



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

APPLICATION RESPONSE

Application Response of: The Petitioner

THIS IS A RESPONSE TO the notice of application of Hans-Uwe Andresen filed on the 8th day of November, 2019 (the "Application").

Part 1: ORDER CONSENTED TO

The Petitioner consents to the granting of NONE of the orders set out in Part 1 of the Application.

Part 2: ORDERS OPPOSED

The Petitioner opposes the granting of ALL of the orders set out in Part 1 of the Application and seeks an order dismissing the Application together with costs.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Petitioner takes no position on the granting of NONE of the orders set out in Part 1 of the Application.

Part 4: FACTUAL BASIS

1. On November 8, 2019 Mr. Andresen filed the Application seeking:

- a. leave to bring an application under s.36.1 of the *Companies' Creditors Arrangement Act* ("CCAA") and s. 38 of the *Bankruptcy and Insolvency Act* ("BIA") as if he was a creditor to:
 - i. commence certain actions on behalf of the Petitioner (the "New Actions");
 - ii. continue certain actions on behalf of the Petitioner (the "Existing Actions");

(together referred to as the "Actions")
 - b. leave to prosecute those actions (pursuant to s. 262 of the *Business Corporations Act*) in the name of the Petitioner;
 - c. an order granting priority to Mr. Andresen's legal fees (on solicitor client basis) and the total value of his preferred shares from the proceeds of the Actions; or
 - d. in the alternative, an order that the Petitioner be assigned into bankruptcy.
2. The Petitioner is already prosecuting the existing actions under the direction of the Monitor who has also confirmed to the court that it is in the process of commencing proceedings in the nature of the New Actions.

Part 5: LEGAL BASIS

Potential issues of conflict

3. By order pronounced March 26, 2019 Mr. Andresen's counsel was initially appointed as representative council for all of the preferred shareholders. At the time of the appointment concerns were raised regarding the possibility that a conflict of interest may exist between members of the preferred shareholders group. Shortly after the initial appointment that conflict manifested itself as a result of which it became necessary to appoint Mr. Davies for a group of the preferred shareholders and Mr. Andresen's counsel was appointed as:

representative counsel for those persons owning preferred shares in the capital of the Petitioner who took all necessary steps to submit a valid redemption request to the Petitioner at a time when reasonable grounds did not exist to the believe that the Petitioner was insolvent, or that honouring a redemption request would make the Petitioner insolvent, and such other preferred shareholders as the court may determine have an analogous claims against the Petitioner (collectively, the "Redeeming Shareholders")"

Order pronounced April 5, 2019

4. In that capacity, counsel for the Redeeming Shareholders advanced submissions, the net effect of which was to support the proposition that the Redeeming Shareholders were 'creditors' of the Petitioner for the purposes of the CCAA proceedings and therefore had priority over the balance of the preferred shareholders.
5. In Reasons for Judgement issued September 4, 2019 the court determined that for the purposes of these proceedings and the CCAA, the claims of all of the Petitioner's preferred shareholders are 'equity claims' as defined in section 2 of the CCAA.
6. The Application is brought solely on behalf of Mr. Andresen and seeks the following relief which is not in the best interests of either the Redeeming Shareholders or the preferred shareholders as whole:
 - a. payment of Mr. Andresen's legal fees on a solicitor client basis;
 - b. the full redemption value of Mr. Andresen's shares; and
 - c. a bankruptcy order.
7. Mr. Andresen has previously sworn evidence to the effect that his motivation for involvement in these proceedings has been for the benefit of all preferred shareholders and it is difficult to reconcile the relief now sought, or the fact that it is being advanced by representative counsel for the Redeeming Shareholders, with that evidence.

Abuse of Process & Collateral Attack

8. The Application is an abuse of process in that it is essentially a collateral attack on the September 4, 2019 decision of this Court (indexed at *All Canadian Investment Corp. (Re)*, 2019 BCSC 1488) confirming that the claims of all of the Petitioner's preferred shareholders are 'equity claims' as defined in section 2 of the CCAA. In particular,
 - a. Mr. Andresen seeks an order that he be treated as if he were a creditor, in circumstances where the court has already confirmed that he is not;
 - b. the relief he seeks is only available to a creditor; and
 - c. most importantly, he seeks an order granting his equity claim priority over all other stakeholders including creditors and the other preferred shareholders.

9. Leave to appeal the September 4, 2019 decision was not taken within the 21-day appeal period set out in s. 14(2) of the CCAA.
10. The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedures in a way that would be manifestly unfair to a party to the litigation or would in some other way bring the administration of justice into disrepute.

Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63

11. The rule against collateral attack attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review procedures.

British Columbia (Workers' Compensation Board) v. Figliola,
2011 SCC 52 at para. 28

12. In light of the fact that the Actions are being, or will be shortly, prosecuted the only reasonable explanation for the Application is an attempt by Mr. Andresen to challenge the previous priority determination. Simply put, Mr. Andresen is seeking to prime the claims of the creditors, all of the other preferred shareholders and the administrative charge.

