

06-Nov-18

REGISTRY

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 to the presiding Judge or Master at the courthouse at 800 Smithe Street, Vancouver, British Columbia, on Friday, November 9, 2018 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. an Order abridging the time for service of this Notice of Application and the materials herein such that the application is properly returnable on Friday, November 9, 2018;
 - b. an Order extending the stay of proceedings provided for in the order pronounced by this Honourable Court on October 19, 2018 from November 14, 2018 to February 8, 2019 or such other date as this honourable court deems just;
 - c. an Order directing the Petitioner to file an application (substantially in the form attached as Schedule "A" to this application) seeking a determination of the status of the Preferred Shareholders of the Petitioner (as defined below); and

d. such further and other orders as this honourable court deems just.

Part 2: FACTUAL BASIS

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 against the Petitioner provided for in the Initial Order has been extended on various occasions, the most recent of which were as follows:
 - (a) by order pronounced September 6, 2018 by Mr. Justice Iyer (the “September Order”) extending the stay of proceedings to November 7, 2018; and
 - (b) by order pronounced October 19, 2018 by Mr. Justice Walker (the “October Order”) extending the stay of proceedings to November 14, 2018.
4. By requisition of the Petitioner filed October 23, 2018, the Petitioner has scheduled the hearing of this application before Mr. Justice Walker (who has seized himself of the proceedings) to take place on November 9, 2018.
5. Pursuant to the October Order, the stay of proceedings expires on November 14, 2018 (the “Stay Period”).
6. The Petitioner seeks an extension of the Stay Period to February 8, 2019. Boale, Wood & Company Ltd. in its capacity as court-appointed Monitor of the Petitioner (the “Monitor”) has been advised of the request for such extension.
7. This extension is sought in order to allow further time for the Petitioner to wind down the loan portfolio and realize funds for distribution to stakeholders, schedule an application to determine the status of Preferred Shareholders of the Petitioner (as defined below), formally submit a claims process for court consideration and finalize the liquidation plan of compromise and arrangement (a “Plan”) to present to its stakeholders. Specifically, this extension would allow the Petitioner to:
 - i. finalize and apply for Court approval of a claims process for the Petitioner’s creditors and stakeholders, in substantially the form set out in Exhibit “A” of Donald Bergman’s Affidavit #9, filed in these proceedings;
 - ii. file, serve and seek a determination by the Court of a notice of application seeking directions and declarations regarding the priorities and status of the Petitioner’s Preferred Shareholders, in substantially the form set out in Schedule “A” to this Application;
 - iii. assist a creditor in its efforts to refinance with third-party lenders

to enable repayment of its outstanding indebtedness to the Petitioner;

- iv. facilitate the execution of a binding agreement to sell certain real property secured by equitable mortgages and certificates of pending litigation, and the negotiation of repayment to the Petitioner from the proceeds of sale;
- v. continue with its efforts to sell real property owned by the Petitioner;
- vi. continue with its efforts to sell real property pursuant to an exclusive order for conduct of sale granted to the Petitioner;
- vii. negotiate and/or seek a determination regarding payment priorities between the Petitioner and the Canada Revenue Agency (the "CRA") from the proceeds of sale of real property security against which the Petitioner has exclusive order for conduct of sale;
- viii. continue to supervise sale listings, conditional sale offers, and closing arrangements for properties which stand as security for loans in the Loan Portfolio;
- ix. continue to negotiate repayment arrangements with Borrowers;
- x. monitor completion of a development project from which a loan repayment is expected; and
- xi. develop the Plan to present to its stakeholders that would involve a fair, controlled and orderly wind-down of its business operations.

Background

- 8. 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").
- 9. The Petitioner's primary asset is its portfolio of Loans (the "Loan Portfolio").
- 10. In addition to the Loan Portfolio, the Petitioner owns certain real property (the "Real Property"). Since the date of filing two of those properties have been sold in accordance with the Order of Mr. Justice Pearlman dated January 24, 2018 (the "January Approval Order") and the Order of Mr. Justice Butler dated August 30,

2018. The balance of the properties are listed for sale.

11. As at the date of filing the Petitioner had issued a total of 37,277 preferred shares and 15,647 warrants, for total capital of approximately \$37,000,277.
12. The Petitioner's purpose for seeking CCAA protection is to stabilize its operations, take steps to recover (or realize security) and develop a Plan of that would involve a fair, controlled and orderly wind-down of its business operations, for the benefit of its stakeholders.

