IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *All Canadian Investment Corporation (Re),* 2020 BCSC 855

Date: 20200608
Docket: S1710393
Registry: Vancouver

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

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for the Petitioner:	J.D. West
Counsel for Parkland Funding Ltd.:	S. Kelly W. Thiessen
Counsel for the Monitor:	D. Hyndman
Place and Dates of Hearing:	Vancouver, B.C. April 21, 2020 May 19 & 21, 2020
Place and Date of Judgment:	Vancouver, B.C. June 8, 2020

Introduction

[1] In this insolvency proceeding, the Monitor disallowed Parkland Funding Ltd.'s claim as a creditor of the debtor, All Canadian Investment Corporation ("ACIC"). Parkland Funding Ltd. ("Parkland") appeals the Monitor's decision, asserting that the Monitor erred in rejecting its claim as a creditor of ACIC in the amount of $200,000. In its notice of application, Parkland seeks a declaration that it is a creditor of ACIC for the purpose of this proceeding and is entitled to all rights and privileges as a creditor of ACIC.

[2] Prior to its insolvency, ACIC had carried on business as a registered mortgage investment corporation since 1998. It is incorporated pursuant to the *Business Corporations Act*, S.B.C. 2002, c. 57. ACIC's business was to loan funds to third party owners of commercial and residential property, secured by mortgages, from a pool of funds it received from time to time from individuals and corporations who invested in ACIC by purchasing preferred shares.

[3] Coincidentally, Parkland also operated as a mortgage investment company.

[4] ACIC commenced this insolvency proceeding pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*] on November 8, 2017. It soon became clear that the proceeding was in effect a liquidating *CCAA*. The Monitor continues in his efforts to recover on the loans made by ACIC, for the benefit of ACIC's creditors and equity claimants. All stakeholders in ACIC's insolvency continue to be better served through a liquidating *CCAA* as opposed to a proceeding brought under the *Bankruptcy and Insolvency Act*, R.S.C.1985, c. B-3.

[5] Further background facts concerning the insolvency may be found at reasons for judgment indexed at 2019 BCSC 1488.

[6] Except for Parkland's claim, the claims of all creditors have been determined by the Monitor. Once Parkland's appeal is determined, the Monitor will take a proposed plan of arrangement to be voted upon by the creditors.

Parkland's Claim

[7] Parkland's relationship with ACIC began when it purchased preferred shares of ACIC in 2007. It continued to purchase shares through to 2012 for a total amount of $1.4 million. Its claim as creditor is not premised on its status as a preferred shareholder but in contract. Parkland's claim as creditor is founded upon a purported settlement agreement it says it made with ACIC on February 12, 2016 to settle its lawsuit against ACIC and three others - ACIC Financial Development Inc. ("AFDI"), which is a company related to ACIC, and Donald Bergman and Wayne Blair, who are two individuals related to ACIC and AFDI.

[8] In its lawsuit (KE S109643) ("Lawsuit") issued on Jan 4, 2016, Parkland alleged that ACIC and AFDI failed to honour its request to redeem $200,000 of preferred shares. Parkland did not identify its specific shareholdings of ACIC and AFDI. Instead, in its notice of civil claim it alleged it had "made investments with the Defendants totalling $1.400,000.00 [sic]." In its originally filed notice of civil claim, Parkland sought an accounting or tracing of $200,000 as well as specific performance of its redemption request. It later amended its notice of civil claim on September 20, 2017, well after the events in issue on this application occurred, alleging the defendants failed to honour another demand for $800,000 and increased its claim for an accounting or tracing to $1 million. The parties did not address the potential effect of this amendment on the issues on this application.

