



No. VLC-S-S-183355  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ALL CANADIAN INVESTMENT CORPORATION

PLAINTIFF

AND:

BDO CANADA LLP

DEFENDANT

AND:

DONALD BERGMAN

THIRD PARTY

**NOTICE OF APPLICATION**

**Names of applicant:** the defendant, BDO Canada LLP ("BDO")

**To:** the plaintiff, All Canadian Investment Corporation ("ACIC")

**And to:** the third party, Donald Bergman

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia, on August 23, 2018 at 9:45 a.m. for the orders set out in Part 1 below.

**Part 1: ORDERS SOUGHT**

1. The claim against BDO be struck out;
2. Alternatively, ACIC shall post security for BDO's costs in the amount of \$120,000, or in such other amount as determined by the Court (the "Security"), in relation to the claims against BDO in these proceedings;
3. The plaintiff's claim be stayed until the Security has been posted;
4. BDO be granted leave to apply to have the claims against BDO dismissed in the event

that ACIC fails to post the Security by a date established by the Court; and

5. Costs of this application.

## Part 2: FACTUAL BASIS

### A. Overview

1. ACIC, a company in protection pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "CCAA"), has commenced a claim against BDO, as a result of BDO's resignation of its audit engagement with ACIC.
2. BDO's resignation as auditor was necessary because ACIC's principal, Mr. Donald Bergman ("Mr. Bergman"), had misrepresented ACIC's security on two of its principal loans, had appropriated an opportunity of the company for his personal benefit, and had attempted to conceal this benefit from the auditors. It was only as a result of BDO's ongoing audit work that these serious financial improprieties were revealed. As a consequence, BDO lost all trust in ACIC's management, namely Mr. Bergman. In light of this loss of trust, BDO had no alternative but to resign the engagement, as required by the Chartered Professional Accountants of British Columbia ("CPABC") Code of Professional Conduct (the "Code").
3. In or about November 2017, ACIC sought CCAA protection. The order of this Court in the CCAA proceedings requires that, *inter alia*, no action, suit or proceeding in respect of ACIC or affecting its business or property may be commenced except with the written consent of the Monitor or leave of this Court. Notwithstanding this stay, Mr. Bergman, whose conduct is the root cause of ACIC's insolvency, caused ACIC to commence this action against BDO, a firm of professional accountants, claiming serious breaches of contract, breaches of professional and ethical duties, breaches of the duty of good faith and honest performance, and breaches of fiduciary duty (the "Claim").
4. Mr. Bergman did not obtain the consent of the Monitor or the leave of the Court to commence the Claim. Therefore, the Claim should be struck.
5. In the alternative, ACIC is impecunious, and has brought an unmeritorious claim attacking the integrity and professionalism of a highly reputable chartered accountancy firm, which will be vigorously defended at great expense to BDO. Therefore security for costs should be ordered.

### B. The Parties

6. BDO is a firm of chartered professional accountants. BDO was the auditor for ACIC for its fiscal years ending September 30, 2009 through September 30, 2014.
7. ACIC is a company incorporated pursuant to the laws of British Columbia. Its business consisted of receiving funds from investors, whose contributions were secured by non-voting preferred shares, and using those funds to provide mortgages on residential and

commercial properties and making loans, both secured and unsecured, for a purported return.

8. At all material times, ACIC represented itself as a Mortgage Investment Corporation (“MIC”) carrying on business in accordance with s. 130 of the *Income Tax Act*. In order to maintain its status as a MIC, it was incumbent on ACIC to continuously ensure that no less than 50% of its loan portfolio was secured by, *inter alia*, mortgages on residential property or land intended as residential property.

***Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.) at s. 130.1(6)(f)**

9. At all material times Mr. Bergman was the controlling shareholder and sole director of ACIC. ACIC had no employees.
10. On November 10, 2017, in British Columbia Action No. S1710393 (the “CCAA Proceedings”), Madam Justice Adair ordered relief pursuant to the CCAA (the “Stay Order”). The CCAA proceedings are ongoing.