The Petitioner's Request for Directions regarding the Preferred Shareholders

13. The Petitioner is a corporation duly incorporated and validly existing in the Province of British Columbia.
14. The Petitioner's corporate structure is divided into common voting shareholders, and preferred non-voting shareholders.
15. The Petitioner has issued a total of four voting common shares (the "Common Shares"), held by four shareholders (the "Voting Shareholders").
16. The Petitioner has issued a total of 37,277 non-voting preferred shares (the "Preferred Shares") and a total of 15,647 warrants (the "Warrants"), issued to 632 shareholders (the "Preferred Shareholders"), for a total capital in the Petitioner of approximately \$37,000,277.
17. From 2005 to 2016, the Petitioner issued dividends to its Preferred Shareholders at least annually.
18. Since 2016, the Petitioner has not issued any dividends to its Preferred Shareholders.
19. The Preferred Shares are redeemable in accordance with the Articles of Incorporation of the Petitioner and the terms of the applicable share subscription offering memorandum between the Preferred Shareholder and the Petitioner.
20. A large number of Preferred Shareholders have requested redemption of their Preferred Shares representing a significant portion of the total capital.
21. If the Preferred Shareholders who have issued Redemption Notices are claimants by way of debt, then any plan of arrangement must provide 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").
22. The Petitioner seeks directions on the status of Redeeming Shareholders for the purpose of finalising a proposed claims process and Plan.

The Petitioner's Activities since the September 2018 Order and the Extension of the Stay

23. On September 6, 2018, the Petitioner provided the Court with an update on its activities in these proceedings by a hearing before Madam Justice Iyer, which resulted in the September Order extending the stay in these proceedings.
24. Since the September Order, the Petitioner has continued to manage the daily operations of its business. In addition, the Petitioner has:
 - a. worked cooperatively with the Monitor to provide the Monitor with information regarding the Loan Portfolio, the Real Property and its security realization efforts;
 - b. communicated with Borrowers, financial advisors, legal counsel, and other parties to assess and where practicable remedy issues regarding collectability;
 - c. communicated with Borrowers, real estate agents, potential purchasers, legal counsel, and other parties regarding the listing for sale certain property securing the Loan Portfolio, and supervised the process;
 - d. communicated with real estate agents, potential purchasers, legal counsel, and other parties regarding the listing and sale of certain property owned by the Petitioner located on Packalen Boulevard in Pender Harbour, British Columbia (the "Packalen Boulevard Properties");
 - e. assisted a borrower in its efforts to refinance a property which secures one of the loans in the Loan Portfolio;
 - f. communicated with real estate agents, potential purchasers, legal counsel, and other parties regarding the listing and sale of certain property listed for sale pursuant to an Order Nisi and conduct of sale in favour of the Petitioner located on Agnes Street in New Westminster, British Columbia (the "Agnes & Elliot Properties");
 - g. prepared for negotiations with the CRA regarding payment priorities from the proceeds of sale from the Agnes & Elliot Properties;
 - h. monitored completion of a development project from which a loan repayment is expected;
 - i. communicated with stakeholders in the CCAA proceedings;
 - j. considered and discussed restructuring plans with the Monitor to maximize the recovery to all stakeholders;
 - k. reviewed issues relating to the status of preferred shareholders with a view

to presenting a process for determining priorities between them to the court for approval;

- l. prepared a draft claims process order which it provided to the Monitor for review and comments; and
 - m. continued negotiations with Borrowers regarding additional security options.
25. The Petitioner believes that given a further extension it will be able to take further steps to realize upon its assets and the Loan Portfolio and submit a claims process for court approval. This will include:
- a. continue with marketing and negotiations for the balance of the real property owned by the Petitioner.
 - b. assisting with the sale of certain properties owned by the Censorio group against which the Petitioner has equitable mortgage interests and against which the Petitioner has registered Certificates of Pending Litigation;
 - c. attempting to negotiate (or litigate) a priority dispute between the Petitioner and the CRA over the sale proceeds of a property (with three more to be sold) against which the Petitioner commenced foreclosure proceedings (and has an Order Nisi for a sum in excess of \$6 million);
 - d. attempting to obtain additional security for certain Loan Portfolio assets upon the completion of a development project which a Borrower is involved in;
 - e. continuing to market the properties against which the Petitioner has an Order Nisi and an order for exclusive conduct of sale; and
 - f. assisting a borrower in its efforts to refinance a property against which the Petitioner has a first mortgage security with a view to repayment of a sum in excess of \$1 million.
26. If some, or all, of those activities are completed, the Petitioner anticipates receiving further payments to the Petitioner over the next few months.
27. The granting of an extension will allow those endeavours to proceed in an orderly fashion which will likely provide greater value to stakeholders, as opposed to an immediate “as is” liquidation of the Loan Portfolio. The cost of administration doing this in the CCAA process is likely to be significantly less than other alternatives and therefore provide a greater return to all stakeholders.
28. The Petitioner is continuing to communicate with the Monitor regarding development of a claims process and a Plan. Specifically:

