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

NOTICE OF APPLICATION

Name of applicant: The Petitioner

To: Service List

TAKE NOTICE that an application will be made by the Petitioner at the courthouse at 800 Smithe Street, Vancouver, British Columbia, commencing on April 24, 2019 at 9:45 a.m. for the Orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. The Petitioner seeks the following orders:

   (a) a declaration that for the purposes of these proceedings that all Preferred Shareholders Claims (as defined below) are "equity claims" within the meaning of section 2(1) of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "*CCAA*");

   (b) an Order directing the Petitioner to treat and assess all Preferred Shareholder Claims as equity claims in any plan of arrangement or compromise filed with this Honourable Court; and

   (c) such further and other orders as this Honourable Court deems just.

Part 2: FACTUAL BASIS

Background

2. On November 10, 2017 Madam Justice Adair made the initial order in these proceedings (the "Initial Order"), granting the Petitioner protection from its creditors pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

3. The stay of proceedings provided for in the Initial Order has been extended on various occasions, the most recent of which was by order pronounced on January 23, 2019 Mr. Justice Walker (the "January 23 Order") extending the stay of proceedings to May 3, 2019.

4. By order of Mr. Justice Walker dated January 11, 2019, the Petitioner was directed to file and serve application materials seeking a determination of the status of the Preferred Shareholders Claims.

History and Corporate Summary of the Petitioner

5. The Petitioner is a mortgage investment corporation ("MIC") which has been in business since 1998. Its business is to provide loans to owners and developers of residential, commercial, office and industrial real estate properties (the "Borrowers"), which are secured by registered, unregistered and equitable mortgages on the properties (the "Mortgage Loans"). In addition, the Petitioner makes other loans and investments from time to time that may be unsecured (the "Other Loans", and together with the Mortgage Loans, hereinafter referred to as the "Loans").

6. The Petitioner's primary asset is its portfolio of Loans (the "Loan Portfolio") although it is presently the owner of certain real property which it in satisfaction of outstanding Loans. The real property presently listed for sale.

7. The Petitioner is a corporation duly incorporated and validly existing in the Province of British Columbia.

8. The Petitioner's corporate structure is divided into common voting shareholders, and preferred non-voting shareholders.

9. The Petitioner has issued a total of four voting common shares (the "Common Shares"), held by four shareholders (the "Voting Shareholders").

10. The Petitioner presently has outstanding 37,277 non-voting preferred shares (the "Preferred Shares") and a total of 15,647 warrants (the "Warrants"), issued to 627 shareholders (the "Preferred Shareholders").

11. The Preferred Shares and the Warrants were issued to Preferred Shareholders in a series of share subscriptions from 1998 to 2015.

12. Each offering memorandum offered by the Petitioner provided that subscribing shareholders would acquire security units (each a "Unit") comprised of one Preferred Share and one Warrant.

13. Each Warrant granted a Preferred Shareholder a non-transferable option to acquire additional Preferred Shares at a fixed price of $1,000.00 per Preferred Share, depending on the terms of the applicable share subscription. Each Warrant expires if:

    (a) 10 years have passed since the issuance of that Warrant; or

    (b) the Warrant holder has sold or otherwise transferred all of its Preferred Shares.

14. The total capital for all Units in the Petitioner is approximately $37,277,000.

15. From 2005 to 2014, the Petitioner issued dividends to its Preferred Shareholders at least annually. Preferred Shareholders received between 6.25% and 8% annual returns on their Preferred Shares during this period.

16. Dividends to Preferred Shareholders were reduced to approximately 2.5% annual returns in 2015 and further reduced to 1% annual returns in 2016.

17. Since 2016 the Petitioner has not issued any dividends to its Preferred Shareholders.

18. The Preferred Shares are redeemable in accordance with the Articles of Incorporation of the Petitioner (the "Articles") and the terms of the applicable offering memorandum.

19. Section 27.4 of the Articles sets out the preconditions for redeeming 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.

20. As at the date of this application approximately 540 Preferred Shareholders have delivered Share Redemption Forms to the Petitioner requesting that the Petitioner redeem their Preferred Shares (collectively, the "Redemption Notices", each a "Redemption Notice").

21. In total, the Redemption Notices request redemption of 27,587 Preferred Shares, for a total capital value of approximately $27,587,500.