[9] The defendants denied liability in their response pleading. They alleged that Parkland's shares in ACIC had been fully redeemed by October 3, 2013 and no longer held any interest in ACIC after that date:

> 11. In or about January of 2012, Parkland's remaining investment in [ACIC] was $400,000.
>
> 12. On December 31, 2012, Parkland requested the redemption of $600,000 of preferred shares and submitted a redemption form for both [ACIC] and [AFDI].
>
> 13. As a result of Parkland only holding $400,000 worth of the preferred shares in [ACIC] as of January, 2012, the redemption request was, with Parkland's concurrence, split between [ACIC] and [AFDI] as follows:

> (a) the redemption request of $400,000 of preferred shares in [ACIC] (the "Second [ACIC] Redemption"); and
>
> (b) the redemption of $200,000 worth of class H preferred shares in [AFDI] (the "[AFDI] Redemption").
>
> 14. The Defendants specifically deny making any representations, assurances or any promises, either as alleged or at all, to the effect that Parkland would receive either the Second [ACIC] Redemption amount or the [AFDI] Redemption amount by April of 2013. Rather, redemptions were at all times subject to the discretion of either [ACIC] or [AFDI] and dependent on sufficient funds being reasonably available to fund a redemption.
>
> 15. The Second [ACIC] Redemption request was nonetheless fully paid out to Parkland in four increments of $100,000 each on or about the following dates: May 6th, July 2nd, July 31st and October 3rd, 2013.
>
> 16. As a result, Parkland, by its own conduct, had no remaining shares or other interest in [ACIC]. Parkland's remaining investment was, pursuant to the Letter of Direction, in [AFDI's] class H preferred shares.
>
> 17. Parkland has continued to receive dividends on a quarterly basis from [AFDI].

[10] It is useful at this juncture to set out my finding that ACIC's records in evidence clearly establish Parkland's redemption requests of ACIC were honoured and it ceased to be a shareholder of ACIC in October 2013. Parkland's status at that point was a shareholder of AFDI.

[11] Parkland's position on appeal is that it was to be paid $200,000 under the settlement agreement and in exchange, it would dismiss the Lawsuit. In oral submissions, Parkland said all of the defendants were bound to perform the settlement agreement, such that each defendant, including ACIC, was jointly and severally obliged to pay the settlement amount.

[12] According to Parkland, the settlement agreement is evidenced in an exchange of emails between its counsel and counsel for the defendants dated February 12, 2016. Parkland maintains the emails contain an offer and an acceptance. Parkland also submits that even if it was not a preferred shareholder of ACIC at that time, there was valid consideration for the settlement agreement because the Lawsuit would be dismissed against ACIC in addition to the other defendants.

[13] In the claim it presented to the Monitor, Parkland advised it was never paid the settlement amount, and as a result of the defendants' breach of the settlement agreement, Parkland's status changed to become a creditor of ACIC in the amount of $200,000. Relying on *Lessing Brandon & Company LLP v. Dyck and others*, 2019 BCSC 2331, Parkland argues that its rights are founded on a contract independent of its status as a preferred shareholder of ACIC.

[14] Parkland's other complaints against ACIC and the other defendants, such as its assertion that its principals were misled when some of their redemption proceeds from ACIC were allegedly invested in AFDI, have no bearing on this appeal. Indeed, Parkland does not assert that they do. As noted above, its claim as creditor of ACIC is founded solely on a breach of a purported settlement agreement it says it made with ACIC on February 12, 2016.

Monitor's Disallowance of the Claim

[15] The Monitor reviewed the documents tendered by Parkland as well as the records of ACIC. It rejected Parkland's claim as creditor for a number of reasons, which are found in his initial and revised Notice of Revision or Disallowance. In rejecting the claim, the Monitor determined:

(a) Parkland was only ever a preferred shareholder and never a creditor of ACIC during the entirety of its relationship with ACIC;

(b) Parkland ceased to be a shareholder of ACIC on October 3, 2013, when the last of its redemption requests of ACIC in the amount of $100,000 was honoured;

(c) as a result, Parkland was not a shareholder of ACIC when the Lawsuit was commenced;

(d) as at and after October 3, 2013, the only financial interest Parkland had in any of the corporate defendants in the Lawsuit was against AFDI;

(e) no settlement agreement was reached between Parkland and ACIC on February 12, 2016, as alleged or at all;

(f) Parkland entered into a settlement agreement with AFDI in September 2016, obliging only AFDI to pay Parkland and to pay the sum of $205,000 in exchange for a dismissal of the Lawsuit against all of the defendants (including ACIC); and

(g) alternatively, if there was a valid and enforceable settlement agreement reached on February 12, 2016, it was superseded by a settlement agreement made in September 2016, which obliged only AFDI to pay Parkland the increased sum of $205,000 and extinguished any purported prior obligation on the part of ACIC to pay.

