferred Share will be redeemed by the Company if and only if:
>
> (a) the Company has received written notice from the registered holder of the Preferred Share that he wishes the Company to redeem the Preferred Share;
>
> (b) the Directors, in their sole discretion, consent to the redemption by the Company of the Preferred Share pursuant to terms and conditions set by the Directors in their sole discretion; and
>
> (c) the Preferred Shareholder who requested that his Preferred Share be redeemed, accepts the terms and conditions of redemption set by the Directors.
>
> The Directors will not be obligated to provide any reasons for not consenting to a Preferred Shareholder's request to have his Preferred Shares redeemed by the Company.
>
> [Bold in original.]

[109] Further, and in contrast to *Nelson Financial*, there are no provisions in the Articles or transaction documents obliging ACIC to buy back shares. To the contrary, Article 8.2 provides that if ACIC proposes at its option to redeem some but not all of the shares of any class or series, then it is in the discretion of its directors subject to special rights and restrictions attached to each share. ACIC's directors are given the discretion whether to decide the manner in which the shares to be redeemed are selected and whether the redemption is *pro rata*.

[110] Turning to the Offering Memoranda, those documents contain detailed information concerning the redemption process and restrictions on redemption requests. Mr. Bergman's discretion to consent or refuse to honour redemption requests is a pervasive theme in the various Offering Memoranda.

[111] For example, ACIC's first Offering Memoranda issued in 1998 warns potential subscribers that redemptions are not guaranteed and may never be honoured:

> **Redemption of Preferred Shares:** The Director of the Company has adopted a Policy regarding the redemption of Preferred Shares. A copy of such policy is available from the Company upon request.
>
> **Pursuant to such policy, a Preferred Share will be redeemable by the Company in certain circumstances. Although the Company will use its best commercial efforts to ensure that all requestsfor redemption are fulfilled, depending on such circumstances the Company cannot guarantee that any or all of the Preferred Shares in respect of which requests for redemption are received will be redeemed in any fiscal year. See Item 8 – "Risk Factors" – Limited Redemption Rights**.
>
> …
>
> The Company will no redeem any Preferred Shares if at the time of such redemption the Company is insolvent or if such redemption will render the Company insolvent, if such redemption will reduce the Company's cash reserves below a level which the Directors determine, in their sole discretion, to be prudent, or if such redemption will cause the Company to breach the requirement that at least 50% of the cost amount of its property must consist of bank deposits or mortgage loans made in respect of residential properties.
>
> [All emphasis in original.]

[112] In addition to the the sole discretion to honour a redemption request vesting with the director, the Offering Memoranda spell out other limitations on redemptions, e.g., adverse financial circumstances including liquidity issues:

> **No Guaranteed Dividends**
>
> The dividends in which the Preferred Shareholders are entitled to participate are **not** cumulative and will not be paid unless such dividends have been declared by the Directors. The Directors have the sole discretion as to whether or not any such dividends are declared. Therefore, there is no guarantee that dividends payable to Preferred Shareholders will be declared.
>
> [All emphasis in original.]

[113] The Offering Memoranda issued in 2001 and 2002 provide another example. They are clear that redemption depends on the consent of the directors in their "sole

discretion" pursuant to "terms and conditions set by the Directors". Subscribers are advised that the "Directors will not be obliged to provide any reasons for not consenting to a Preferred Shareholders' request to have their Preferred Shares redeemed by the Company".

[114] Commencing in 2003, the Offering Memoranda referred to a redemption policy and included a summary making it clear that redemption remained in the discretion of its directors to amend or cancel it, adopt an alternative policy, or refuse to consent to a redemption.

[115] This example is taken from the 2003-2006 and 2015 Offering Memoranda:

> **Redemption of Preferred Shares**: The Company has adopted a policy regarding the redemption of Preferred Shares. A copy of such policy is available from the Company upon request.
>
> **Pursuant to such policy, a Preferred Shareholder will be redeemable by the Company in certain circumstances. Although the Company will use its best commercial efforts to ensure that all requests for redemption are fulfilled, depending on such circumstances the Company cannot guarantee that any or all of the Preferred Shares in respect of which requests for redemption are received will be redeemed in any given fiscal year**. …
>
> …
>
> The Company will not redeem any Preferred Shares if at the time of such redemption the Company is insolvent or if such redemption will render the Company insolvent, if such redemption will reduce the Company's cash reserves below a level which the Company's directors (the "**Directors**") determine, in their sole discretion, to be prudent, or if such redemption will cause the Company to breach the requirement that at least 50% of the cost amount of its property must consist of bank deposits or mortgage loans made in respect of residential properties.
>
> Further, in any calendar quarter, the Company will not redeem any more than that number of Preferred Shares which is equal to 2 1/2 % of the outstanding Preferred Shares at the end of the immediately preceding calendar quarter. ...
>
> …
>
> **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 Shareholder's request to have their Preferred Shares redeemed by the Company.**
>
> [All emphasis in original.]

