



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 A PLAN OF COMPROMISE AND ARRANGEMENT OF
ALL CANADIAN INVESTMENT CORPORATION

APPLICATION RESPONSE

Application response of: 1083163 Alberta Ltd. (the "**Application Respondent**")

THIS IS A RESPONSE TO the notice of application of the Petitioner filed January 25, 2019 (the "**Notice of Application**").

Part 1: ORDERS CONSENTED TO

The Application Respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application on the following terms: ALL

Part 2: ORDERS OPPOSED

The Application Respondent opposes the granting of the orders set out in paragraphs NIL of Part 1 of the Notice of Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondent takes no position on the granting of the orders set out in paragraphs NIL of Part 1 of the Notice of Application.

Part 4: FACTUAL BASIS

1. Unless otherwise defined herein, the Application Respondent adopts the defined terms used in the Notice of Application.
2. The Application Respondent is a creditor of the Petitioner in these proceedings.
3. The Application Respondent purchased an unsecured debenture from the Petitioner in the principal amount of \$500,000 on July 11, 2014 (the “**Debenture**”).
4. The Debenture is evidenced by a Debenture Certificate dated July 11, 2014 and a Private Placement Subscription Agreement dated July 18, 2014.
5. The principal amount of the Debenture matured on May 31, 2015. Interest on the principal amount of the Debenture is payable at the rate of 8% per annum, which interest is payable monthly. As of the date of the Initial Order in these proceedings, the principal balance and interest of approximately \$597,972.60 is outstanding on the Debenture.
6. The Application Respondent pleads and relies upon the facts set out in Part 2 of the Notice of Application.
7. Unless otherwise defined herein, the Application Respondent adopts the defined terms used in the Notice of Application.

Part 5: LEGAL BASIS

1. The Application Respondent relies on the terms and provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “**CCAA**”).
2. The Application Respondent also relies on Rules 1-3, 8-1 and 22-1 of the *Supreme Court Civil Rules*.
3. There will be significant prejudice to the Application Respondent and the other unsecured creditors of the Petitioner if the Preferred Shareholders are determined to be creditors in debt instead of equity claimants in this *CCAA* proceeding.

The Treatment of Equity Claims under the CCAA

4. Pursuant to Sections 6(8) and 22.1 of the CCAA, equity claims are rendered subordinate to those of unsecured creditors.

5. 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:

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, section 6(8)

6. Pursuant to Section 22.1 of the CCAA, despite a debtor company's ability to divide its creditors into different classes, subject to court approval, all equity claims must be placed in 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, section 22.1

7. The terms "equity claim" and "equity interest" are defined under Section 2 of the CCAA 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, section 2(1), “equity claim”

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, section 2(1), “equity interest”

8. The language of Section 2 of the CCAA is clear and unambiguous. It expressly provides that a claim for “a redemption or retraction obligation” constitutes an equity claim for the purposes of the statute.
9. Canadian courts have found claims for the return of capital investment under the redemption rights of preferred shares to clearly fall within the definition of an “equity claim” under the CCAA.

Re Bul River Mineral Corporation, 2014 BCSC 1732 at para [Bul River]
Re Nelson Financial Group Ltd., 2010 ONSC 6229 [Nelson Financial]

10. The statutory definitions of “equity claim” and “equity interest” were the result of the amendments to the CCAA in 2009 (the “**2009 Amendments**”).
11. Prior to the 2009 Amendments, there was less certainty on what constituted an “equity claim” under the CCAA. Past courts would focus on the substance or true nature of the claim to determine whether it should be characterized as debt or equity. To ascertain the substance of the claim, courts would look to the intention of the parties by examining the terms and conditions applicable to the preferred shares in the debtor company’s articles of incorporation.

Canada Deposit Insurance Corp v Canadian Commercial Bank,
1992] 3 SCR 558 at para 52 [Canadian Commercial]

Royal Bank of Canada v Central Capital Corp.,
[1996] OJ No 349 (CA) at paras 120-122 [Central Capital]

12. Preferred shareholder claims have been found to be equity claims in substance in circumstances where: the debtor company's articles contained standard terms applicable to the preferred shares; the preferred shareholders ranked with other shareholders in a defined priority in the event of winding up, dissolution or liquidation of the company; the company's articles were silent on whether the preferred shareholders had priority equivalent to ordinary creditors; and there was no suggestion that the preferred shareholders ceased to be shareholders upon the provision of a retraction notice.

Re Dexior Financial Inc, 2011 BCSC 348 [*Dexior Financial*] at paras 13-14
Central Capital at paras 16-22

13. Whether a redemption notice is provided pre- or post- filing does not impact the original intention of the claim. In other words, the timing of notice does not change the true nature or substance of a debt or equity claim.

Dexior Financial at para 16

14. The 2009 Amendments have not affected the courts' ability to continue to analyze the substance of a claim. There are circumstances where equity may become debt and it is therefore important that form does not trump substance in the characterization of such claims. However, such an analysis must now be conducted within the context of the expanded definition of "equity claim" under the *CCAA*.

Bul River at paras 101-102

15. The statutory definition of "equity claim" has created more certainty and less flexibility on what constitutes an equity claim under the *CCAA*. Justice Fitzpatrick in *Bul River*, in considering the effect of the 2009 Amendments on equity claims, explained:

... while the 2009 amendments did represent in part a codification of the previous case law concerning equity claims, it also represented a more concrete definition of "equity claims" and by such definition a broadening and more expansive definition of such claims ... Parliament has now clearly cast the net widely in terms of the broad definition of equity claims such that claims that might have previously escaped such characterization will now be caught by the CCAA.