Section 36.1 of the CCAA

13. The relief sought is clearly not available to Mr. Andresen under the provisions of the relevant legislation. Perhaps more importantly, the ramifications of doing so are entirely inconsistent with the principles underlying the general powers codified in s. 11 of the CCAA.

14. Section 36.1 of the CCAA provides as follows:

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

15. While s. 38 of the BIA is specifically referred to, the cases applying section 36.1 are almost exclusively, if not entirely, confined to claims advanced under section 95-101 of the BIA. Counsel has been unable to locate any cases (in the available time) where s. 38 powers are utilized in a CCAA.

16. Section 38(1) of the BIA provides as follows:

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

17. Mr. Andresen is unable to establish that:

- a. he is a creditor. It has already been determined that he is not;
- b. the Petitioner/monitor has refused or neglected to take the proceeding he wishes to bring. The Actions have already been, or on the are in the process of being, commenced;
- c. the Application was brought on notice to all other individuals with the same interests, which in this case would be both creditors and preferred shareholders. This has not occurred.

See: Smith v. Pricewaterhousecoopers Inc.,
2013 ABCA 288

B.N.R. Holdings Ltd. v. Royal Bank (1992),
74 B.C.L.R. (2d) 332 (C.A.) (“*B.N.R. Holdings*”)

18. Here, the orders sought are clearly prejudicial to all of the creditors and all of the other preferred shareholders as they essentially grant Mr. Andresen’s equity claim priority.

Jaston & Co. v. McCarthy (1998),
59 B.C.L.R. (3d) 168 (CA) (“*Jatson*”)

19. In addition, if Mr. Andresen was to be granted rights under s. 38, all of the other preferred shareholders would be entitled to ‘join’ in those proceedings and if that occurred, their equity claims would be paid in priority to those of the creditors.

Section 232 of the Business Corporations Act

20. The stay of proceedings operates to prevent Mr. Andresen from seeking or maintaining claims for relief pursuant to section 232 of the *Business Corporations Act*, S.B.C. 2002, c. 57 (the “BCA”).

21. Additionally, 36.1 of the CCAA and s. 38 of the BIA provide a complete code for dealing with the question of how potential lawsuits or claims which a monitor or petitioner does not wish to proceed with our dealt with. Here, of course, the Actions are being pursued.

Rizzo & Rizzo Shoes Ltd. (Re) (1995), 32 C.B.R. (3d) 96 (ONSC),
issue raised but expressly not decided on appeal indexed at
Rizzo & Rizzo Shoes Ltd. (Re) (1998), 38 O.R. (3d) 280 (ONCA)

22. In addition, Mr. Andresen has not met the criteria for obtaining leave to file a derivative claim which requires him to establish that:

- a. he has made reasonable efforts to cause the proceedings to be commenced (and they haven't been);
- b. he has given proper notice of the Application;
- c. he is acting in good faith; and
- d. it is in the best interests of the company (and the stakeholders) for the Actions to be prosecuted by him rather than the Petitioner or Monitor.

Bennett v. Rudek, 2008 BCSC 1278 at para. 40

S. 11 of the CCA

23. Mr. Andresen seeks to invoke the general power of the court to make any order that it considers appropriate in the circumstances. The purpose of the general power is to further the interests of the stakeholders as a whole and the purposes of the CCAA.

24. The relief sought in the application is not only inconsistent with those purposes, it is expressly contrary in that it:

- a. serves to prefer Mr. Andresen's personal interests over those of other stakeholders including the creditors;
- b. is a collateral attack on the court's previous findings;
- c. will inevitably delay the claims process, meeting process and presentation of the plan to the creditors; and
- d. will almost inevitably increase the cost of the administration thereby materially reducing the likely recovery to stakeholders.

Bankruptcy Order

25. The stay of proceedings operates to prevent Mr. Andresen from seeking a bankruptcy order and he does not apply for the stay to be lifted.
26. No factual or legal basis is provided for the stay to be lifted or an order assigning the company in to bankruptcy.
27. There is a "very heavy onus" on an applicant seeking to lift a stay. The court needs to consider, the good faith and due diligence of the debtor company, whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties and whether it is in the interests of justice.

505396 B.C. Ltd. (Re), 2013 BCSC 1580 at para. 19

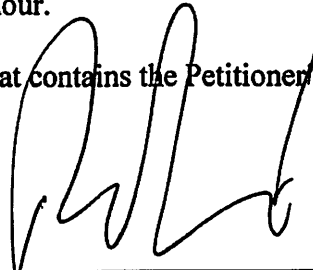
Part 6: MATERIAL TO BE RELIED ON

28. The materials filed herein.

The Petitioner estimates that the application will take 1 hour.

The Petitioner has filed in this proceeding a document that contains the Petitioner's address for service.

Date: November 15, 2019



Signature of Jeremy D. West
Counsel for the Petitioner