22. Of that amount, $1,380,500 worth of Preferred Shares have been redeemed leaving a balance of outstanding Redemption Notices for Preferred Shares totalling $26,207,000.

23. The other the Preferred Shareholders have either not requested redemption of their Preferred Shares, or have sought to redeem only some of their Preferred Shares. The total dollar value of those Preferred Shares is approximately $9,689,500.

24. The Warrants do not provide for any capital interest in the Petitioner until they are exercised, and are not redeemable.

25. Section 27.5 of the Articles sets out the procedure for distribution of the Petitioner's assets upon winding up or liquidation.

> *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.*

26. The Petitioner currently anticipates that the maximum value of the Loan Portfolio and other assets in a wind-down or liquidation will not exceed $37,277,000.

27. If the Preferred Shareholders who have issued Redemption Notices are characterized as claimants by way of debt, then any plan of arrangement will likely require that Preferred Shareholders who have issued Redemption Notices ("Redeeming Shareholders") must be fully paid before any distribution to Preferred Shareholders who have not issued Redemption Notices ("Non-Redeeming Shareholders").

28. There is significant prejudice to Non-Redeeming Shareholders if the claims of the Redeeming Shareholders are determined to be claims in debt, rather than equity claims. Based on the wind-down realization values set out in the Monitor's 11th Report, there is a substantial likelihood that the Non-Redeeming Shareholders will not receive anything.

29. The Petitioner seeks a determination of the status of Redeeming Shareholders in order to formulate a plan of arrangement or compromise.

30. The Monitor has been fully apprised of the Petitioner's intention to apply for directions regarding the status of the Redeeming Shareholders.

31. The Petitioner has acted, and will continue to act, in good faith in accordance with any directions from this Honourable Court in these CCAA proceedings.

Part 3: LEGAL BASIS

32. The Petitioner relies on the terms and provisions of the CCAA, as amended.

33. The Petitioner also relies on Rules 1-3, 4-4, 8-1, 8-5, 22-1 and 22-4 of the *Supreme Court Civil Rules.*

34. Section 45 of the Initial Order provides that the Petitioner may from time to time apply to this Honourable Court for directions in the discharge of its duties under the CCAA.

Initial Order of Madam Justice Adair, Vancouver Registry
Court File No. S1710393, pronounced November 10, 2017

35. Section 22 of the CCAA provides procedures for a company establishing different classes of creditors in a plan of arrangement or compromise.

36. Section 22(1) provides that a company may divide its creditors into different classes, subject to court approval.

CCAA, at s. 22

37. Section 22.1 of the CCAA provides that, despite a company's general freedom to divide its creditors into different classes, a company must put all equity claims into a single class. Section 22.1 states:

> *22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.*

CCAA, at section 22.1

38. Section 6(8) of the CCAA provides that the Court may not approve a plan of arrangement unless that plan provides for unsecured debt to be fully paid before the payment of equity claims. Section 6(8) states:

> *Payment — equity claims*
>
> 6. *(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.*

CCAA, at section 6(8),

39. It is necessary and expedient for the Petitioner to determine whether the claims of Redeeming Shareholders are claims in the nature of unsecured debt, or equity claims.

40. Pursuant to s. 11 of the CCAA, the Court may make any order that it considers appropriate.

41. Pursuant to s. 2(1) of the CCAA, an "equity claim" is defined to include claims in the nature of equity interests. Section 2(1) defined an "equity claim" as follows:

> *equity claim means a claim that is in respect of an equity interest, including a claim for, among others,*
>
> *(a) a dividend or similar payment,*
>
> *(b) a return of capital,*
>
> *(c) a redemption or retraction obligation,*
>
> *(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or*
>
> *(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d).*

CCAA, s. 2(1), "equity claim"

42. Pursuant to s. 2(1) of the CCAA, an "equity interest" is defined as a share in a company other than those derived from convertible debt. Section 2(1) defines an "equity interest" as follows:

> *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;*

CCAA, s. 2(1), "equity interest"

43. In CCAA proceedings, the status of preferred shareholders with a right of retraction may be debts provable in bankruptcy, or equity claims in a company, depending on the circumstances at issue. A Court must determine the true substance of the relationship between the shareholder and the company.