[116] Nothing in ACIC's redemption policies removed or otherwise constrained Mr. Bergman's unfettered discretion to consent or refuse to honour redemption requests.

[117] The redemption policy that ACIC adopted (in accordance with s. 27.4 of the Articles) on December 1, 2006 serves as a useful example of its ongoing retention of discretion to honour redemption requests. The policy language is clear that ACIC's new policy did not fetter the discretion of its director from time to time to amend or cancel it in whole or in part or refuse to consent to a redemption request:

> B. Pursuant to Section 27.4 of the Articles of the Company, Preferred Shares are redeemable by the holder provided that:
>
> …
>
> 2. The Company's Director, in his sole discretion consents to such redemption pursuant to terms and conditions set by the Director in his sole discretion; and
>
> 3. The holder accepts the terms and conditions of redemption set by the Director.
>
> The Director is not required to provide any reasons for not consenting to a request for redemption of Preferred Shares.
>
> …
>
> 7. The adoption of this Preferred Share Redemption Policy does not fetter the discretion of the Director from time to time to amend or cancel this 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 Shareholder's request to have their Preferred Shares redeemed by the Company.

[118] Another redemption policy (undated) in evidence from Mr. Bergman, attached as Exhibit "D" to his affidavit sworn November 7, 2017, is to a similar effect, making it clear that redemptions may not be honoured:

> **Redemption of Preferred Shares:**
>
> The Company has adopted a policy regarding the redemption of Preferred Shares. A copy of such policy is available from the Company upon request. Pursuant to such policy, a Preferred Share will be redeemable by the Company in certain circumstances. **Although the Company will use its best commercial efforts to ensure that all requests for redemption are fulfilled, depending on such circumstances the Company cannot guarantee that any or all of the Preferred Shares in respect of which requests for redemption are received will be redeemed in any given fiscal year.**

> …
>
> 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 Shareholder's request to have their Preferred Shares redeemed by the Company.
>
> **There are times when redemption requests may not be processed in a timely manner and shareholders may have to wait longer than expected to receive their redemption request. The source of funds used to process redemptions may be from new capital raised and/or loans being repaid. There is no guarantee that funds will be available to meet all redemption requests.**
>
> [All emphasis in original.]

Unsatisfied Redemption Requests Are Not Debt

[119] The redeeming preferred shareholders place great importance on the decision of the Court of Appeal in *Re East Chilliwack Agricultural Cooperative* (1989), 74 C.B.R. (N.S.) (B.C.C.A.), to support their claim to be debt claimants when they delivered their redemption notices. The decision in that case has been the subject of adverse comment or distinguished in other case authorities in this province and others. However, it is sufficient for my determination to note that the facts of that case are clearly distinguishable from the instant proceeding.

[120] In that case, farmers who owned shares in an agricultural cooperative gave notice to the co-op of their intention to have their shares redeemed. Thereafter, and before they were paid, the Superintendent of Co-operatives suspended the right of the co-op to redeem its shares due to liquidity issues. Mr. Justice Hutcheon, writing for the majority, determined that they were entitled to be treated as creditors. However, as is noted at the outset of his reasons, the effect of the Superintendent's order was not argued on the appeal. More importantly for the issues raised on the present application, by virtue of the Cooperative's constating documents, the claimant shareholders in *East Chilliwack*, ceased to be shareholders when they served their redemption notices.

[121] As previously discussed, in the case at bar, redeeming preferred shareholders whose redemption requests were not honoured, either in whole or in

part, retained their rights and privileges as shareholders. They continued to receive a share of the profits of ACIC from dividend payments through to 2016. Also unlike *East Chilliwack*, ACIC's obligation to honour the redemption notices and to buy back shares remained discretionary throughout. In the present case, ACIC's obligation to redeem was always premised, at a minimum, on a best efforts basis and dependent on its liquidity.

[122] Thus, the decision in *East Chilliwack* is not authority for a general proposition that unpaid redemption requests are *indicia* of debt. Unsatisfied redemption requests do not of themselves change the substance of the relationship from an equity interest to a debt claim. In *Central Capital*, the preferred shareholders' claim that they were debt claimants on the basis of their unsatisfied rights of redemption was rejected by the majority: paras. 97, 135-136.