**Affidavit #1 of Z. Hecimovic made July 19, 2018 (the “Hecimovic Affidavit”), Exhibit A**

**CCAA, s. 11.02**

11. The Stay Order, among other things, appointed Boale, Wood & Company Ltd. as the monitor of ACIC (the “Monitor”) and provided that, *inter alia*, no proceedings “affecting the Business or the Property” of ACIC could be “commenced or continued except with the written consent of the Petitioner and the Monitor, or with leave of this Court” (the “Stay of Proceedings”).

**Hecimovic Affidavit, Exhibit A, at paras. 14 and 24**

12. The Stay of Proceedings has been extended from time to time by subsequent orders of the Court. Most recently, pursuant to an order made June 11, 2018 by Mr. Justice Sewell, the Stay of Proceedings has been extended until September 7, 2018.

**Hecimovic Affidavit, Exhibits A – D, and Exhibit E, at para. 3**

### **C. The 2015 Audit Engagement**

13. On or about December 14, 2015, BDO and ACIC entered into a written contract (the “Engagement Letter”) pursuant to which BDO agreed to audit and report upon ACIC’s September 30, 2015 year-end financial statements (the “2015 Audit Engagement”) and to prepare ACIC’s September 30, 2015 year-end tax returns.

**Affidavit #1 of Jeff Johnson made July 17, 2018 (the “Johnson Affidavit”), Exhibit A**

14. It was a term of the Engagement Letter that BDO would carry out the 2015 Audit Engagement in accordance with Canadian generally accepted auditing standards (“GAAS”). BDO was also required to perform its services in accordance with the Code.

**Johnson Affidavit, at para. 5, and Exhibit A**

**D. False Statements regarding ACIC’s Loan and Security Portfolio**

a. Misrepresentation Regarding Mortgage Security on Significant Loans

15. In the course of the 2015 Audit Engagement, Mr. Bergman represented to BDO that two large loans, for which residential mortgage security was necessary to maintain the company’s MIC status, were in fact secured by mortgages registered against related lands. These loans were:

- a. The “Altezza” loan in the amount of \$6,415,224; and
- b. The “Hastings 4719” loan in the amount of \$2,065,691

(collectively, the “Censario Loans”).

**Affidavit #1 of Angela Spencer, made July 17, 2018 (the “Spencer Affidavit”), at paras. 6 – 8, and Exhibit A**

16. In January 2016, BDO commenced its audit work at ACIC. At the end of January it was apparent that Mr. Bergman had not provided the necessary information to allow BDO to proceed with the audit, including the supporting documents confirming that ACIC had residential mortgage security in relation to the Censario Loans.

**Spencer Affidavit, at paras. 10 – 11, 19 – 20**

17. In February 2016, Mr. Bergman delayed having the audit team return to ACIC, as according to him, due to a recent move he did not have the phone and computer equipment he required to provide the documents and information that BDO had been requesting in order to proceed with the audit.

**Spencer Affidavit, at paras. 21 – 22, and Exhibit G**

18. In late February 2016, Mr. Bergman confirmed that ACIC was prepared to have BDO return to ACIC’s offices to complete its audit procedures. However, on February 24, 2016, when the audit team attended at BDO’s offices it was clear that the requested information was not available. BDO agreed to provide Mr. Bergman with a detailed list of what was required from ACIC to proceed.

**Spencer Affidavit, at paras. 23 – 25, and Exhibit I**

19. On or about March 2, 2016, BDO conducted a title search which revealed that ACIC had discharged its mortgage security in relation to the Hastings 4719 loan. Other lenders had registered mortgages against title to the related property.

**Spencer Affidavit, at para. 37, and Exhibit N**

20. When the release of security on the Hastings 4719 loan was raised with Mr. Bergman, Mr. Bergman refused to provide any credible explanation for why he would release ACIC's security in relation to the loan, but instead suggested that BDO permit ACIC to create "temporary security" or otherwise retroactively document that there had been security for the Hastings 4719 loan until the audit was completed to support the company's MIC status and loan values as of September 30, 2015. BDO refused to participate in such unlawful activity.

