



Court file 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

AND

IN THE MATTER OF ALL CANADIAN INVESTMENT CORPORATION

(the "Petitioner")

MONITOR'S 20th REPORT TO COURT

FEBRUARY 4, 2020

McEown and Associates Ltd.

Monitor appointed in the
Companies' Creditors Arrangement Act proceedings of
All Canadian Investment Corporation

**Suite 1140 – 800 West Pender Street
Vancouver, B.C. V6C 2V6**

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- A. Order of the Honourable Mr. Justice Walker pronounced Monday, November 25, 2019**
- B. Applications of John Whyte Representing Hank Andresen**

A. INTRODUCTION

1. This report (the “**Twentieth Report**”) is filed by McEown and Associates Ltd. (“**McEown**”) in its capacity as monitor (the “**Monitor**”) appointed in a proceeding commenced on November 8, 2017 by All Canadian Investment Corporation (the “**Petitioner**”) pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c.-36, as amended (the “**CCAA Proceedings**”).
2. The purpose of the Twentieth Report is to provide the Court with:
 - a) An update on the transfer of the administration of the CCAA Proceedings from Boale, Wood & Company Ltd. (“**BWC**”) to McEown and Associates Ltd.
 - b) An update on the application of John Whyte on behalf of Hans Andresen in November 2019;
 - c) An update on the Claims Process pursuant to the Claims Order;
 - d) An update on realizations from the assets of the Petitioner;
 - e) the Monitor’s comments on the Petitioner’s request for an extension of the Stay of Proceedings until May 20, 2020; and
 - f) the Monitor’s conclusions and recommendations;

B. DISCLAIMER AND TERMS OF REFERENCE

3. Except as specified, in preparing this report the Monitor has obtained and relied upon unaudited, draft and/or internal information which Management advises has been compiled from the Petitioner's books and records. Where available, the Monitor has reviewed external records and documentation including post-filing banking records, corporate searches and financial statements.
4. Except as otherwise described in this report:
 - a) the Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the information which has been provided in a manner that would wholly or partially comply with Generally Accepted Assurance Standards pursuant to the Chartered Professional Accountant Canada Handbook; and
 - b) the Monitor has not conducted an examination or review of any financial forecast and projections in a manner that would comply with the procedures described in the Chartered Professional Accountant Canada Handbook.
5. This Report have been prepared solely for the purpose described and readers are cautioned that it may not be appropriate for other purposes.

C. TRANSFER OF ADMINISTRATION TO MCEOWN AND ASSOCIATES LTD.

6. On November 22, 2019, Boale, Wood & Company Ltd. and McEown and Associates Ltd. filed an application for the transfer of the administration of the CCAA Proceedings from BWC to McEown.
7. On November 25, 2019, the application was heard and an Order pronounced by the Mr. Justice Walker granting that the duties, requirements, responsibilities and obligations of BWC as Court Appointed Monitor in these proceedings be and they are hereby assigned and transferred from BWC to McEown and such assignment and transfer to be effective from the date of the pronouncement of the Order. A copy of Affidavit # 5 of John McEown in support of the is application and the Court Order granted are attached as Appendix A to this report.
8. The Monitor has circulated the Order to all stakeholders and posted the Order on its website <https://www.mceownassociates.com/all-canadian-investment-corporation>.

D. APPLICATION OF JOHN WHYTE REPRESENTING HANK ANDRESEN

9. On November 8th 2019 John Whyte on behalf of Hank Andresen filed an application to Court for the relief described in the Notice of Application attached as Appendix B (the “**Andresen Application**”).
10. As expressed in the Monitor’s Eighteenth Report, the Monitor’s view was that John Whyte’s entire application should be dismissed with costs.
11. By consent order entered December 17, 2019 the Andresen Application was dismissed without costs to any party.

E. MONITOR'S UPDATE AND COMMENTS ON CLAIMS PROCESS ORDER

12. The Monitor has received and reviewed the Creditor Proofs of claim received and determined the validity and value of each claim submitted. The Monitor issued its Nineteenth Report (the "**Claims Report**") on January 28, 2020 reporting on the accepted and rejected claims. A copy of the Claims Report can be found on the Monitor's website.
13. Pursuant to the Claims Process Order the Monitor has delivered a copy of the Claims Report to all creditors whose claims were accepted claims and rejected and posted the Claims Report and copies of the accepted claims on the Monitor's website.
14. On January 31, 2020 the Monitor delivered Notices of Disallowance to the affected Creditor at the addresses shown on the Proofs of Claim filed. Any creditor who disputes the disallowance of its Claim as set forth in a Notice of Disallowance shall, within twenty-one (21) days after the date of delivery of the Claims Report, seek a determination by the Court of the validity and/or value of its Claim by filing with the Court, and serving upon the Monitor, a Notice of Application, together with all other documents upon which the Creditor intends to rely on.
15. Only after this twenty-one (21) day period has passed and the Disputing Creditor Application(s) have been heard and determined, shall the Monitor be able to proceed with the filing and circulating of the Plan of Arrangement and the calling of a meeting of creditors to approval the Plan of Arrangement pursuant to the Meeting Order.

F. UPDATE ON REALIZATIONS / SALE OF PROPERTIES

16. The Petitioner is continuing its efforts to sell real properties owned by the Petitioner and recover on the outstanding loan portfolio. A brief update follows:

Altezza Property

17. On December 13, 2019, the sale of the remaining Altezza properties completed and the Monitor received and deposited to its trust account the net sale proceeds of \$1,241,194.28.

Carleton Project

18. Peter Censorio has not been able to arrange financing to complete the Carleton Project and as a result thereof People's Trust has commenced foreclosure proceedings and applied to Court for the appointment of a Receiver to complete the construction of the Carleton Project and thereafter sell the commercial and residential strata lots.
19. This Monitor supports the appointment of a Receiver for purposes of completing the construction and sale of the Carleton Project as the recovery to the secured creditors is expected to be considerably higher than can be achieved if the Carleton Project is not completed and sold as is.

Agnes Property

20. An offer has been accepted in the amount of \$764,000 plus GST for only remaining Agnes property, unit 1801-188 Agnes Street, New Westminster. The subjects removal date is February 9, 2020.