- a. the Petitioner has prepared materials to bring an application to the Court seeking a determination of the status of the Redeeming Shareholders;
 - b. the Petitioner provided the Monitor with a proposed draft claims process order, which has been significantly amended as a result of comments from the Monitor and its counsel, which will enable an orderly claims process and minimize disruption to the Petitioner's ongoing efforts to realize upon the Loan Portfolio: and
 - c. the Petitioner has discussed the general terms of a proposed Plan with the Monitor which given the liquidation nature of the proceedings will be relatively simple.
29. The Petitioner requires further time to realize the maximum value of the value of the Loan Portfolio, whether by negotiation or prosecution of existing and further proceedings to realize on security.
30. An extension of the stay is a vital component of that process. Without it, there is no question that the position of stakeholders will be significantly prejudiced and the value of the Loan Portfolio will be compromised
31. The Petitioner will continue to work with the Monitor to attempt to reduce its overhead costs which have already been significantly reduced since the Initial Order.
32. There is little to no prejudice to any stakeholders in the event the Stay Period is extended.
33. The Monitor has been fully apprised of the Petitioner's intention to apply for an extension of the Stay Period to February 8, 2018.
34. The Petitioner has acted, and continues to act, in good faith and with due diligence in these CCAA proceedings.

Part 3:LEGAL BASIS

35. The Petitioner relies on the terms and provisions of the CCAA, as amended.
36. 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*.

Extension of the Stay

37. Pursuant to s. 11 of the CCAA, the Court may make any order that it considers appropriate.
38. Pursuant to ss. 11.02(2) and (3) of the CCAA, the Court may extend a stay of

proceedings granted in an Initial Order when:

- a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
 - b) in the case of an order under subsection (2) [extension of a stay], the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.
39. An extension of a stay should only be granted in furtherance of the CCAA's fundamental purpose of facilitating a plan of arrangement between debtor companies and their creditors.

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp., 2008 BCCA 327

40. In addition to the fundamental purpose of the extension, other factors to be considered on an application for a stay include:
- a) the debtor's progress during the previous stay period toward a restructuring;
 - b) whether the creditors will be prejudiced if the court grants the extension; and
 - c) the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension.

Re Worldspan Marine Inc., 2011 BCSC 1758

41. The CCAA can be used for an orderly wind-down of a company.

Re Target Canada Co., 2015 ONSC 303 (S.C.J.)

42. The extension of the Stay Period sought by the Petitioner is appropriate in the circumstances as it is consistent with the purpose of the CCAA and will enable the Petitioner to proceed with its business operations and develop a Plan to be presented to its stakeholders for an orderly wind-down of the company.
43. The Petitioner has acted and continues to act in good faith and with due diligence.
44. There is little to no prejudice to any stakeholders in the event the Stay Period is extended.

Directions regarding the Status of Redeeming Shareholders

45. 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*

46. Section 22 of the CCAA provides procedures for a company establishing different classes of creditors in a plan of arrangement or compromise.
47. Section 22(1) provides that a company may divide its creditors into different classes, subject to court approval.

CCAA, at section 22

48. 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

49. 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),

50. 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.

Part 4: MATERIAL TO BE RELIED ON

51. The pleadings and materials filed herein;
52. Affidavit #1 of Donald Bergman, made November 7, 2017;
53. Affidavit #2 of Donald Bergman, made November 30, 2017;
54. Affidavit #3 of Donald Bergman, made January 19, 2018; and

55. Affidavit #4 of Donald Bergman, made March 1, 2018;
56. Affidavit #5 of Donald Bergman, made on April 6, 2018;
57. Affidavit #6 of Donald Bergman, made on June 6, 2018;
58. Affidavit #7 of Donald Bergman, made on August 29, 2018;
59. Affidavit #8 of Donald Bergman, made on August 31, 2018;
60. Affidavit #9 of Donald Bergman, made on November 5, 2018;
61. Monitor's updated report (to be filed); and
62. Such further and other material as counsel may advise and this Honourable Court may allow.

The Applicants estimates that the Application will take ½ a day.

[] 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: November 5, 2018

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

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ 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

SCHEDULE "A"

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 to the presiding Judge or Master at the courthouse at 800 Smithe Street, Vancouver, British Columbia, on _____, 20____ 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.
 - (d)

SCHEDULE “A”

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 against the Petitioner provided for in the Initial Order has been extended on various occasions, the most recent of which was on November 9, 2018, when Mr. Justice Walker made an order (the “November Order”) extending the stay of proceedings to _____, 2018.
4. Pursuant to the November Order, the Petitioner was directed by Mr. Justice Walker to file an application seeking a determination of the status of the preferred shareholders in the capital of the Petitioner.