**Spencer Affidavit, at para. 38**

21. On or about March 18, 2016, BDO conducted a title search which revealed that ACIC had also discharged its mortgage security in relation to the Altezza loan. Again, other lenders had registered mortgages against title to the related property.

**Spencer Affidavit, at para. 39, and Exhibit O**

22. As these two loans represented approximately one-third of ACIC's loan portfolio it was important to ACIC's status as a MIC that the Censario Loans were secured by mortgages against residential property. If they were not, less than 40% of ACIC's loan portfolio would meet the requirements necessary to maintain ACIC's MIC status.

**Spencer Affidavit, at para. 40**

b. Misrepresentation regarding the 0911 Loan and Self-Dealing

23. Additionally, in the course of the audit work, Mr. Bergman represented to BDO that ACIC had another significant loan in the amount of \$3,389,414, originally payable by 0911368 B.C. Ltd (the "0911 Loan"). In the course of the audit work for the previous 2014 fiscal year, Mr. Bergman represented that the 0911 Loan had been "restructured", and was payable by another numbered company controlled by the principal of 0911368 B.C. Ltd.

**Spencer Affidavit at paras. 14 – 16, and Exhibit E**

24. During the course of the audit work for the 2015 fiscal year, BDO repeatedly requested that Mr. Bergman provide supporting documentation for the 0911 Loan.

**Spencer Affidavit, at paras. 7, 26 – 28, Exhibit A, and Exhibits I  
- M**

25. Ultimately, on or about March 2, 2016, in a discussion with a senior manager with BDO, Mr. Bergman advised that:

- a. the 0911 Loan no longer existed;
- b. Mr. Bergman had agreed on behalf of ACIC to forgive the 0911 Loan in exchange for which the principal of 0911368 B.C. Ltd. provided to Mr. Bergman (through a holding company controlled by him) a 10% interest in a company controlled by its principal with an estimated value of \$60 million;
- c. one of Mr. Bergman's numbered companies would assume the liability to ACIC for the amount of the 0911 Loan; and
- d. Mr. Bergman was aware that this transaction would have to be fully disclosed in the audited financial statements and would likely result in an adverse finding from the British Columbia Securities Commission.

**Spencer Affidavit, at para. 29**

26. On March 21, 2016, BDO met with Mr. Bergman to raise its concerns regarding the ongoing failure of Mr. Bergman to provide sufficient audit evidence to support the valuation of the ACIC loan portfolio, and to explain Mr. Bergman's appropriation of a corporate opportunity, which represented approximately 10% of the entire ACIC loan portfolio, for a personal benefit. At that meeting, Mr. Bergman confirmed that:
- a. He had agreed to have ACIC forgive the 0911 Loan in exchange for a personal benefit that he estimated was worth \$60 million, with no benefit to ACIC;
  - b. He expressed a complete lack of concern for ACIC should it receive a finding from the B.C. Securities Commission that might result in a cease trading order, again imperiling the operations of ACIC and its ability to repay its preferred shareholders; and
  - c. He would "create" whatever agreements BDO required to support the ACIC loan valuations and permit BDO to complete the 2015 audit and deliver a "clean" audit opinion.

**Johnson Affidavit, at paras. 22 – 26**

27. As a result of the actions of Mr. Bergman including, *inter alia*, that Mr. Bergman:
- a. tried to lead BDO to believe that the Censario Loans were secured by residential mortgages, when he knew that was not the case;
  - b. proposed to "create temporary mortgage security" or otherwise falsely represent that the Censario Loans were secured by registered mortgages as at September 30, 2015 when that was not the case;
  - c. misrepresented that the 0911 Loan was a company asset, when he was aware the 0911 Loan no longer existed;

- d. received a significant personal benefit in exchange for forgiveness of the 0911 Loan;
- e. proposed to address the forgiveness of the 0911 Loan by putting “whatever agreement in place” BDO needed to see as auditors to allow them to complete the audit;
- f. showed no concern that his actions could imperil ACIC’s ability to operate as a MIC, and demonstrated a seemingly cavalier attitude towards the potential repercussions from B.C. Securities Commission;

BDO concluded that it had lost all trust in the management of ACIC, and as a result and in accordance with its professional obligations, BDO had no choice but to resign from the 2015 Audit Engagement.