**G. ACTUAL CASH FLOW FROM NOVEMBER 27, 2017 TO
JANUARY 31, 2020**

21. The Actual Cash Flow from November 27, 2017 to January 31, 2020 can be summarized as follows:

Actual Cash Inflows

Mortgage Interest Payments	\$ 195,125
Mortgage Paydowns	1,298,400
Sale of Real Properties	2,385,683
Repayment of Stonewater Motel Loan	1,315,797
DIP Financing Proceeds	<u>1,500,000</u>
	\$6,695,005

Actual Cash Outflows

Operations

Management Fees	\$ 428,667
Bank Charges	2,216
Auditor Fees	30,017
Monitor's Fees/Disbursements	436,550
Legal Fees/Disbursements (Monitor's counsel)	174,602
Legal Fees/Disbursements (Petitioner's counsel)	672,731
Appraisal Fees	10,949
DIP Loan Fees & Expenses	211,200
DIP Loan Interest	137,370
Property Taxes & Utilities	23,296
GST	19,750
Other Miscellaneous Expense	<u>6,250</u>
	\$2,153,598

Secured Debt Repayments

DIP Loan	\$1,613,304
Van Maren Financial	554,512
Fisgard Capital	<u>1,386,575</u>
	\$3,554,391
Net Cash Inflows (outflows)	\$ 987,016
Opening Cash Position	<u>69,134</u>
Closing Cash Position	<u>\$ 1,056,150</u>

H. PETITIONER'S APPLICATION / REQUEST FOR EXTENSION OF THE STAY OF PROCEEDINGS

22. The Petitioner is requesting an extension of the Stay of Proceedings until May 20, 2020 to continue the liquidating CCAA.
23. The Monitor is satisfied that the Petitioner is continuing to make progress towards approval of the Plan that is expected to be voted on within the next two months depending on the time it will take to deal with the disputed claims.
24. The Monitor is also satisfied that the Petitioner is continuing to make progress in liquidating the assets of the Petitioner.
25. The Monitor will continue to have responsibility for the management and decision-making authority over the Petitioner's sale of real properties and recovery on its loan portfolio.
26. The Monitor confirms that the Petitioner is continuing to act in good faith and with due diligence and supports the requested extension of the stay of proceedings until May 20, 2020.

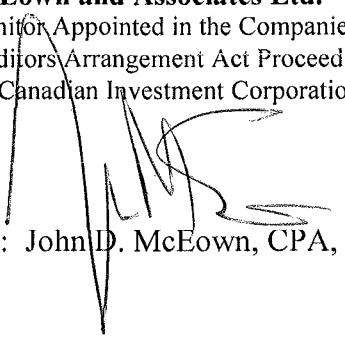
I. CONCLUSIONS AND RECOMMENDATIONS

27. The Petitioner continues to make progress in liquidating the assets of the Petitioner under the management and direction of the Monitor.
28. As previously mentioned earlier in this report, only after this twenty-one (21) day period has passed and the Disputing Creditor Application(s) have been heard and determined, shall the Monitor be able to proceed with the filing and circulating of the Plan of Arrangement and the calling of a meeting of creditors to approval the Plan of Arrangement pursuant to the Meeting Order.
29. The Petitioner has requested an extension of the stay of proceeding until May 20, 2020 and it is anticipated that by this extension date the Disputing Creditor Application(s) will have been heard and determined and the Plan will have been voted on.
30. The Monitor is of the view that the Petitioner is continuing to act in good faith and that the stakeholders will not be prejudiced by the extension being sought by the Petitioner.

DATED at the City of Vancouver, British Columbia, this 4th day of February, 2020.

McEown and Associates Ltd.

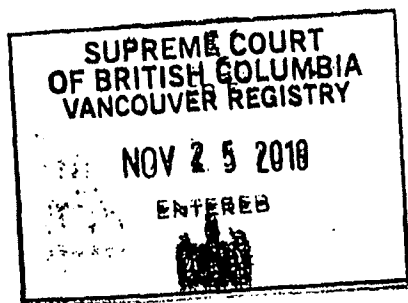
Monitor Appointed in the Companies'
Creditors Arrangement Act Proceedings of
All Canadian Investment Corporation



Per: John D. McEown, CPA, CA, CIRP

APPENDIX A

**Order of the Honourable Mr. Justice Walker
November 25, 2019**



Court File No. VLC-S-S-1710393
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 *CANADIAN 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

BEFORE THE HONOURABLE)	MONDAY, THE 25TH DAY
)	
MR. JUSTICE WALKER)	OF NOVEMBER, 2019

ORDER MADE AFTER APPLICATION

ON THE APPLICATION of Boale, Wood & Company Ltd. and McEown and Associates Ltd. and their counsel, Kornfeld LLP, coming on for hearing at the Courthouse, 800 Smithe Street, Vancouver, British Columbia, on November 25,

2019; AND ON HEARING Douglas B. Hyndman, Counsel for Boale, Wood & Company Ltd., and those other counsel listed on Schedule "A" hereto; AND UPON READING Affidavit #5 of John McEown and the pleadings and proceedings had and taken herein;

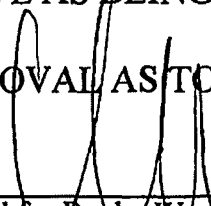
THIS COURT ORDERS that:

1. the time for service of the Notice of Application herein is hereby abridged such that the Notice of Application is properly returnable today and service hereof upon any interested party other than those parties on the service list maintained by the Petitioner and the Monitor in these proceedings is hereby dispensed with.
2. The duties, requirements, responsibilities and obligations of Boale, Wood & Company Ltd. as Court Appointed Monitor in these proceedings under and pursuant to the Orders of Madam Justice Adair pronounced November 10, 2017 and Mr. Justice Walker pronounced November 9, 2018 (collectively, the "Orders"), be and they are hereby assigned and transferred from Boale, Wood & Company Ltd. to McEown and Associates Ltd., such assignment and transfer to be effective from the date of pronouncement of the Order herein.
3. McEown and Associates Ltd. shall be entitled to all of the benefits and protections contained in the Orders including, but not limited to, any indemnities contained therein.

4. Boale, Wood & Company Ltd. be and it is hereby discharged from its duties, requirements, responsibilities and obligations as Monitor in these proceedings effective from the date of pronouncement of the Order herein.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

APPROVAL AS TO FORM:



Counsel for Boale, Wood & Company
Ltd. and McEown and Associates Ltd.
Douglas B. Hyndman
Kornfeld LLP

BY THE COURT



~~—~~ DEPUTY DISTRICT REGISTRAR



SCHEDULE "A"

Jeremy West	All Canadian Investment Corporation

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 *CANADIAN 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

ORDER MADE AFTER APPLICATION

KORNFELD LLP

Barristers & Solicitors

1100 One Bentall Centre

505 Burrard Street

Box 11

Vancouver, British Columbia, Canada V7X 1M5

Telephone: (604) 331-8300

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Attention: Douglas B. Hyndman
File No.: BOA004/ALL171

APPENDIX B

**Applications of John Whyte
Representing Hank Andresen**



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: Hans-Uwe Andresen (the "Applicant")

To: Service List

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smith Street Vancouver, British Columbia on November 18, 2019 at 10:00 a.m. for the orders set out in Part 1 below.