[123] In some instances, ACIC made partial payment of a redemption request and indicated in documents provided to certain redeeming preferred shareholders that the remaining unpaid redemption amounts were "o/s", or outstanding. During oral submissions, the possibility was raised that this advice from ACIC might reflect a change in the relationship between those particular redeeming shareholders and the company. In my opinion, it does not. In *Bul River*, the fact that redeeming shareholders had gone one step further and obtained judgment to recover unpaid redemption amounts was insufficient to convert their equity interest to a debt claim.

Winding-Up Provisions Do Not Affect the Result

[124] The redeeming preferred shareholders rely on the decision in *Coast Capital*, which treated similar winding up language in the Articles as *indicia* of a debt relationship, to support their position that they are debt claimants.

[125] I disagree that the reasons in *Coast Capital* support the position articulated by the redeeming preferred shareholders.

[126] At issue in that case was the tax treatment of shares issued by the credit union labelled "non-equity shares". The case involved statutory interpretation of provisions in the *Corporation Capital Tax Act*, R.S.B.C. 1996, c. 73, the *Financial*

Institutions Act, R.S.B.C. 1966, c. 141 [*FIA*], and the *Credit Union Incorporation Act*, R.S.B.C. 1996, c. 82, as well as the certain provisions of the rules promulgated by Coast Capital respecting the impugned shares (described as “non-equity” shares). Disimilar to the case at bar, the *FIA* defines a non-equity share (in s. 1(1)) issued by a credit union as one evidencing indebtedness of the credit union to the holder of the share that does not represent an equity interest in the credit union.

[127] The outcome in *Coast Capital* turned on its own facts, which are significantly different and thus distinguishable from the case at bar. For example, and unlike the case at bar, the shares in issue in *Coast Capital* were restricted to a 6% non-cumulative dividend in addition to the amount paid on winding up or dissolution. In addition, the credit union was required to redeem those shares on a fixed date. The Court of Appeal engaged in an analysis of the legal substance of those shares and determined that they reflected a debt interest.

[128] The statutory objectives and considerations in that case also differ from those concerning the *CCAA*. In her reasons in *Coast Capital*, Newbury J.A. observed that the case before the Court of Appeal did not concern bankruptcy of insolvency law: paras. 7, 53-56.

[129] In the case at bar, and unlike *CDIC*, there is no provision in the Articles or Offering Memoranda stating or even suggesting that upon a winding-up or insolvency, ACIC’s preferred shareholders, let alone any who have sought redemption, are entitled to rank *pari passu* with its creditors: *CDIC* at 563; *Central Capital* at para. 132.

[130] Section 27.5 of the Articles provides a procedure for distribution of ACIC’s assets upon winding up or liquidation. ACIC’s assets will be distributed to the Preferred Shareholders in priority to the Common Shareholders as follows:

> Upon the winding up or dissolution or liquidation of the Company, the Company’s assets will be distributed to the Preferred Shareholders in priority to the Common Shareholders as follows:
>
> - first to the Preferred Shareholders on a pro rata basis among the Preferred Shareholders until each Preferred Shareholder has received the lesser of: (i) the original subscription price for each Preferred

> Share for which the Preferred Shareholder is the registered holder and all dividends that have been declared but for which the Preferred Shareholder has yet to be paid; and (ii) the book value of the Preferred Shares, for which the Preferred Shareholder is the registered holder, as determined in the upcoming year-end audited financial statements; and
>
> - the balance to the Common Shareholders on a pro rata basis among the Common Shareholders, to the exclusion of the Preferred Shareholders.

[131] In *Central Capital*, Weiler J.A. pointed out that winding up and liquidation are other forms of insolvency. Both, she said, are "methods for secured creditors to enforce their claims by seizing the assets in which they hold security interests": para. 99. In the same paragraph, however, she said that in light of s. 173 of the governing statute in that case - the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 - whose provisions are similar to those found in Part 9 of the *BCA*, the interests of preferred shareholders with redemption rights are subordinated to creditors.

[132] Laskin J.A. took a similar view. As is the case in the instant proceeding, he found that even after redemption rights are exercised, preferred shareholders continue to be entitled to dividends until their shares are in fact redeemed. On a liquidation, shareholders rank as equity claimants and not as creditors (even though in that case, and unlike the facts of this case, their redemption rights allowed shareholders to compel the company to redeem so long as it was solvent). Redemption, Laskin J.A. explained, is a return of capital not a repayment of a loan: paras. 134-135.

[133] The same view was taken in *Nelson Financial* at para. 31(c).

No Alteration to Establish a Contractual Right to Compel Redemption Exists

[134] In their alternative argument, the redeeming preferred shareholders submit that if they were equity claimants at the outset, then their contractual relationship with ACIC changed as a result of its later redemption policies and certain communications that ACIC published or delivered to potential and existing

shareholders. They submit that ACIC's redemption policies moved away from a discretionary right held by Mr. Bergman and became an enforceable contractual right held by each preferred shareholder to compel redemption during specific windows of time and upon certain conditions being met.