- 28. Accordingly, on March 29, 2016, BDO advised ACIC and Mr. Bergman that because of its loan investment practices, BDO was resigning immediately from its engagement and would not be reporting upon the company’s September 30, 2015 financial statements.

**Johnson Affidavit, at para. 29, and Exhibit F**

**E. ACIC’s Financial Circumstances**

a. ACIC is Insolvent

- 29. ACIC is in the midst of a financial crisis. Mr. Bergman’s evidence in the CCAA Proceeding is that as of November 27, 2017, ACIC faced claims totalling \$29,914,702.

**Affidavit #1 of D. Bergman, made November 7, 2017 in the CCAA Proceeding, at paras. 5 – 7 (“Bergman Affidavit #1”)**

- 30. At the same time that ACIC is facing nearly \$30M in claims, its loan portfolio is seriously impaired. Despite claiming a loan portfolio with a value of approximately \$37.8M, Mr. Bergman has given evidence that there have been “delays on timely interest payments and payouts of the Loans” which has “negatively affected [ACIC’s] cash flow and its ability to meet its obligations to its creditors, including to its preferred shareholders.”

**Bergman Affidavit #1, Exhibit A, at paras. 5 and 18**

- 31. As of June 8, 2018, the Monitor reported that the overall recovery from the interest ACIC holds in the real properties held as security for the Loan Portfolio is estimated to be between \$14.9M and \$20.2M. This estimate assumes that ACIC has now validly secured its interest in the relevant properties – however, recent title searches show that ACIC has not registered its mortgages against title, and that there are other mortgages which rank in priority to ACIC’s interest, which would further impair the value of the Loan Portfolio.

**Affidavit #1 of Adrian Greer made July 19, 2018 (the “Greer Affidavit”), Exhibit D, at p. 8, para. 18**

32. In short, on any view of ACIC's financial circumstances, the company is insolvent and will be unable to meet the full claims of its creditors. In the meantime, ACIC is liquidating real estate which will generate cash flow which ought to be used to the degree possible to satisfy the claims of ACIC's creditors. To the extent those funds are being diverted away to fund this lawsuit without the Monitor's consent, this ought to be a significant concern to this Court.

b. ACIC's Assets are Encumbered

33. ACIC's assets include its loan portfolio (the "Loans") and four British Columbia properties (together with the Loans, "ACIC's Property").

**Bergman Affidavit #6, at paras. 16 – 18**

34. ACIC has no exigible assets from which BDO could recover its costs because the Stay of Proceedings prohibits execution against ACIC's Property.

**Hecimovic Affidavit, Exhibit A, at para. 14, and Exhibit E**

35. Additionally, the Stay Order, and the Order of Madam Justice Russell granted on April 11, 2018 in the CCAA Proceedings, grant several priority charges over ACIC's Property up to a total amount of \$2,360,000. These priority charges over ACIC's Property mean that there will be additional amounts secured for other creditors ahead of BDO in respect of any costs judgment BDO may obtain if it successfully defends this Claim.

**Hecimovic Affidavit, Exhibit A, at paras. 22, 32, and Exhibit D, at paras. 8, 11 – 14**

**F. ACIC's Claim is Stayed**

36. The Stay of Proceedings extends to this Claim. The Stay Order provides, *inter alia*, that:

Until and including December 9, 2017, or such later date as this Court may order (the "Stay Period"), no action, suit or proceeding in any court or tribunal (each, a "Proceeding") against or in respect of the Petitioner or the Monitor, or affecting the Business or the Property, shall be commenced or continued except with the written consent of the Petitioner and the Monitor or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Petitioner or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court emphasis added].

**Hecimovic Affidavit, Exhibit A, at para. 14**

37. ACIC does not have the permission of the Monitor or leave of the Court to bring this Action.

**Hecimovic Affidavit, at para. 10, and Exhibits F – H**



**Part 3: LEGAL BASIS**

**A. ACIC's Claim is Prohibited by the Stay of Proceedings**

38. ACIC's claim should be struck as a nullity, or alternatively as an abuse of process, pursuant to Rule 9-5.
39. The applicable test is whether it is plain and obvious that the action is certain to fail because the pleading contains a radical defect.