Grounds of Appeal

[16] Parkland's appeal is brought per paras. 14 and 18 of the Claims Process Order issued in this proceeding on November 18, 2019. Paragraph 18 provides that Parkland's appeal is a true appeal and shall be heard upon such further terms as may be ordered.

[17] Parkland says that the Monitor erred in law or in the alternative committed errors of mixed fact and law or fact and his decision was unreasonable. The essence of its appeal is summarized as follows:

(a) the Monitor misconstrued Parkland's claim as submitted and erred in law when it considered it on a different basis (i.e., as a past preferred shareholder);

(b) consequently, the Monitor erred in law when it adjudicated Parkland's claim based on prior redemption requests;

(c) the Monitor failed to recognize that Parkland's claim as a creditor is founded in contract;

(d) the Monitor erred in law or in mixed fact and law or in fact by failing to recognize the settlement agreement reached on February 12, 2016 as a valid and enforceable contract; and

(d) the Monitor erred when, in the alternative, it treated the subsequent agreement made in September 2016 as "superseding" its prior settlement agreement with ACIC and concluded it extinguished any claim Parkland may have had against ACIC.

[18] Parkland acknowledges that it bears the onus to demonstrate the Monitor committed an error of law based on the standard of review of correctness, or an error of mixed fact or of fact based on the standard of review of palpable and overriding error.

[19] Parkland also raised the issue of reasonableness as a live issue on this appeal. For errors of fact or mixed fact and law, it submits the law requires me to determine whether the Monitor made any palpable and overriding error(s) when I assess the reasonableness of the Monitor's decision.

[20] Parkland referred to paras. 103-107 of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, where the Court said a reasonable decision is one based on internally coherent reasoning and justified in light of the legal and factual constraints that bear on the decision. However, its submissions regarding reasonableness appear to confuse a true appeal of the Monitor's decision with a judicial review. See *8640025 Canada Inc. (Re),* 2018 BCCA 93 at paras. 60-66. However, the Monitor also referred to *Galaxy Sports Inc*. *(Re)*, 2004 BCCA 284, which at para. 39 raises the issue of reasonableness in the insolvency context.

[21] In the event the reasons in *Vavilov* mean that considerations arising on a judicial review are relevant to this appeal, it is also important to keep in mind the Court's statement that a reviewing court must also consider the governing statutory scheme and the common law: paras. 103-114. Regardless, I would consider them on this true appeal in any event.

Determination

[22] For the reasons that follow, I am satisfied that the Monitor did not err in rejecting Parkland's claim as a creditor of ACIC. The Monitor correctly applied the law when determining that the Parkland and ACIC did not reach an agreement in February 2016. The Monitor did not err when he considered Parkland's prior status as a preferred shareholder of ACIC as part of his analysis.

No Consensus Ad Idem

[23] The communications between counsel in February 2016 relied upon by Parkland do not establish a mutual intention to create contractual relations.

[24] The initiating correspondence pointed to by Parkland is an email sent by the lawyer acting for the defendants in the Lawsuit to counsel for Parkland at 7:25 a.m. on February 12, 2016. There is no evidence that it was sent as a result of or following any prior discussions between counsel or their clients. The email is marked without prejudice:

> Hi [S] –
>
> My clients are in a position to fund payment to your client of the sum of $200,000. That can be done immediately upon you providing me with a signed consent dismissal order in the usual form, providing for a without costs dismissal against all defendants on the same basis as if pronounced after a trial on the merits.
>
> Please confirm this resolution is acceptable. If you wish me to prepare the CDO, let me know.
>
> Regards,
>
> [J]
>
> [Emphasis added]

[25] The response from Parkland's counsel was sent at 3:02 p.m. the same day:

> Thank you, [J].
>
> That resolution is acceptable. Please send the funds to my attention payable to Parkland Funding Ltd. and I will undertake not to release same to my client until we have filed the CDO. You might as well prepare the CDO and send it along with the settlement funds.
>
> Regards,
>
> [S]

[26] I agree with the Monitor that the language used in the defence counsel's email conveys a statement of fact, i.e., his clients were in a position to fund a $200,000 payment, and does not convey an offer.