Part 1: ORDER SOUGHT

- 1 Pursuant to section 11 of the *Companies' Creditors Arrangement Act* (R.S.C., 1985, c. C-36) (the "CCAA"), Mr. Andresen be given leave to bring an application under section 36.1 of the CCAA and section 38 of the *Bankruptcy and Insolvency Act* (R.S.C., 1985, c. B-3) (the "BIA") as if he were a creditor.
- 2 Pursuant to section 36.1 of the CCAA and section 38 of the BIA, Mr. Andresen be given leave to commence the following actions on behalf of the Petitioner (collectively, the "Actions"):
 - a. An action against 0911368 BC Ltd. ("911") in relation to a loan dated June 1, 2011 from the Petitioner to 911;

- b. An action against Donald Bergman and ACIC Financial Developments Inc. ("**AFDI**") in relation to:
 - i. a loan from the Petitioner to AFDI;
 - ii. Breach of a management agreement dated September 18, 2003 between the Petitioner and AFDI (the "**Management Agreement**"); and
 - iii. Breach of fiduciary duty and negligence by Mr. Bergman in his capacity as director for the Petitioner.
- 3 Pursuant to section 36.1 of the CCAA and section 38 of the BIA, Mr. Andresen be given leave to amend and continue the following proceedings that have been commenced by the Petitioner in the name of the Petitioner:
 - a. *ACIC et. al. v. Censorio Group (Agnes & Elliot) Holdings Ltd. et. al.*, SCBC Vancouver Registry File H180143 ("**H180143**").
 - b. *ACIC v. Altezza Properties Ltd. et. al.*, SCBC Vancouver Registry File S184595 ("**S184595**"); and
 - c. *ACIC v. Censorio Group (Hastings & Carleton) Holdings Ltd. et. al.*, SCBC Vancouver Registry File S1910311 ("**S1910311**").

(collectively, the "**Censorio Proceedings**")
- 4 In the alternative, pursuant to section 11 of the CCAA and section 232 of the *Business Corporations Act* (SBC, 2002, c.57) (the "**BCBCA**"), Mr. Andresen be given leave to prosecute the Actions and the Censorio Proceedings in the name and on behalf of the Petitioner.
- 5 Pursuant to the inherent jurisdiction of the Court, the orders for leave to bring the Actions be entered *nunc pro tunc*, as of the day when this Application was filed.
- 6 The Monitor and Petitioner shall execute an assignment assigning all their rights, title, and interest which the Monitor or Petitioner have, had or shall have in the subject matter of the Actions, including any documents in support thereof.

- 7 Any benefits recovered as the result of the Actions are to be paid out as follows:
 - a. First, to pay Mr. Andresen's legal fees, costs, and disbursements relating to the Actions on a solicitor's and own client basis;
 - b. Next, to pay for the redemption of Mr. Andresen's preferred shares in the Petitioner, up to the value of his preferred shares in the Petitioner; and
 - c. Any surplus will be paid to the Petitioner, to be distributed pursuant to the plan of distribution.
- 8 In the further alternative:
 - a. pursuant to section 11 of the CCAA, a bankruptcy order under the BIA be made against the Petitioner; and
 - b. Costs of the application be paid by the Petitioner to the Applicant.

Part 2: FACTUAL BASIS

- 1 The applicant is a preferred shareholder of All Canadian Investment Corporation ("**ACIC**").
- 2 ACIC is subject to proceedings under the CCAA that were commenced on November 8, 2017 (the "**CCAA Proceedings**")
- 3 Boale, Wood & Company Ltd. has been appointed as monitor in the CCAA Proceedings (the "**Monitor**").
- 4 Since the outset of the CCAA Proceedings the intended plan of the Petitioner has been to conduct an orderly wind-down of the business in an effort to maximize the recovery to the stakeholders. Until November 2018, Donald Bergman was managing the wind-down of the business.

Monitor's Eleventh Report, at paras. 89-90
- 5 As of November 8, 2018, the court has suspended any and all power and authority of Donald Bergman with respect to the Property or the Business, whether by virtue of being an Officer, Director or Management of the Petitioner. At the same time, the Monitor's powers and authority were expanded.

- 6 Since November 2018 the Monitor has been managing the wind-down of the business pursuant to expanded powers granted to the Monitor in the Order dated November 9, 2018.

Monitor's Eleventh Report, at para. 90

- 7 The Monitor estimates full payment of all creditors under both its high and low end recovery estimates, while preferred shareholders will obtain 7% (\$2,556,527) to 34% (\$12,556,527) recovery. These estimates do not include the potential recovery from personal or corporate guarantees.

Monitor's Seventeenth Report, at paras. 83-85

The Loans

- 8 As of April 26, 2018, the Petitioner's loan portfolio involved the following loans:
- a. Eight loans to the Censorio Group of Companies, guaranteed by, *inter alia*, a personal guarantee of Peter Censorio (collectively, the "**Censorio Loans**").
 - b. A loan to Meridian Resource Accommodations Inc. secured by a Registered 1st Mortgage over properties in Bienfait, Saskatchewan (the "**Meridian Loan**").
 - c. A loan to 911 secured by an equitable mortgage over a 40 acre property located in Lac La Biche County, Alberta (the "**911 Loan**").
 - d. A loan to AFDI arising from non-arm's length debt restructuring between the Petitioner and AFDI, secured by AFDI's 37.5% interest in a joint venture with Seamont Investments Ltd. (the "**AFDI Loan**").
 - e. A personal loan to Wayne Blair, an employee on ACIC's payroll.
 - f. A loan to Karl Buchmann secured by a registered mortgage over a land parcel in Salmon Arm, BC (the "**Buchmann Loan**").
 - g. A personal loan to Robert and Katherine Frederick without security (the "**Frederick Loan**").
 - h. A loan to Michael Lensen without security (the "**Lensen Loan**").
 - i. A loan to Stonewater secured by a registered mortgage and assignment of rents over a motel, campsite and RV park at Madeira

Park, BC, personal guarantees from the Teresa Gail Griffin, and Scott Jefferson Barras, the principals of Stonewater, and a registered mortgage against the personal residence of Ms. Griffin and Mr. Barras (the "**Stonewater Loan**").

- j. A loan to Ron Weninger secured by an equitable mortgage over a property in Beaverdell, BC (the "**Weninger Loan**").