***Johnson v. Smith*, 2018 BCSC 836, at para. 12**

40. ACIC's capacity to manage its business is subject to the Stay Order. The Stay of Proceedings contained therein prohibits anyone, including ACIC, from commencing an action "in respect of the Petitioner" or "affecting the Business" of ACIC without the written consent of the Monitor or leave of the Court.

**Hecimovic Affidavit, Exhibit A, at paras. 4 and 14**

41. The phrases "in respect of the Petitioner" or "affecting the Business" should be interpreted broadly, and in accordance with the policy of the CCAA:

... a stay imposed in a CCAA proceeding is to be interpreted broadly and in accordance with the objective of providing debtors with the best possible chance of affecting a successful restructuring and ensuring that creditors are treated fairly. As noted by Farley J. in *Re Lehndorff General Partner Ltd.*, the power to grant a stay extends to affect not only creditors but to non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company [emphasis added].

***Canwest Global Communications Corp.*, 2010 ONSC 3530, at para. 30**

42. Indeed, a stay pursuant to the CCAA is so broad that it may restrain judicial or extra-judicial conduct that has the potential to impair the debtor's ability to focus and concentrate on a restructuring plan.

***Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 at p. 4**

43. The prosecution of this litigation would greatly limit Mr. Bergman's ability to focus and concentrate on the restructuring of ACIC. It is clear that this Claim would affect ACIC's business. Use of significant company resources to prosecute this Claim will detract from the company's pursuit of the loans and interest due to it, and is not fair treatment of ACIC's creditors.

44. ACIC has no capacity to bring this Claim in breach of the Stay Order. The Claim is a

nullity, akin to proceedings commenced in breach of other insolvency rules.

**See for example, *Federal Business Development Bank v. Shearwater Marine Limited*, (1979) 102 D.L.R. (3d) 257, at paras. 6 – 7**

45. It is consistent with the purpose of insolvency legislation to require an insolvent company to commence proceedings only with the consent of the court-appointed Monitor or with leave of the Court. The purpose of the CCAA is to extend protection for the ultimate benefit of all stakeholders, or in other words, “the whole economic community”.

***Nortel Networks Corporation (Re)*, [2009] O.J. No 3169, at para. 33**

46. Instead, here, Mr. Bergman is causing the company to sue BDO for the losses of the company, when he himself took a corporate opportunity and released security contrary to the company’s interests. This Claim will cause the company to spend money, focus resources on litigation against BDO which is of dubious merit, and expose ACIC to costs. The Monitor’s approval or leave of the Court is required in these circumstances to ensure that legal proceedings commenced by a company subject to CCAA proceedings are in the best interest of its creditors or other stakeholders.
47. Striking this Claim, which was brought without the consent required by the Stay Order, is consistent with the principles underlying the doctrine of abuse of process, which prohibit proceedings involving a deception on the court, or where the process of the court is not being fairly or honestly used.

***Babovic v. Babowech*, [1993] B.C.J. No. 1802 (S.C.), at para. 18**

48. For these reasons, it is plain and obvious that the Claim is a nullity or an abuse of process and should be struck pursuant to Rule 9-5.

#### **B. Security for Costs**

49. This Court has the power to order security for costs against a corporate plaintiff, and to stay the proceeding until that security is posted, pursuant to its inherent jurisdiction and section 236 of the *Business Corporations Act*, S.B.C. 2002, c. 57, which provides:

#### **Court may order security for costs**

236 If a corporation is the plaintiff in a legal proceeding brought before the court, and if it appears that the corporation will be unable to pay the costs of the defendant if the defendant is successful in the defence, the court may require security to be given by the corporation for those costs, and may stay all legal proceedings until the security is given.