[135] I disagree. The redeeming preferred shareholders have not established that their contractual relationship with ACIC changed so as to become debt creditors.

[136] The redemption policies that ACIC issued starting in 2006 did not provide an unconditional promise that redemption notices would be honoured. Those policies were clear that ACIC's right to honour a redemption request was always at the discretion of its directors.

[137] The communcations from ACIC also do not alter the contractual relationship. The examples provided by the redeeming preferred shareholders consist, for the most part, of marketing materials, executive summaries, and standard form answers to "FAQs" (frequently asked questions). Many of the impugned communications appear on their face to be intended to induce investment in ACIC through subscriptions of Units.

[138] ACIC's communications do not convey an intention to enter into a binding agreement: *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144 at paras. 47- 48.

[139] As I have found, ACIC's communications with its preferred shareholders concerning redemptions and redemption policies and terms were clearly stated throughout to be subject to the sole discretion of its directors. ACIC continued to make it clear to its preferred shareholders throughout that in addition to its right to refuse to honour a redemption request, it retained the right to alter, amend, or cancel its redemption policy at any time. In some communications, ACIC advised that its ability to honour a redemption request depends on the company's liquidity.

[140] Each preferred shareholder was required to sign a Subscription Agreement in order to purchase Units. They contained language confirming the subscriber's

decision to purchase Units was based solely upon the information contained in the Offering Memoranda and any agreements or documents incorporated in them. There is no room to incorporate into the Subscription Agreements any representations that might have been made and relied upon by the redeeming preferred shareholders either at the time of subscription or afterward.

[141] ACIC's redemption policies and communications cannot purport to change the rights attached to shares, such as redemption rights, as set out in the Articles, which is a foundation document governing the contractual rights of preferred shareholders. The Articles can only be amended by special resolution and in strict compliance with the *BCA*, which did not occur in this case: *BCA*, ss. 2(2)(b), 54(3), 58(2), 61. For example, s. 61 of the *BCA* provides that special rights and restrictions attached to a share are not varied or deleted until a company's articles have been altered to reflect the variation or deletion:

> 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.

[142] Further, based on the evidence adduced on this application, mass communications sent from or given by ACIC to potential and existing preferred shareholders do not establish a change in the relationship.

[143] In any event, even if it could be said that there was an elimination of unfettered and at will discretion to redeem on the part of ACIC's director, the substance of the relationship between ACIC and its preferred shareholders did not change from equity to debt as a result.

[144] Lastly, it is not an issue on this application whether the redeeming preferred shareholders can look beyond the four corners of their Subscription Agreements, such as to advance a claim for inducement to purchase shares or any delay in requesting a redemption through a representation(s) made by on or behalf of ACIC. The answer to that question also has no bearing on the characterization of the

nature of the redeeming preferred shareholders' status in this *CCAA* insolvency proceeding.

[145] For these reasons, I do not need to consider the redeeming preferred shareholders' submission, based on *Rosas v. Toca*, 2018 BCCA 191, that no consideration is necessary to support the alleged change in their contractual relationship with ACIC.

Treatment in Financial Records

[146] Since surrounding circumstances are referred to by the redeeming preferred shareholders, it is useful to refer to the manner in which ACIC treated its preferred shareholders in its financial records. Reference to treatment in financial records was considered in some of the case authorities I have cited (e.g., *Central Capital*). In considering this evidence, I am mindful of the caution in *CDIC* (at para. 61) that a company's treatment in its financial records is to be accorded limited weight.

[147] ACIC's financial records describe the preferred shares as "Share Capital" and not as debt. There are separate, specific line items for short term and long term debt and debentures, which do not include the monies paid by subscribers for their Units. For example, the 2015 financial statements state that there is "No Long Term Debt". Capital from share subscriptions is described as "Shareholders' equity" in financial statements prepared by ACIC's third party accounting firm, BDO Dunwoody, under a line item entitled, "Liabilities and Shareholders' Equity".

Conclusion

[148] The preferred shareholders' investment in ACIC was in respect of an equity interest. Their claims are not debt claims. They are claims that only a shareholder can make. The redemption rights attached to ACIC's preferred shares are in substance rights to the return of a capital invested in a MIC with significant risks.

[149] ACIC's deteriorating financial position led to its inability to honour the outstanding redemption requests delivered by certain preferred shareholders. It is a

risk that all preferred shareholders were clearly informed of before purchasing their shares.

[150] A declaration shall issue that the claims of all of its preferred shareholders fall within the ambit of equity claims as defined in s. 2 of the *CCAA*.

"Walker J."

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The Honourable Mr. Justice Walker