Exhibit C to affidavit #6 of D. Bergman

Legal Proceedings to date

9 The Petitioner has commenced legal proceedings in relation to:

- a. Each of the Censorio Loans;

Exhibit C to Affidavit #4 of J. Wolska

Exhibit D to Affidavit #4 of J. Wolska

Exhibit A to Affidavit #2 of K. Record, at p. 1

- b. The Lensen Loan;

Exhibit B to Affidavit #3 of K. Record, at p. 12

- c. The Meridian Loan;

Exhibit C to Affidavit #3 of K. Record, at p. 17

- d. The Blair Loan;

Exhibit D to Affidavit #3 of K. Record, at p. 23

- e. The Frederick Loan; and

Exhibit E to Affidavit #3 of K. Record, at p. 29

- f. The Weninger Loan.

Exhibit F to Affidavit #3 of K. Record, at p. 34

10 The proceedings in relation to the Censorio Loans are not all pleaded in a manner such that judgment is sought as a remedy against the principals of each loan or their guarantors.

Exhibit C to Affidavit #4 of J. Wolska

Exhibit A to Affidavit #2 of K. Record, at p. 1

- 11 The Petitioner has not commenced legal proceedings in relation to:
- a. The 911 Loan;
 - b. The AFDI Loan;
 - c. The Buchmann Loan; or
 - d. The Stonewater Loan.

Exhibit A to affidavit #4 of J. Wolska

- 12 The Monitor advises that it is commencing a lawsuit against AFDI for the recovery of the monies owed to the Petitioner.

Monitor's Seventeenth Report, at para. 64

The Stonewater Loan

- 13 The Monitor advises that the Stonewater Loan was repaid in full on December 7, 2018.

Monitor's Seventeenth Report, at para. 53

The Buchmann Loan

- 14 In relation to the Buchmann Loan, the Monitor advises that:
- a. \$345,938.66 remains outstanding;
 - b. Mr. Buchmann has continued making payments under the Buchmann Loan, including two payments in October 2019;
 - c. The Monitor has requested the Petitioner's counsel to proceed with a notice of intention to enforce security and if necessary, commence foreclosure proceedings; and
 - d. The Monitor expects full recovery of the Buchmann Loan by May 2020.

Monitor's Seventeenth Report, at paras. 56-59

The 911 Loan

- 15 Several of Mr. Bergman's affidavits indicate that the 911 Loan was forgiven as part of a restructuring agreement (the "**Restructuring Agreement**").

Affidavit #6 of D. Bergman, at paras. 102-107

Exhibit C to Affidavit #6 of D. Bergman

Affidavit #9 of D. Bergman, at paras. 48-50

Exhibit E to Affidavit #4 of J. Wolska

- 16 Nothing in the Restructuring Agreement indicates that any portion of the 911 Loan was forgiven, aside from interest payable by 911 pursuant to the 911 Loan from and after April 30, 2014.

Exhibit E to Affidavit #4 of J. Wolska

Potential Claims against AFDI and Mr. Bergman

- 17 At all material times, Mr. Bergman was the sole director and the president of the Petitioner.

Affidavit #1 of D. Bergman, at para. 1.

Investment Guidelines

- 18 The Petitioner established investment guidelines for mortgage loans and other loans and investments (the "**Investment Guidelines**").

Exhibit F to Affidavit #1 of D. Bergman, at pp. 101-103

- 19 Pursuant to the Investment Guidelines, all mortgage loans were, *inter alia*, obligated to be secured and registered in the appropriate land title office as a charge against the real property subject to the mortgage.
- 20 Contrary to the Investment Guidelines, Mr. Bergman caused or allowed the Petitioner to enter into numerous mortgage agreements that were not secured by mortgages registered against the real property subject to the mortgage. As a result of the failure to register mortgages, the Petitioner faced shortfalls on its loans, was unable to fund its redemption requests, and commenced these proceedings.

Exhibit C to Affidavit #6 of D. Bergman

AFDI Loan

- 21 The Petitioner is managed by AFDI under the Management Agreement. Mr. Bergman is the sole director and officer of AFDI.

Petition filed November 8, 2017, Part 2, at para. 13

- 22 The AFDI Loan arises from a restructuring agreement between the Petitioner and AFDI wherein the Petitioner assigned two or three

promissory notes totalling \$2.2M to AFDI in exchange for a secured loan from AFDI. This was a non-arm's length transaction for the benefit of AFDI which may have contravened the rule against self-dealing.

Exhibit C to Affidavit #6 of D. Bergman

Monitor's Seventeenth Report, at paras. 62

- 23 The restructuring agreement between the Petitioner and AFDI was necessary so that the Petitioner was in compliance with the lending requirements of a mortgage investment corporation.

Monitor's Seventeenth Report, at para. 62

- 24 The restructuring agreement involving the 911 Loan is another example of Mr. Bergman's use of the Petitioner in transactions involving his other companies and may contravene the rule against self-dealing.

Exhibit E to Affidavit #4 of J. Wolska

The Management Agreement

- 25 Under the Management Agreement, AFDI was, *inter alia*, obligated to assist the Company in taking all such actions pertaining to loans and the enforcement of all security granted in respect of the loans as may be requisite and providing instructions to and liaising with the Company's legal counsel in that regard.

Exhibit E to Affidavit #1 of D. Bergman, at pp. 86-95

- 26 The Petitioner failed to take reasonable, or any, steps to enforce loans and mortgages which had fallen into default until these proceedings were commenced. AFDI failed to take reasonable steps to ensure these steps were taken.

Exhibit A to Affidavit #4 of J. Wolska

Failure to enforce security

- 27 The failure to take steps to enforce security granted in respect to defaulting loans in a timely manner meant that the Petitioner did not commence proceedings until a decline in the market had occurred, decreasing the available security for the defaulting loans.

- 28 There are concerns regarding the judgment exercised by Mr. Bergman and AFDI in relation to the loans and security they obtained. In particular, the Meridian Loan:
- a. May have been a non-recourse loan;
 - b. Involves a loan where funds advanced far exceeded the value of the land based on speculation of a potential redevelopment;
 - c. The proposed redevelopment was never a realistic possibility; and
 - d. The principal of Meridian is William Leslie Allen, the principal of 911.

Monitor's Seventeenth Report, at paras. 48-52

Exhibit D to Affidavit #4 of J. Wolska

Request for the Monitor and Petitioner to commence litigation

- 29 Lakes, Whyte LLP, in its capacity as representative counsel, requested that:
- e. the Petitioner and the Monitor commence actions in respect of
 - i. The 911 Loan;
 - ii. The AFDI Loan;
 - iii. Breach of the Management Agreement by AFDI; and
 - iv. Breach of fiduciary agreement and negligence by Mr. Bergman;
 - f. the Petitioner and Monitor amend the Censorio Proceedings to pursue judgments in each of the Censorio Proceedings, and to pursue judgment against Peter Censorio personally in each of the Censorio Proceedings.