50. In *Kropp v. Swanaset Bay Golf Course Ltd.*, the Court of Appeal set out the principles

applicable in an application for security for costs, including:

- a. The court has a complete discretion whether to order security, and will act in light of all of the relevant circumstances;
- b. The possibility or probability that the plaintiff company will be deterred from pursuing its claim is not without more sufficient reason for not ordering security;
- c. The court must attempt to balance injustices arising from use of security as instrument of oppression to stifle a legitimate claim on one hand, and the use of impecuniosity as a means of putting unfair pressure on a defendant on the other;
- d. The court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious;
- e. The court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal;
- f. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled; and
- g. The lateness of the application for security is a circumstance which can properly be taken into account.

***Kropp v. Swanaset Bay Golf Course Ltd.* (1997), 29 B.C.L.R. (3d) 252 (C.A.) (“Kropp”), at para. 17**

a. ACIC is Insolvent

51. To obtain security for costs against a corporate plaintiff, a defendant is only required to show a *prima facie* case that the corporate plaintiff may be unable to pay costs. A *prima facie* case is established by showing an absence of exigible assets.

***Boardwalk Contracting Inc. v. Naples*, 2017 BCSC 1581 (“Boardwalk Contracting”), at paras. 18 – 22**

52. Where it is evident that a company is at risk of going out of business, a *prima facie* case in favour of security for costs is established.

***Emperor Oil Ltd. v. Panorama Petroleum Inc.*, 2015 BCSC 1498, at paras. 9 – 16**

53. Based on the Stay of Proceedings and the evidence of ACIC’s financial issues set out above, it is clear that ACIC has no exigible assets, and there is a *prima facie* case that ACIC will be unable to pay BDO's costs in the event of BDO’s success at trial.

**Bergman Affidavit #1, paras. 5 – 7**

**Hecimovic Affidavit, Exhibit A, at paras. 14 and 24**

54. Indeed, the evidence demonstrates that ACIC is going out of business. Given its financial disclosure in the CCAA proceedings, it is clear that even if ACIC liquidates its real property, and even if it achieves its own estimates on recovery on its loans, it will only recover \$18.5 - \$26.2M (which is seriously in doubt given that the loans have not been validly secured as assumed by the Monitor). ACIC will not be able to satisfy the nearly \$30M in claims against it.

**Greer Affidavit, Exhibit D, p. 9, para. 22**

55. It is highly unlikely ACIC will be able to carry on business as a MIC, as it no longer meets the requirements of the *Income Tax Act*. Further, the B.C. Securities Commission has issued an Investigation Order in respect of ACIC and Mr. Bergman.

**Hecimovic Affidavit, Exhibit L**

**b. Security for Costs Should be Ordered**

56. The purpose of an order for security for costs is “to protect a defendant from the likelihood that in the event of its success it will be unable to recover its costs from the plaintiff. The plaintiff is not permitted a free ride at the defendant’s expense.”

Not the correct quote

***Fat Mel’s Restaurant Ltd. v. Canadian Northern Shield Insurance Co.*, [1993] B.C.J. No. 507 (C.A.) (“*Fat Mel’s*”), at para. 16**

57. Once an applicant for security for costs has shown that a corporate plaintiff will not be able to pay costs should the claim fail, security for costs is generally ordered unless the court is satisfied that there is no arguable defence.

***Ocean Pastures Corporation v. Haida Salmon Restoration Corporation*, 2016 BCCA 12, at para. 18**

***Fat Mel’s, supra*, at para. 16**

58. As set out above, as a result of the Stay of Proceedings, ACIC will not be able to pay costs.

**i. BDO has a Strong Arguable Defence**

59. In order to establish that the defendant has no arguable defence, the court must conclude that the plaintiff’s action would obviously succeed.

***Scopeset Technology Inc. v. Astaro Corporation et al.*, 2004 BCSC 830, at para. 30**

60. ACIC has brought this very serious Claim against a firm of professional accountants,

who, at all times, were acting pursuant to their professional and ethical duties. BDO has filed a Response to Civil Claim which demonstrates that it was prevented by Mr. Bergman from discovering Mr. Bergman's actions in releasing security against major loans, jeopardizing ACIC's MIC status, and forgiving loans to benefit himself. It was Mr. Bergman who delayed in providing information, and provided false and misleading information, in order to prevent BDO from discovering his self-dealing. When BDO did discover Mr. Bergman's misrepresentations and appropriation of a corporate opportunity, BDO's confidence in the information it had been provided and trust in Mr. Bergman was lost entirely. As a result, BDO was obligated pursuant to the CPABC Code to resign.