Canada Deposit Insurance Corp. v. Canadian Commercial Bank, [1992] 3 S.C.R. 558 at 588 – 590 [*Canadian Commercial*]

Royal Bank of Canada v. Central Capital Corp., [1996] O.J. No. 359 at paras. 67 and 128 (C.A.) [*Central Capital*]

44. In *Central Capital,* the Ontario Court of Appeal addressed whether preferred shareholders who had issued retraction notices prior to the petitioning company's reorganization were creditors or equity claimants in CCAA proceedings. The Court's analysis, as summarized by Weiler J.A., required the Court to address three issues:

(1) Can the relationship between the claimant and the company be characterized as a shareholder relationship?

(2) Did the nature of the relationship change after the claimant's share retraction or redemption or at the time of the reorganization?

(3) If the nature of the relationship is not a shareholder-equity relationship, are the claimants entitled to prove a claim under the CCAA?

Central Capital at para. 68

45. The Court in *Central Capital* (Finlayson J.A. dissenting) held that the company's obligation to redeem preferred shares was not a claim in debt. Justices Weiler and Laskin held that the attempted redemptions were not enforceable, and converting preferred shareholders' claims into claims in debt would have been contrary to the principle of creditor protection.

Central Capital at paras. 79, 129 and 153

46. The central policy interest engaged in characterizing the relationship between a company and preferred shareholders seeking to redeem their shares in that company is creditor protection. It is a foundational principle of insolvency law that on the eve of insolvency, creditors rank ahead of shareholders seeking a return of their capital. Accordingly, allowing a shareholder to convert their equity claim into a debt claim, with a higher priority, increases the risk to *bona fide* creditors of a company and is contrary to the principal of creditor protection.

Central Capital at para. 153 (per Laskin, J.A.)

Re Bul River Mineral Corporation, 2014 BCSC 1732 at paras. 100 – 115

47. Section 27.4 of the Articles provides the procedures for redeeming Preferred Shares.

48. The Petitioner is not obligated to redeem any Preferred Shares unless its directors approve the redemption in "their sole discretion".

49. Section 79 of the *Business Corporations Act,* S.B.C. 2002, c. 57 provides that a company may not redeem shares when it is insolvent or when redemption would render that company insolvent. Section 79(1) states:

> *Redemption prohibited when insolvent*
>
> *79 (1) A company must not make a payment or provide any other consideration to redeem any of its shares if there are reasonable grounds for believing that*
>
> *(a) the company is insolvent, or*
>
> *(b) making the payment or providing the consideration would render the company insolvent.*

Business Corporations Act, S.B.C. 2002, c. 57 at s. 79

50. Even if a company has a contractual obligation to redeem shares, that claim is not claim in debt if it is not recoverable because of a conflict with a company's statutory obligations. This issue was summarized in relation to preferred shareholders in *Central Capital* by Weiler J.A. as follows:

> *117 Here, the contract to repurchase the shares, while perfectly valid, is without effect to the extent that there is a conflict between the corporation's promise to redeem the shares and its statutory obligation under s. 36 of the CBCA not to reduce its capital where it is insolvent. As was the case in the Holowach decision, this statutory overlay renders Central Capital's promise to redeem the appellants' preferred shares unenforceable. Although there is a right to receive payment, the effect of the solvency provision of the CBCA means that there is no right to enforce payment. Inasmuch as there is no right to enforce payment, the promise is not one which can be proved as a claim.*
>
> [underlining added]
>
> *Central Capital* at para. 117

51. Weiler J.A.'s determination that a company's redemption obligations are not a debt claim has been upheld by subsequent court decisions in British Columbia.

> *Fallin v. OFM Holdings Ltd.*, 2014 BCSC 1777 at paras. 17 -27

52. If the Redeeming Shareholders are determined to be creditors in debt instead of equity claimants, there is significant prejudice to the Non-Redeeming Shareholders who have not issued Redemption Notices.

Part 4: MATERIAL TO BE RELIED ON

53. The pleadings and materials filed herein;

54. Affidavit #10 of Donald Bergman made on January 24, 2019;

55. Monitor's updated report (to be filed); and

56. Such further and other material as counsel may advise and this Honourable Court may allow.

The Applicant estimates that the Application will take 3 days.

[ ] This matter is within the jurisdiction of a master.

[X] 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: January 24, 2019

Signature of Jeremy D. West
Counsel for the Petitioner

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:

_____

_____

_____

_____

Date: _____

_____
Signature of [ ] Judge [ ] Master

APPENDIX

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

[ ] 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