Exhibit F to Affidavit #4 of J. Wolska, at pp. 40-44

- 30 To date, the Petitioner has not taken any steps to commence the above-noted actions or to amend the Censorio Proceedings. As mentioned, the Monitor advises that it is commencing a lawsuit against AFDI for the recovery of the monies owed to the Petitioner under the AFDI Loan.
- 31 The relevant limitation periods in respect of the above-noted actions are not obvious to the Applicant. However, there is a concern that if the Petitioner does not commence these actions in a timely manner, some or all of these claims will be barred by the *Limitation Act*.

Part 3: LEGAL BASIS

Representation Order

- 1 Section 11 of the CCAA provides:

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

- 2 Section 36.1 of the CCAA provides:

36.1 (1) 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.

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

(a) to “date of the bankruptcy” is to be read as a reference to “day on which proceedings commence under this Act”;

(b) to “trustee” is to be read as a reference to “monitor”; and

(c) to “bankrupt”, “insolvent person” or “debtor” is to be read as a reference to “debtor company”.

- 3 Section 38 of the *BIA* provides:

38 (1) 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.

(2) On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in

the chose in action or subject-matter of the proceeding, including any document in support thereof.

(3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

(4) Where, before an order is made under subsection (1), the trustee, with the permission of the inspectors, signifies to the court his readiness to institute the proceeding for the benefit of the creditors, the order shall fix the time within which he shall do so, and in that case the benefit derived from the proceeding, if instituted within the time so fixed, belongs to the estate.

Derivative Actions

4 Section 232 of the BCBCA provides:

232 (1) In this section and section 233,

"complainant" means, in relation to a company, a shareholder or director of the company;

"shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

(2) A complainant may, with leave of the court, prosecute a legal proceeding in the name and on behalf of a company

(a) to enforce a right, duty or obligation owed to the company that could be enforced by the company itself, or

(b) to obtain damages for any breach of a right, duty or obligation referred to in paragraph (a) of this subsection.

(3) Subsection (2) applies whether the right, duty or obligation arises under this Act or otherwise.

(4) With leave of the court, a complainant may, in the name and on behalf of a company, defend a legal proceeding brought against the company.

5 Section 233 of the BCBCA provides:

233 (1) The court may grant leave under section 232 (2) or (4), on terms it considers appropriate, if

(a) the complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding,

(b) notice of the application for leave has been given to the company and to any other person the court may order,

(c) the complainant is acting in good faith, and

(d) it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.

(2) Nothing in this section prevents the court from making an order that the complainant give security for costs.

(3) While a legal proceeding prosecuted or defended under this section is pending, the court may,

(a) on the application of the complainant, authorize any person to control the conduct of the legal proceeding or give any other directions for the conduct of the legal proceeding, and

(b) on the application of the person controlling the conduct of the legal proceeding, order, on the terms and conditions that the court considers appropriate, that the company pay to the person controlling the conduct of the legal proceeding interim costs in the amount and for the matters, including legal fees and disbursements, that the court considers appropriate.

(4) On the final disposition of a legal proceeding prosecuted or defended under this section, the court may make any order it considers appropriate, including an order that

(a) a person to whom costs are paid under subsection (3) (b) repay to the company some or all of those costs,

(b) the company or any other party to the legal proceeding indemnify

(i) the complainant for the costs incurred by the complainant in prosecuting or defending the legal proceeding, or

(ii) the person controlling the conduct of the legal proceeding for the costs incurred by the person in controlling the conduct of the legal proceeding, or

(c) the complainant or the person controlling the conduct of the legal proceeding indemnify one or more of the company, a director of the company and an officer of the company for expenses, including legal costs, that they incurred as a result of the legal proceeding.

(5) No legal proceeding prosecuted or defended under this section may be discontinued, settled or dismissed without the approval of the court.

(6) No application made or legal proceeding prosecuted or defended under section 232 or this section may be stayed or dismissed merely because it is shown that an alleged breach of a right, duty or obligation owed to the company has been or might be approved by the shareholders of the company, but evidence of that approval or possible approval may be taken into account by the court in making an order under section 232 or this section.

Backdate limitation date

- 6 In a derivative action, the limitation period is not suspended by the plaintiff's application to the court for leave to bring a derivative action. However, if the plaintiff applies for leave before the end of the limitation period, the court may apply the doctrine of *nunc pro tunc* to allow the plaintiff to file the action after the limitation period.
- 7 The Supreme Court of Canada laid out this principle in relation to class action certification applications in ***Canadian Imperial Bank of Commerce v. Green***, 2015 SCC 60. In that case, the court found that an action is commenced only when leave to commence the action has been granted and the action has been filed; if the action is commenced after the

limitation period, a limitation defence would apply. However, as the court states at paras 90 – 94, courts have inherent jurisdiction to issue orders *nunc pro tunc*, meaning that a court can backdate the effective date of its order if it is appropriate to do so. This means that, in cases where leave to file an action is sought before the expiry of the limitation period, the court can grant a nunc pro tunc order so that the commencement of the action falls within the limitation period (paras 92 – 93).

- 8 This does not apply only to certification applications under the Class Proceedings Act but also applies to other Acts where the plaintiff must seek leave of the court to file an action, including derivative actions (**1186708 Ontario Inc. v Gerstein**, 2017 ONSC 1217).
- 9 The following non-exhaustive factors guide the courts in determining whether to exercise their inherent jurisdiction to grant:
 - (1) the opposing party will not be prejudiced by the order;
 - (2) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity;
 - (3) the irregularity is not intentional;
 - (4) the order will effectively achieve the relief sought or cure the irregularity;
 - (5) the delay has been caused by an act of the court; and
 - (6) the order would facilitate access to justice.

Canadian Imperial Bank of Commerce v. Green, 2015 SCC 60, at para. 90

Part 4: MATERIAL TO BE RELIED ON

- 1 Affidavit #1 of Donald Bergman dated November 7, 2017.
- 2 Affidavit #6 of Donald Bergman dated June 7, 2018.
- 3 Affidavit #9 of Donald Bergman dated November 5, 2018.
- 4 Affidavit #1 of Joanna Wolska dated March 14, 2019
- 5 Affidavit #4 of Joanna Wolska dated November 5, 2019
- 6 Monitor's Eleventh Report
- 7 Monitor's Seventeenth Report

The applicant estimates that the application will take 120 minutes.

☐ 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

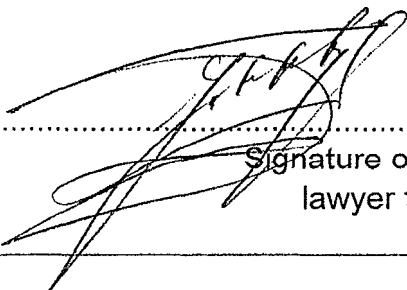
(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(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: November 8, 2019

.....