61. Accordingly, BDO has a strong arguable defence to ACIC's claims, and it is far from obvious that ACIC's claims will succeed. This is not a factor that should prevent this Court from granting an order for security for costs.

*ii. There was No Delay in Bringing this Application*

62. During the exchange of pleadings in these proceedings, on May 30, 2018, counsel for BDO advised ACIC's counsel that BDO would be bringing an application for security for costs. Subsequently, plaintiff's counsel delivered an application to strike BDO's Third Party Notice. Counsel agreed that these applications would be heard at the same time.

**Hecimovic Affidavit, Exhibit I**

b. BDO's Counterclaim and Third Party Notice Does not Materially Add to the Costs of these Proceedings

63. BDO has filed a Counterclaim in these proceedings for recovery of unpaid fees, which claim will likely be stayed by virtue of the Stay Order. In addition, BDO has filed a Third Party Notice against Mr. Bergman personally for his own tortious conduct in making misrepresentations to BDO.
64. The existence of a Counterclaim and Third Party Notice does not preclude this Court from making an order for security for costs.

***Kata Construction v. J. Simons Management, 2014 BCSC 681, at paras. 22 – 23***

***Boardwalk Contracting, supra, at para. 35 – 40***

65. Moreover, practically, the Third Party Notice will only proceed in circumstances in which ACIC's Claim is advanced.
66. The Counterclaim and Third Party Notice would only add nominally to the overall volume of litigation created by ACIC's Claim. The Counterclaim relates only to compensation for unpaid accounts and work-in-progress. The Third Party Notice against Mr. Bergman addresses Mr. Bergman's liability for his own misrepresentations, which topic would be entirely covered by the evidence in defence of the main Claim. BDO submits that in these circumstances it is entitled to an order for security in the amount of

95% of its costs of this litigation.

c. Quantum

67. A draft bill of costs is attached as Exhibit A to the Affidavit #1 of Adrian Greer, presenting a tariff claim including disbursements of \$126,773.80, assuming a 20 day trial. Given the serious allegations against the accountants, including breach of professional and ethical duties, and breach of fiduciary duty, BDO will be forced to vigorously defend this claim. Expert evidence on the professional obligations of auditors will be required.

**Greer Affidavit, Exhibit A**

68. If ACIC should fail to prove its allegations of breach of professional duties, breach of ethical duties, and breach of fiduciary duty made against a firm of professionals in a public pleading, it would likely be ordered to pay special costs. Nevertheless, even on a tariff basis, the draft bill of costs is low as it uses Scale B, rather than the more likely applicable Scale C.

**Part 4: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Donald Bergman made November 7, 2017 in B.C. Vancouver Registry Action No. S1710393;
2. Affidavit #6 of Donald Bergman made June 7, 2018 in B.C. Vancouver Registry Action No. S1710393;
3. Affidavit #1 of Zdenka Hecimovic made July 19, 2018
4. Affidavit #1 of Jeffrey Johnson, made July 17, 2018;
5. Affidavit #1 of Angela Spencer, made July 17, 2018;
6. Affidavit #1 of Adrian Greer, made July 19, 2018; and
7. Such pleadings and other documents as counsel may advise.

The applicants estimate that the application will take **2 hours**.

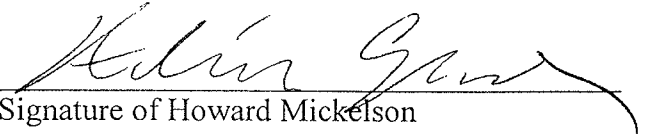
- This matter is within the jurisdiction of a master.  
 This matter is not within the jurisdiction of a master.

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

- (a) file an application response in Form 33,

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

Date: July 20, 2018

Per:   
 Signature of Howard Mickelson  
 Lawyer for BDO Canada LLP

*To be completed by the court only:*

Order made  
 in the terms requested in paragraphs ..... of Part I 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:**

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery

- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts.