



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: **Those preferred shareholders of All Canadian Investment Corporation (the "Company") who requested the redemption of their shares in the Company at a time when reasonable grounds did not exist to believe that the Company was insolvent at the time of the request, or that honoring the request would cause the Company to become insolvent (the "Redeeming Shareholders")**

THIS IS A RESPONSE TO the notice of application of **James Hancock & 103163 Alberta Ltd.** (the "**Applicants**") filed **February 25, 2020**.

Part 1: ORDERS CONSENTED TO

The application respondent consents to the granting of the orders set out in Part 1 of the notice of application: **NIL**.

Part 2: ORDERS OPPOSED

The application respondent opposes the granting of the orders set out in **paragraphs 1 and 2** 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 **NONE** of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. The Applicants seek an order that the Petitioner pay full indemnity legal costs for their participation in an application which took place on June 18-20, 2019 on the basis that they allege:
 - a. The charges ordered in relation to the Redeeming Shareholders and Non-Redeeming Shareholders (the “**Charges**”) were in priority to the claims of unsecured creditors.
 - b. The order sought is necessary to treat stakeholders under the CCAA proceedings as fairly and equitably as the circumstances allow; and
 - c. The actions of the Applicants in retaining counsel was of benefit to the unsecured creditors in general.
2. The Charges are not in priority to the claims of unsecured creditors, because the Applicants claims were known on March 26, 2019.

Tab 1: Petition to the Court, at paras. 56, 57, and 60

Tab 66: Order Made After Application (March 26, 2019), at para. 3

Tab 67: Order Made After Application (April 5, 2019), at para. 1(c)

Tab 76: Order Made After Application (April 26, 2019), at para. 8

3. The Charges were granted such that the legal fees incurred on behalf of the Redeeming Shareholders and Non-Redeeming Shareholders were effectively paid by the preferred shareholders, collectively.
4. The order sought by the Applicants is such that the legal fees of one unsecured creditor, allegedly acting for the benefit of the unsecured creditors in general, would be paid by the preferred shareholders, collectively. Such an order would not treat stakeholders fairly and equitably, but rather, would be a special costs award against the preferred shareholders.
5. An analogous order to the Charges would have been an order to seek to have the legal costs of the Applicants paid on a *pro rata* basis by all unsecured creditors, which would have resulted in the unsecured creditors sharing the cost of one creditor acting for all of their benefit.

6. There was a significant overlap between the interests, position, and submissions of the Applicants and the Non-Redeeming Shareholders in relation to the application which took place on June 18-20, 2019.

Tab 78: Application Response to Preferred Shareholders Application – Non-Redeeming Shareholders dated May 23, 2019

Tab 80: Application Response – James Hancock

Tab 82: Application Response – 1083163 Alberta Ltd.

Tab 90: Reasons for Judgement (Mr. Justice Walker) dated September 4, 2019

Part 5: LEGAL BASIS

Basis for the charges.

7. The initial charge in favour of representative counsel for the preferred shareholders was granted following the consideration of an application brought by Hans-Uwe Andresen and Linda Riesterer.

Notice of application of Hans-Uwe Andresen and Linda Riesterer dated March 15, 2019

8. Representative counsel for the preferred shareholders was appointed based upon factors that have been considered by the courts in granting the appointment of representatives in a CCAA case, including the following:
 - a. the vulnerability and resources of the group sought to be represented;
 - b. any benefit to the companies under CCAA protection;
 - c. any social benefit to be derived from representation of the group;
 - d. the facilitation of the administration of the proceedings and efficiency;
 - e. the avoidance of a multiplicity of legal retainers;
 - f. the balance of convenience and whether it is fair and just including to the creditors of the Estate;
 - g. whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
 - h. the position of other stakeholders and the Monitor.

Canwest Publishing Inc., 2010 ONSC 1328, at para. 21

Urbancorp Inc. (Re), 2016 ONSC 5426, at para. 11

9. The Charges were granted based upon statutory authority under Rule 11.52 of the CCAA, and the factors applicable to such orders, including the following:
- a. The size and complexity of the businesses being restructured;
 - b. The proposed role of the beneficiaries of the charge;
 - c. Whether there is an unwanted duplication of roles;
 - d. Whether the quantum of the proposed charge appears to be fair and reasonable;
 - e. The position of the secured creditors likely to be affected by the charge;
 - f. The position of the Monitor.

Canwest Publishing Inc., 2010 ONSC 222, at para. 54.

Walter Energy Canada Holdings, Inc. (Re), 2016 BCSC 107, at para. 42.

- g. a court officer is already involved, namely the court appointed monitor and, as such, he is the “eyes and ears” of the Court, and he must, at all times, remain independent and act impartially for the benefit of all stakeholders;
- h. therefore, services already rendered or to be rendered by the monitor must not be duplicated by the interested person’s financial, legal or other experts, at least, not for the debtor’s account;
- i. an “effective participation” has to be pro-active and constructive, never losing sight of the global picture of the restructuring and the interests of all stakeholders;
- j. an “effective participation” shall not include challenging the merits per se of the restructuring proceedings; the debtor need not fund the opponent of its restructuring;
- k. “time is of the essence”: the monitor must be in a position to assess appropriately, and budget for, the fees and expenses to be incurred in a restructuring; therefore, interested persons claiming the right to be indemnified or secured for their financial, legal or other experts’ “effective participation” must act quickly to obtain confirmation of said right and set up the applicable rules;
- l. once the rules are established by the claimant, the monitor and the debtor, they must be authorized by the Court, including whether or not fees and expenses already incurred ought to be included; and

m. as authorizing the payment of fees and expenses before any distribution to a debtor's stakeholders is tantamount to granting prior ranking security, the Court has endorsed the following considerations:

- i. an administrative charge established under the CCAA is intended to be exceptional, and limited only to what is essential to the success of a restructuring;
- ii. unless special circumstances are well-supported by convincing evidence, an administrative charge should not include legal or financial advisers other than those of the monitor and the debtors;
- iii. the objective of an administrative charge is not to protect the maximum of professionals possible. Rather, it is to put in place a charge that facilitates the goal of arriving at an arrangement at the best possible cost for the creditors who will ultimately pay the cost; and
- iv. It is justified for each of the stakeholders to retain their legal or financial advisers, but not to do so at the expense of the debtor Company, and therefore from the least protected creditors.

Homburg Invest Inc. (Arrangement relatif à), 2014 QCCS 980, at paras. 99-102

10. The preferred shareholders were granted an order appointing representative counsel, and securing their legal fees with the Charges, based upon evidence from Mr. Andresen, Mr. Parfeniuk, and the numerous emails from other preferred shareholders which addressed all of the above factors supporting the granting of the Charge.

Tab 62: Affidavit #1 of Hans-Uwe Andresen dated March 14, 2019

Tab 63: Affidavit #1 of Gerald Basil Parfeniuk dated March 14, 2019

Tab 64: Affidavit #1 of Joanna Wolska dated March 14, 2019

Tab 65: Affidavit #2 of Joanna Wolska dated March 15, 2019

11. By contrast Mr. Hancock's evidence is limited to the following:

- a. A description of legal proceedings to date; and
- b. The Applicants have collectively incurred legal fees, disbursements and applicable taxes in the total amount of \$47,242.73.

12. The Applicants have established none of the factors which would support a charge against the Company's assets which they seek.

13. This Application should be dismissed with costs.

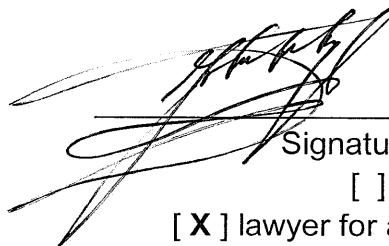
Part 6: MATERIAL TO BE RELIED ON

1. Tab 1: Petition to the Court
2. Tab 58: Notice of Application – Preferred Shareholders
3. Tab 61: Notice of Application of Hans-Uwe Andresen & Linda Riesterer
4. Tab 62: Affidavit #1 of Hans-Uwe Andresen dated March 14, 2019
5. Tab 63: Affidavit #1 of Gerald Basil Parfeniuk dated March 14, 2019
6. Tab 64: Affidavit #1 of Joanna Wolska dated March 14, 2019
7. Tab 65: Affidavit #2 of Joanna Wolska dated March 15, 2019
8. Tab 66: Order Made After Application (March 26, 2019)
9. Tab 67: Order Made After Application (April 5, 2019)
10. Tab 69: Application Response of Redeeming Shareholders dated April 10, 2019
11. Tab 76: Order Made After Application (April 26, 2019)
12. Tab 78: Application Response to Preferred Shareholders Application – Non-Redeeming Shareholders dated May 23, 2019
13. Tab 80: Application Response – James Hancock
14. Tab 82: Application Response – 1083163 Alberta Ltd.
15. Tab 90: Reasons for Judgement (Mr. Justice Walker) dated September 4, 2019

The application respondents estimate that the application will take **1 hour**.

[X] The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Date: **February 26, 2020**.



Signature of **JOHN D. WHYTE**
[] application respondent
 [X] lawyer for application respondent,
the Redeeming Shareholders