Signature of John D. Whyte
lawyer for the Applicant

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:[dd/mmm/yyyy].....	
.....	
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
- ☐ 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



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**

AMENDED NOTICE OF APPLICATION

Name of applicant: Hans-Uwe Andresen (the "Applicant")

To: Service List

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smith Street Vancouver, British Columbia on ~~November 18, 2019~~ November 26, 2019 at 10:00 a.m. for the orders set out in Part 1 below.

Part 1: ORDER SOUGHT

- 1 Pursuant to section 11 of the *Companies' Creditors Arrangement Act* (R.S.C., 1985, c. C-36) (the "CCAA"), Mr. Andresen be given leave to bring an application under section 36.1 of the CCAA and section 38 of the *Bankruptcy and Insolvency Act* (R.S.C., 1985, c. B-3) (the "BIA") as if he were a creditor.
- 2 Pursuant to section 36.1 of the CCAA and section 38 of the BIA, Mr. Andresen be given leave to commence the following actions on behalf of the Petitioner (collectively, the "Actions"):

- a. An action against 0911368 BC Ltd. ("911") in relation to a loan dated June 1, 2011 from the Petitioner to 911;
- b. An action against Donald Bergman and ACIC Financial Developments Inc. ("AFDI") in relation to:
 - i. a loan from the Petitioner to AFDI;
 - ii. Breach of a management agreement dated September 18, 2003 between the Petitioner and AFDI (the "Management Agreement"); and
 - iii. Breach of fiduciary duty and negligence by Mr. Bergman in his capacity as director for the Petitioner.

3 Pursuant to section 36.1 of the CCAA and section 38 of the BIA, Mr. Andresen be given leave to amend and continue the following proceedings that have been commenced by the Petitioner in the name of the Petitioner:

- a. *ACIC et. al. v. Censorio Group (Agnes & Elliot) Holdings Ltd. et. al.*, SCBC Vancouver Registry File H180143 ("H180143").
- b. *ACIC v. Altezza Properties Ltd. et. al.*, SCBC Vancouver Registry File S184595 ("S184595"); and
- c. *ACIC v. Censorio Group (Hastings & Carleton) Holdings Ltd. et. al.*, SCBC Vancouver Registry File S1910311 ("S1910311").

(collectively, the "Censorio Proceedings")

- 4 In the alternative, pursuant to section 11 of the CCAA and section 232 of the *Business Corporations Act* (SBC, 2002, c.57) (the "BCBCA"), Mr. Andresen be given leave to prosecute the Actions and the Censorio Proceedings in the name and on behalf of the Petitioner.
- 5 Pursuant to the inherent jurisdiction of the Court, the orders for leave to bring the Actions be entered *nunc pro tunc*, as of the day when this Application was filed.
- 6 The Monitor and Petitioner shall execute an assignment assigning all their rights, title, and interest which the Monitor or Petitioner have, had or shall have in the subject matter of the Actions, including any documents in support thereof.

- 7 Any benefits recovered as the result of the Actions are to be paid out as follows:
- a. First, to pay Mr. Andresen's legal fees, costs, and disbursements relating to the Actions on a solicitor's and own client basis;
 - b. ~~Next, to pay for the redemption of Mr. Andresen's preferred shares in the Petitioner, up to the value of his preferred shares in the Petitioner; and~~
 - c. Any surplus will be paid to the Petitioner, to be distributed pursuant to the plan of distribution.
- 8 In the further alternative:
- a. pursuant to section 11 of the CCAA, a bankruptcy order under the BIA be made against the Petitioner; and
 - b. Costs of the application be paid by the Petitioner to the Applicant.

Part 2: FACTUAL BASIS

- 1 The applicant is a preferred shareholder of All Canadian Investment Corporation ("ACIC").
- 2 ACIC is subject to proceedings under the CCAA that were commenced on November 8, 2017 (the "CCAA Proceedings")
- 3 Boale, Wood & Company Ltd. has been appointed as monitor in the CCAA Proceedings (the "Monitor").
- 4 Since the outset of the CCAA Proceedings the intended plan of the Petitioner has been to conduct an orderly wind-down of the business in an effort to maximize the recovery to the stakeholders. Until November 2018, Donald Bergman was managing the wind-down of the business.

Monitor's Eleventh Report, at paras. 89-90

- 5 As of November 8, 2018, the court has suspended any and all power and authority of Donald Bergman with respect to the Property or the Business, whether by virtue of being an Officer, Director or Management of the Petitioner. At the same time, the Monitor's powers and authority were expanded.

- 6 Since November 2018 the Monitor has been managing the wind-down of the business pursuant to expanded powers granted to the Monitor in the Order dated November 9, 2018.

Monitor's Eleventh Report, at para. 90

- 7 The Monitor estimates full payment of all creditors under both its high and low end recovery estimates, while preferred shareholders will obtain 7% (\$2,556,527) to 34% (\$12,556,527) recovery. These estimates do not include the potential recovery from personal or corporate guarantees.

Monitor's Seventeenth Report, at paras. 83-85

The Loans

- 8 As of April 26, 2018, the Petitioner's loan portfolio involved the following loans:
- a. Eight loans to the Censorio Group of Companies, guaranteed by, *inter alia*, a personal guarantee of Peter Censorio (collectively, the "Censorio Loans").
 - b. A loan to Meridian Resource Accommodations Inc. secured by a Registered 1st Mortgage over properties in Blenfait, Saskatchewan (the "Meridian Loan").
 - c. A loan to 911 secured by an equitable mortgage over a 40 acre property located in Lac La Biche County, Alberta (the "911 Loan").
 - d. A loan to AFDI arising from non-arm's length debt restructuring between the Petitioner and AFDI, secured by AFDI's 37.5% interest in a joint venture with Seamount Investments Ltd. (the "AFDI Loan").
 - e. A personal loan to Wayne Blair, an employee on ACIC's payroll.
 - f. A loan to Karl Buchmann secured by a registered mortgage over a land parcel in Salmon Arm, BC (the "Buchmann Loan").
 - g. A personal loan to Robert and Katherine Frederick without security (the "Frederick Loan").
 - h. A loan to Michael Lensen without security (the "Lensen Loan").
 - i. A loan to Stonewater secured by a registered mortgage and assignment of rents over a motel, campsite and RV park at Madeira

Park, BC, personal guarantees from the Teresa Gail Griffin, and Scott Jefferson Barras, the principals of Stonewater, and a registered mortgage against the personal residence of Ms. Griffin and Mr. Barras (the "Stonewater Loan").

- j. A loan to Ron Weninger secured by an equitable mortgage over a property in Beaverdell, BC (the "Weninger Loan").

Exhibit C to affidavit #6 of D. Bergman

Legal Proceedings to date

- 9 The Petitioner has commenced legal proceedings in relation to:

- a. Each of the Censorio Loans;

Exhibit C to Affidavit #4 of J. Wolska

Exhibit D to Affidavit #4 of J. Wolska

Exhibit A to Affidavit #2 of K. Record, at p. 1

- b. The Lensen Loan;

Exhibit B to Affidavit #3 of K. Record, at p. 12

- c. The Meridian Loan;

Exhibit C to Affidavit #3 of K. Record, at p. 17

- d. The Blair Loan;

Exhibit D to Affidavit #3 of K. Record, at p. 23

- e. The Frederick Loan; and

Exhibit E to Affidavit #3 of K. Record, at p. 29

- f. The Weninger Loan.

Exhibit F to Affidavit #3 of K. Record, at p. 34

- 10 The proceedings in relation to the Censorio Loans are not all pleaded in a manner such that judgment is sought as a remedy against the principals of each loan or their guarantors.

Exhibit C to Affidavit #4 of J. Wolska

Exhibit A to Affidavit #2 of K. Record, at p. 1

- 11 The Petitioner has not commenced legal proceedings in relation to:
- a. The 911 Loan;
 - b. The AFDI Loan;
 - c. The Buchmann Loan; or
 - d. The Stonewater Loan.

Exhibit A to affidavit #4 of J. Wolska

- 12 The Monitor advises that it is commencing a lawsuit against AFDI for the recovery of the monies owed to the Petitioner.

Monitor's Seventeenth Report, at para. 64

The Stonewater Loan

- 13 The Monitor advises that the Stonewater Loan was repaid in full on December 7, 2018.

Monitor's Seventeenth Report, at para. 53

The Buchmann Loan

- 14 In relation to the Buchmann Loan, the Monitor advises that:
- a. \$345,938.66 remains outstanding;
 - b. Mr. Buchmann has continued making payments under the Buchmann Loan, including two payments in October 2019;
 - c. The Monitor has requested the Petitioner's counsel to proceed with a notice of intention to enforce security and if necessary, commence foreclosure proceedings; and
 - d. The Monitor expects full recovery of the Buchmann Loan by May 2020.

Monitor's Seventeenth Report, at paras. 56-59

The 911 Loan

- 15 Several of Mr. Bergman's affidavits indicate that the 911 Loan was forgiven as part of a restructuring agreement (the "Restructuring Agreement").

Affidavit #6 of D. Bergman, at paras. 102-107

Exhibit C to Affidavit #6 of D. Bergman

Affidavit #9 of D. Bergman, at paras. 48-50

Exhibit E to Affidavit #4 of J. Wolska

- 16 Nothing in the Restructuring Agreement indicates that any portion of the 911 Loan was forgiven, aside from interest payable by 911 pursuant to the 911 Loan from and after April 30, 2014.

Exhibit E to Affidavit #4 of J. Wolska

Potential Claims against AFDI and Mr. Bergman

- 17 At all material times, Mr. Bergman was the sole director and the president of the Petitioner.

Affidavit #1 of D. Bergman, at para. 1.

Investment Guidelines

- 18 The Petitioner established investment guidelines for mortgage loans and other loans and investments (the "Investment Guidelines").

Exhibit F to Affidavit #1 of D. Bergman, at pp. 101-103

- 19 Pursuant to the Investment Guidelines, all mortgage loans were, *inter alia*, obligated to be secured and registered in the appropriate land title office as a charge against the real property subject to the mortgage.
- 20 Contrary to the Investment Guidelines, Mr. Bergman caused or allowed the Petitioner to enter into numerous mortgage agreements that were not secured by mortgages registered against the real property subject to the mortgage. As a result of the failure to register mortgages, the Petitioner faced shortfalls on its loans, was unable to fund its redemption requests, and commenced these proceedings.

Exhibit C to Affidavit #8 of D. Bergman

AFDI Loan

- 21 The Petitioner is managed by AFDI under the Management Agreement. Mr. Bergman is the sole director and officer of AFDI.

Petition filed November 8, 2017, Part 2, at para. 13

- 22 The AFDI Loan arises from a restructuring agreement between the Petitioner and AFDI wherein the Petitioner assigned two or three

promissory notes totalling \$2.2M to AFDI in exchange for a secured loan from AFDI. This was a non-arm's length transaction for the benefit of AFDI which may have contravened the rule against self-dealing.

Exhibit C to Affidavit #8 of D. Bergman

Monitor's Seventeenth Report, at paras. 62

- 23 The restructuring agreement between the Petitioner and AFDI was necessary so that the Petitioner was in compliance with the lending requirements of a mortgage investment corporation.

Monitor's Seventeenth Report, at para. 62

- 24 The restructuring agreement involving the 911 Loan is another example of Mr. Bergman's use of the Petitioner in transactions involving his other companies and may contravene the rule against self-dealing.

Exhibit E to Affidavit #4 of J. Wolska

The Management Agreement

- 25 Under the Management Agreement, AFDI was, *inter alia*, obligated to assist the Company in taking all such actions pertaining to loans and the enforcement of all security granted in respect of the loans as may be requisite and providing instructions to and liaising with the Company's legal counsel in that regard.

Exhibit E to Affidavit #1 of D. Bergman, at pp. 86-85

- 26 The Petitioner failed to take reasonable, or any, steps to enforce loans and mortgages which had fallen into default until these proceedings were commenced. AFDI failed to take reasonable steps to ensure these steps were taken.

Exhibit A to Affidavit #4 of J. Wolska

Failure to enforce security

- 27 The failure to take steps to enforce security granted in respect to defaulting loans in a timely manner meant that the Petitioner did not commence proceedings until a decline in the market had occurred, decreasing the available security for the defaulting loans.

- 28 There are concerns regarding the judgment exercised by Mr. Bergman and AFDI in relation to the loans and security they obtained. In particular, the Meridian Loan:
- a. May have been a non-recourse loan;
 - b. Involves a loan where funds advanced far exceeded the value of the land based on speculation of a potential redevelopment;
 - c. The proposed redevelopment was never a realistic possibility; and
 - d. The principal of Meridian is William Leslie Allen, the principal of 911.

Monitor's Seventeenth Report, at paras. 48-52

Exhibit D to Affidavit #4 of J. Wolska

Request for the Monitor and Petitioner to commence litigation

- 29 Lakes, Whyte LLP, in its capacity as representative counsel, requested that:
- e. the Petitioner and the Monitor commence actions in respect of
 - i. The 911 Loan;
 - ii. The AFDI Loan;
 - iii. Breach of the Management Agreement by AFDI; and
 - iv. Breach of fiduciary agreement and negligence by Mr. Bergman;
 - f. the Petitioner and Monitor amend the Censorio Proceedings to pursue judgments in each of the Censorio Proceedings, and to pursue judgment against Peter Censorio personally in each of the Censorio Proceedings.

Exhibit F to Affidavit #4 of J. Wolska, at pp. 40-44

- 30 To date, the Petitioner has not taken any steps to commence the above-noted actions or to amend the Censorio Proceedings. As mentioned, the Monitor advises that it is commencing a lawsuit against AFDI for the recovery of the monies owed to the Petitioner under the AFDI Loan.
- 31 The relevant limitation periods in respect of the above-noted actions are not obvious to the Applicant. However, there is a concern that if the Petitioner does not commence these actions in a timely manner, some or all of these claims will be barred by the *Limitation Act*.

Part 3: LEGAL BASIS

Representation Order

1 Section 11 of the CCAA provides:

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 Section 36.1 of the CCAA provides:

36.1 (1) 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.

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

(a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";

(b) to "trustee" is to be read as a reference to "monitor"; and

(c) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

3 Section 38 of the BIA provides:

38 (1) 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.

(2) On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in

the chose in action or subject-matter of the proceeding, including any document in support thereof.

(3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

(4) Where, before an order is made under subsection (1), the trustee, with the permission of the inspectors, signifies to the court his readiness to institute the proceeding for the benefit of the creditors, the order shall fix the time within which he shall do so, and in that case the benefit derived from the proceeding, if instituted within the time so fixed, belongs to the estate.

Derivative Actions

4 Section 232 of the BCBCA provides:

232 (1) In this section and section 233,

"complainant" means, in relation to a company, a shareholder or director of the company;

"shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

(2) A complainant may, with leave of the court, prosecute a legal proceeding in the name and on behalf of a company

(a) to enforce a right, duty or obligation owed to the company that could be enforced by the company itself, or

(b) to obtain damages for any breach of a right, duty or obligation referred to in paragraph (a) of this subsection.

(3) Subsection (2) applies whether the right, duty or obligation arises under this Act or otherwise.

(4) With leave of the court, a complainant may, in the name and on behalf of a company, defend a legal proceeding brought against the company.

5 Section 233 of the BCBCA provides:

233 (1) The court may grant leave under section 232 (2) or (4), on terms it considers appropriate, if

(a) the complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding,

(b) notice of the application for leave has been given to the company and to any other person the court may order,

(c) the complainant is acting in good faith, and

(d) it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.

(2) Nothing in this section prevents the court from making an order that the complainant give security for costs.

(3) While a legal proceeding prosecuted or defended under this section is pending, the court may,

(a) on the application of the complainant, authorize any person to control the conduct of the legal proceeding or give any other directions for the conduct of the legal proceeding, and

(b) on the application of the person controlling the conduct of the legal proceeding, order, on the terms and conditions that the court considers appropriate, that the company pay to the person controlling the conduct of the legal proceeding interim costs in the amount and for the matters, including legal fees and disbursements, that the court considers appropriate.

(4) On the final disposition of a legal proceeding prosecuted or defended under this section, the court may make any order it considers appropriate, including an order that

(a) a person to whom costs are paid under subsection (3) (b) repay to the company some or all of those costs,

(b) the company or any other party to the legal proceeding indemnify

(i) the complainant for the costs incurred by the complainant in prosecuting or defending the legal proceeding, or

(ii) the person controlling the conduct of the legal proceeding for the costs incurred by the person in controlling the conduct of the legal proceeding, or

(c) the complainant or the person controlling the conduct of the legal proceeding indemnify one or more of the company, a director of the company and an officer of the company for expenses, including legal costs, that they incurred as a result of the legal proceeding.

(5) No legal proceeding prosecuted or defended under this section may be discontinued, settled or dismissed without the approval of the court.

(6) No application made or legal proceeding prosecuted or defended under section 232 or this section may be stayed or dismissed merely because it is shown that an alleged breach of a right, duty or obligation owed to the company has been or might be approved by the shareholders of the company, but evidence of that approval or possible approval may be taken into account by the court in making an order under section 232 or this section.

Backdate limitation date

- 6 In a derivative action, the limitation period is not suspended by the plaintiff's application to the court for leave to bring a derivative action. However, if the plaintiff applies for leave before the end of the limitation period, the court may apply the doctrine of *nunc pro tunc* to allow the plaintiff to file the action after the limitation period.
- 7 The Supreme Court of Canada laid out this principle in relation to class action certification applications in ***Canadian Imperial Bank of Commerce v. Green***, 2015 SCC 60. In that case, the court found that an action is commenced only when leave to commence the action has been granted and the action has been filed; if the action is commenced after the

limitation period, a limitation defence would apply. However, as the court states at paras 90 – 94, courts have inherent jurisdiction to issue orders *nunc pro tunc*, meaning that a court can backdate the effective date of its order if it is appropriate to do so. This means that, in cases where leave to file an action is sought before the expiry of the limitation period, the court can grant a *nunc pro tunc* order so that the commencement of the action falls within the limitation period (paras 92 – 93).

- 8 This does not apply only to certification applications under the Class Proceedings Act but also applies to other Acts where the plaintiff must seek leave of the court to file an action, including derivative actions (*1186708 Ontario Inc. v Gerstein*, 2017 ONSC 1217).
- 9 The following non-exhaustive factors guide the courts in determining whether to exercise their inherent jurisdiction to grant:
 - (1) the opposing party will not be prejudiced by the order;
 - (2) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity;
 - (3) the irregularity is not intentional;
 - (4) the order will effectively achieve the relief sought or cure the irregularity;
 - (5) the delay has been caused by an act of the court; and
 - (6) the order would facilitate access to justice.

Canadian Imperial Bank of Commerce v. Green, 2015 SCC 60, at para. 90

Part 4: MATERIAL TO BE RELIED ON

- 1 Affidavit #1 of Donald Bergman dated November 7, 2017.
- 2 Affidavit #6 of Donald Bergman dated June 7, 2018.
- 3 Affidavit #9 of Donald Bergman dated November 5, 2018.
- 4 Affidavit #1 of Joanna Wolska dated March 14, 2019
- 5 Affidavit #4 of Joanna Wolska dated November 5, 2019
- 6 Monitor's Eleventh Report
- 7 Monitor's Seventeenth Report

The applicant estimates that the application will take 120 minutes.

☐ 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: November 18, 2019

..... Fer. 
Signature of John D. Whyte
lawyer for the Applicant

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:[dd/mm/yy].....

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
- ☐ 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