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”).
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 has issued a total of 37,277 non-voting preferred shares (the “Preferred Shares”) and a total of 15,647 warrants (the “Warrants”), issued to 632 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

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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 between \$_____ and \$_____ per Preferred Share, depending on the terms of the applicable share subscription. Each Warrant expires if:
 - (a) 10 years have past 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 \$37,000,277.
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 then, 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 and the terms of the applicable share subscription offering memorandum between the Preferred Shareholder and the Petitioner.
19. Section 27.4 of the Petitioner's Articles of Incorporation provides the procedures for redeeming Preferred Shares. This section states:

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

SCHEDULE "A"

by the Company.

20. Pursuant to the Petitioner's Articles, approximately _____ Preferred Shareholders have provided the Petitioner with notices requesting that the Petitioner redeem that shareholder's Preferred Shares (collectively, the "Redemption Notices", each a "Redemption Notice").
21. In total, the Redemption Notices request redemption of _____ Preferred Shares, for a total capital value of approximately \$_____.
22. Approximately _____ Preferred Shareholders have not requested redemption of their Preferred Shares, totalling _____ Preferred Shares for a total capital of approximately \$_____.
23. The Warrants do not provide for any capital in the Petitioner until they are exercised, and are not redeemable.
24. Section 27.5 of the Petitioner's Articles of Incorporation provides the procedures for distribution of the Petitioner's assets upon winding up or liquidation of the Petitioner. This section states:

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.*
25. The Petitioner anticipates that the maximum value of its Loan Portfolio in a wind-down or liquidation will not exceed \$37,000,000.
 26. If the Preferred Shareholders who have issued Redemption Notices are claimants by way of debt, then any plan of arrangement must provide 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").
 27. Accordingly, if the claims of Redeeming Shareholders are characterized as claims in debt, rather than equity claims, the Redeeming Shareholders must be

SCHEDULE "A"

completely paid before any distribution to the Non-Redeeming Shareholders.

28. There is significant prejudice to Non-Redeeming Shareholders if the claims of Redeeming Shareholders are determined to be claims in debt, rather than equity claims.
29. The Petitioner seeks a determination of the status of Redeeming Shareholders in order to formulate a plan of arrangement for compromise to submit to its creditors.
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, 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 section 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

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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); (réclamation relative à des capitaux propres)

CCAA, at section 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) defined an “equity interest” as follows:

equity interest means

(a) in the case of a company other than an income trust, a

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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; (intérêt relatif à des capitaux propres)

CCAA, at section 2(1), “equity interest”

43. In CCAA proceedings, the status of preferred shareholders with a right of retraction may be debts proveable 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 in agreement 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

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46. The central policy for 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 Petitioner's Articles of Incorporation provides the procedures for redeeming Preferred Shares. This section states:

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.

Affidavit No. ... of Donald Bergman. Exhibit ____

48. Pursuant to the Articles, the Petitioner is not obligated to redeem any Preferred Shares unless the Petitioner's directors approve the redemption in "their sole discretion".
49. Section 27.5 of the Petitioner's Articles of Incorporation provides the procedures for distribution of the Petitioner's assets upon winding up or liquidation of the Petitioner. This section states:

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*

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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.*

Affidavit No. ... of Donald Bergman. Exhibit _____

50. 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

51. 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]

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Central Capital at para. 117

52. 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

53. 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

54. The pleadings and materials filed herein;
55. Affidavit #1 of Donald Bergman, made November 7, 2017;
56. Affidavit #2 of Donald Bergman, made November 30, 2017;
57. Affidavit #3 of Donald Bergman, made January 19, 2018; and
58. Affidavit #4 of Donald Bergman, made March 1, 2018;
59. Affidavit #5 of Donald Bergman, made on April 6, 2018;
60. Affidavit #6 of Donald Bergman, made on June 6, 2018;
61. Affidavit #7 of Donald Bergman, made on August 29, 2018;
62. Affidavit #8 of Donald Bergman, made on August 31, 2018;
63. Affidavit #9 of Donald Bergman, made on November 5, 2018;
64. Affidavit #____ of Donald Bergman, made on _____, 2018;
65. Monitor's updated report (to be filed); and
66. Such further and other material as counsel may advise and this Honourable Court may allow.

The Applicants estimates that the Application will take 1/2 a day.

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

[X] This matter is not within the jurisdiction of a master.

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TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application:

- (a) file an application response in Form 33;
- (b) file the original of every affidavit, and of every other document, that:
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: November 5, 2018

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

SCHEDULE “A”

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ 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