Bul River at paras 82 and 102 [emphasis added]
Nelson Financial at para 34

The Claims of the Preferred Shareholders

16. The claims of the Preferred Shareholders are for the return of capital investment under the redemption rights of the Preferred Shares and therefore clearly fall within the definition of an “equity claim” under the *CCAA*.
17. The Articles of Incorporation of the Petitioner (the “**Articles**”) further confirm that the substance and true nature of the Preferred Shareholders’ claims are equity, as opposed to debt.
18. The Articles contain standard terms that apply to the Preferred Shareholders. The Articles neither expressly nor impliedly suggest that the Preferred Shareholders have priority equivalent to ordinary creditors.
19. Section 27.2 of the Articles specify two limited circumstances where the Preferred Shareholders have priority over the Common Shareholders (as defined in the Articles). First, with respect to the distribution of declared dividends on the issued and outstanding Preferred Shares. Second, with respect to the distribution of the Petitioner’s assets upon the winding up, dissolution or liquidation of the company. In all other respects, the Preferred Shareholders rank equally to the Common Shareholders.
20. There is no suggestion in the Articles or otherwise that the Preferred Shareholders cease to be shareholders upon the provision of a redemption notice.
21. Section 27.4 of the Articles sets out the procedure for redeeming the Preferred Shares. Pursuant to Section 27.4, even in circumstances where a redemption notice is provided, the Petitioner is under no obligation to redeem any Preferred Shares unless consented to by its directors in “their sole discretion”. Further, the directors of the Petitioner are under no obligation to provide any reasons for not consenting to a Preferred Shareholder’s request to have his or her Preferred Shares redeemed by the Petitioner.
22. It is evident from the Articles that the intention of the parties was for the Preferred Shareholders’ claims to be treated as equity claims, and not debt claims.

23. The Preferred Shareholders' claims clearly fall within the definition of "equity claims" under the *CCAA* and are equity claims in substance. The Preferred Shareholders do not have provable claims in debt under the *CCAA*.

Policy Reasons for the Subordination of Equity Claims under *CCAA*

24. The policy objectives of the *CCAA* are a fair and efficient resolution of competing claims in an insolvency where all obligations or expectations cannot be fulfilled.

Bul River at para 101

25. The court has the broad and flexible authority to facilitate restructurings that are fair, reasonable and equitable in accordance with the express will of Parliament, as dictated in the *CCAA*, or as might be reasonably interpreted as falling within the statute's remedial purposes.

Bul River at para 100 citing
Century Services Inc v AG of Canada, 2010 SCC 60

26. Parliament has confirmed that, to give effect to the remedial purposes of the *CCAA*, equity claims must be subordinated to outstanding debt claims in an insolvency. This was so prior to the 2009 Amendments and is even more unequivocally so now, in light of the express and expansive statutory definition of equity claims.

Bul River at para 101

27. In *Re Sino-Forest Corp*, Justice Morawetz explained the policy rationale for the subordination of shareholder equity claims to general creditor claims as follows:

Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise.

The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited upside potential when purchasing shares. Creditors have no corresponding upside potential.

As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement.

Re Sino-Forest Corp, 2012 ONSC 4377 at paras 23-25,
cited with approval in *Re Sino-Forest Corp*, 2012 ONCA 816 at para 30

28. The court's characterization of these claims has an important role in advancing these policy objectives and the CCAA's overall remedial purpose.

Bul River at para 102

29. In addition to Canada's insolvency statutes, the principle that ordinary creditors rank ahead of shareholders when a corporation is insolvent or in the vicinity of insolvency is reflected in the *Business Corporations Act*, S.B.C., 2002 c 57 (the "**BCBCA**").

30. Section 79 of the *BCBCA* provides that a company may not redeem its shares when it is insolvent or when the redemption would render the company insolvent. Section 79(1) states:

79(1) *A company must not make 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

BCBCA, section 79

31. The implications of Section 79 of the *BCBCA* are that, even if a preferred shareholder has a contractual right to have his or her shares redeemed by a debtor company, such a claim is not recoverable if it conflicts with the company's statutory obligations under the *BCBCA*. The Ontario Court of Appeal summarized this issue in relation to the preferred shareholders in *Central Capital* as follows:

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 ... not to reduce its capital where it is insolvent ... 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.

Central Capital at para 117

See also *Fallin v OFM Holdings Ltd*, 2014 BCSC 1777 at paras 17-27

32. Section 11 of the *CCAA* provides that the court may make any order that it considers appropriate.

CCAA, section 11

33. Canadian courts have placed considerable emphasis on the above policy objectives in exercising their discretion under Section 11 of the *CCAA*.

Part 6: MATERIAL TO BE RELIED ON

1. The pleadings and materials filed herein;
2. The Notice of Application of the Petitioner dated January 25, 2019;
3. Affidavit #1 of Allan Backman made on June 11, 2019;
4. Affidavit #1 of Donald Bergman made on November 8, 2017; and
5. Such further and other material as counsel may advise and this Honourable Court may allow.

The application respondent(s) estimate(s) that the application will take 3 days.

[Check whichever one of the following is correct and complete any required information.]

- ☐ The application respondent has filed in this proceeding a document that contains the application respondent's address for service.
- ☒ The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is:

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Date: June 11, 2019



Signature of Vicki Tickle
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