[27] The issue was framed in Parkland's submissions as one engaging basic contract law principles of offer and acceptance. No cases were cited. No other evidence was adduced, such as other communications or evidence of conduct. My analysis therefore focuses on an objective construction of the correspondence in evidence.

[28] Even assuming that Parkland's counsel took defence counsel's correspondence as an offer, objectively construed, the correspondence between counsel does not evidence a mutual intention to create contractual relations. *Consensus ad idem* is not established.

[29] In oral submissions, the Monitor suggested it is useful to "compare and contrast" the language used in the February correspondence between counsel with the language they used in their exchange in September 2016. I agree.

[30] On September 6, 2016 counsel for the defendants sent a without prejudice letter to Parkland's counsel stating:

> Further to our correspondence concerning this matter, I have now received instructions from my clients to offer to settle this matter on the following basis:
>
> 1. The defendant, [AFDI], will pay your client the amount of $200,000, commencing in October 2016, consisting of $25,000 quarterly payments for eight consecutive calendar quarters, with the final payment in July 2018;
> 2. Your client with forthwith discontinue the action against all the defendants; and,
> 3. Your client will forthwith execute a release that will be held in trust pending completion of the payment obligation in subparagraph (1), above. The release will release the defendants in respect of all claims or causes of action arising from or related to the facts alleged and relief claimed in the action.
>
> As an alternative to subparagraph (1) above, but with the other terms unchanged, AFDI will pay installments of $50,000 beginning in October 2016, and continuing over the next three consecutive calendar quarters, with the

> final payment in July 2017. Although this would provide payment of the $200,000 more quickly, it would, as I understand it from my clients, likely mean a lesser dividend to your client.
>
> The defendants reserve the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in the proceeding. I look forward to hearing from you.
>
> Yours truly,
>
> [J]
>
> [Emphasis added]

[31] Parkland's response was sent by its counsel on September 13, 2016, with a counter offer to increase the amount by $5,000 to $205,000:

> Hi [J],
>
> My client is willing to accept your clients' offer of the $25,000.00 quarterly payments beginning in October as set out in your letter of September 6th, subject to your clients agreeing to make an additional $5,000.00 payment within 10 days. You will recall that after the previous settlement agreement collapsed and my client had to incur significant additional costs for me to travel to Alberta to gather the necessary information to respond to your clients' demand for particulars and to prepare the List of Documents, my client advised that the cost of the settlement would go up. …
>
> [Emphasis added]

[32] Parkland's counter offer was accepted on September 20, 2016, when defence counsel wrote:

> [S] - -
>
> Thanks for your message.
>
> My clients will settle on the terms previously proposed by me, in my letter of September 6, 2016, plus the payment of $5,000. I expect to receive the $5,000 payment shortly and when I do will make arrangements to forward the funds to you. I expect this process will take ten days to two weeks.
>
> I will forward a draft release to you in the interim.
>
> Please note the $5,000 payment is being made only as a gesture of good faith and in order to expedite the resolution of this matter.
>
> Regards,
>
> [J]
>
> [Emphasis added]

[33] In the absence of any other evidence, I construe the remarks of Parkland's counsel in para. 31 above concerning the collapse of an earlier settlement to evince his thinking, in September 2016, about a prior agreement. It does not, however, affect my determination that no mutual intention to create contractual relations - *consensus ad idem* - was reached earlier in February.

[34] In this exchange of correspondence, mutuality of intention to create contractual relations in September 2016 is clear.

[35] I wish to comment on the Monitor's submission that there was no consideration for any purported settlement agreement in February 2016, or if there was, it was improvident.

[36] As noted at the outset, I have found that Parkland ceased to be a preferred shareholder of ACIC in 2013. It was not a shareholder in February 2016, such that its claim against ACIC for a redemption of ACIC shares lacked merit. Nonetheless, in my opinion, payment in exchange for a dismissal or discontinuance of a meritless lawsuit may constitute valuable consideration. A party may choose to contribute money to a settlement in exchange for the dismissal of a meritless action in order to secure finality and to save expense or on its other resources.

[37] The Monitor also submits an agreement which requires ACIC to be bound, jointly and severally, to pay $200,000 on account of a share redemption allegedly owed only by AFDI is improvident. I agree that the facts as known at this stage appropriately raise the question and would warrant an enquiry if I had found *consensus ad idem*. That said, there may be circumstances, such as the internal relationship between ACIC and AFDI, which might answer any concerns regarding consideration. In my opinion, it would be inappropriate to determine the issue at this juncture in the absence of additional facts.

September 2016 Agreement

[38] Parkland argued in oral submissions that based on the communications excerpted above, it reached a further settlement agreement with all of the defendants in the Lawsuit in September 2016 entitling it to be paid $205,000.

[39] Parkland also says that each defendant nonetheless remained bound to perform the settlement agreement reached on February 12, 2016.

[40] Yet, Parkland does not assert the result is an increase in the overall settlement amount from $200,000 to $405,000. Instead, it says that any payment made under the second agreement would reduce the financial obligation of the defendants under the earlier one.

[41] Objectively construed, the documents do not support that submission.

[42] Nor is there any other factual basis to make that finding.

[43] Even if I were to assume a valid enforceable contract was reached between Parkland and the defendants in the Lawsuit on February 12, 2016 and then subsequently breached, Parkland's claim as predicated on a breach of that agreement was compromised and settled in September 2016. The terms of the second agreement varied the settlement amount and also varied the payment obligation. After the agreement was reached in September 2016, the only contracting party obliged to pay Parkland was AFDI. Parkland could no longer claim ACIC was indebted to it.

Parkland's Status

[44] The Monitor did not err when he considered Parkland's status as a former preferred shareholder of ACIC as part of his analysis.

[45] In insolvency proceedings, it is essential to determine the substance or true nature of the relationship between a claimant and the debtor when deciding whether the former is a creditor or equity claimant. Monetary losses suffered by equity claimants must not diminish the assets of the debtor available to general creditors.

That is particularly so in light of the 2009 amendments to the *CCAA* expanding the definition of equity claims: see definition of “equity claim” in *CCAA*, ss. 2(1). See also: s. 6(8); *Sino-Forest Corporation (Re)*, 2012 ONCA 816.

[46] The amendments did not change the historical treatment given to creditors and equity claimants (such as shareholders). The latter are subordinated in priority to creditors in insolvency proceedings. In *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732, Madam Justice Fitzpatrick said:

> [65] Historically, equity and debt claims have been treated differently in an insolvency proceeding given the fundamental difference in the nature of such claims. That different treatment resulted in the subordination of equity to debt claims. The basis for this judicially developed principle was that equity investors are understood to be higher risk participants. Creditors, on the other hand, have been held by the courts to have chosen a lower level of risk exposure that should generally result in priority over equity investors in an insolvency context.

[47] In *Bul River*, Fitzpatrick J. pointed to the policy objectives of the *CCAA* to facilitate a restructuring that is fair, reasonable, and equitable, in her discussion of the expanded definition of equity claims in 2009 amendments:

> [100] I return to the comments in *Century Services* regarding the remedial purposes of the *CCAA* and the broad and flexible authority of this court to facilitate a restructuring that is fair, reasonable and equitable in accordance with either the express will of Parliament, as specifically dictated in the *CCAA*, or as might be reasonably interpreted as falling within those broad purposes.
>
> [101 At its core, the policy objectives of the *CCAA* are a fair and efficient resolution of competing claims in a situation (insolvency) where all obligations or expectations cannot be fulfilled. What is “fair” is a flexible or uncertain concept and needless to say, what is fair will likely be differently interpreted depending on which stakeholder you ask. Nevertheless, Parliament has clearly signalled that the policy objectives continue to be that equity will take a back seat in terms of any recovery where there are outstanding debt claims. This was so before September 2009 and is even more decidedly so now, given the express and expansive statutory treatment of equity claims that now applies.
>
> [102] In my view, the characterization of claims by the court continues to have an important role in fulfilling that purpose. I have already outlined the considerable authority from Canadian courts in respect of such claims, both pre- and post-amendments. Particularly, the court continues to have a role in applying these new equity claims provisions by considering the true nature or substance of those claims. In many cases, the matter is now considerably

> clearer given the definition of "equity claims". What is most important, however, is that form will still not trump substance in the consideration of this issue.

[48] In *Sino-Forest*, the Ontario Court of Appeal discussed the expanded definition of equity claims in the 2009 amendments:

> [1] In 2009, the [*CCAA*] was amended to expressly provide that general creditors are to be paid in full before an equity claim is paid.
>
> …
>
> [39] The definition [of equity claim] incorporates two expansive terms.
>
> [40] First, Parliament employed the phrase "in respect of" twice in defining equity claim: in the opening portion of the definition, it refers to an equity claim as a "claim that is in respect of an equity interest", and in para. (e) it refers to "contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)"…
>
> [41] The Supreme Court of Canada has repeatedly held that the words "in respect of" are "of the widest possible scope", conveying some link or connection between two related subjects. …
>
> …
>
> …
>
> [44] Second, Parliament also defined equity claim as "including a claim for, among others", the claims described in paragraphs (a) to (e). The Supreme Court has held that this phrase "including" indicates that the preceding words – "a claim that is in respect of an equity interest" – should be given an expansive interpretation, and include matters which might not otherwise be within the meaning of the term…
>
> …
>
> [46] "Equity claim" is not confined by its definition, or by the definition of "claim", to a claim advanced by the holder of an equity interest. Parliament could have, but did not, include language in para. (e) restricting claims for contribution or indemnity to those made by shareholders.
>
> …
>
> [53] In our view, the definition of "equity claim" is sufficiently clear to alter the pre-existing common law…

[49] Thus, in insolvency proceedings, courts are tasked with ascertaining the true nature or substance of the claim being advanced against the debtor. The point is aptly summarized in *Bul River*:

> [68] In light of that key distinction [between equity claimants and creditors], courts in the past have embarked upon a consideration as to the true characterization of certain claims in an insolvency context. There is considerable authority that in making that determination, the court will consider the true substantive nature or character of the claim, rather than the form of the claim.

[50] Other case authorities discussing the 2009 amendments and the enquiry into the true nature or substance of the claim advanced are set out in my reasons at 2019 BCSC 1488 (respecting a prior application in this proceeding by some of ACIC's redeeming preferred shareholders who claimed to be creditors).

[51] Parkland's claim against ACIC and AFDI in the Lawsuit was premised on its claim to be an extant shareholder of both companies at the time the Lawsuit was commenced. Parkland's claim was founded on alleged ownership of preferred shares in both.

[52] In this proceeding, the Monitor and ACIC correctly maintain that Parkland's status was as an equity claimant when it owned ACIC shares, but ceased to have any interest in ACIC after October 3, 2012.

[53] I agree with the Monitor that even if Parkland entered into a binding settlement agreement in February 2012, Parkland's status as an equity claimant never changed. The true nature or substance of its relationship with ACIC was always as an equity claimant.

[54] In *Canadian Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558 at 590-591 [*CDIC*], the Supreme Court of Canada said, "When a court is searching for the substance of a particular transaction, it should not too easily be distracted by aspects of a transaction that are, in reality, only incidental or secondary in nature to the main thrust of the agreement."

[55] By way of example, Fitzpatrick J. held in *Bul River* that an equity claimant does not become a creditor in an insolvency proceeding because it obtained judgment against the debtor consequent after an unpaid redemption request: paras. 69, 85-98, 103-117.

[56] Parkland's attempt to distinguish *Bul River* on the basis that a judgment creditor does not pursue a separate cause of action - as opposed to the case at bar where it says its cause of action founded on breach of contract - overlooks the caution against distraction in *CDIC* and the analysis and result in *Sino-Forest*.

[57] In *Sino-Forest*, the debtor's auditors were added as third parties for alleged malpractice in a class action lawsuit brought by the debtor's shareholders for misrepresentation. In the insolvency proceeding, the Ontario Court of Appeal rejected the auditors' claim for indemnity as creditors. In applying the policy objectives of the *CCAA*, the Court of Appeal held the auditors' claim for indemnity against the debtor company was properly characterized as an equity claim:

> [2] This appeal considers the definition of "equity claim" in s. 2(1) of the *CCAA*. More particularly, the central issue is whether claims by auditors and underwriters against the respondent debtor, Sino-Forest Corporation ("Sino-Forest"), for contribution and indemnity fall within that definition. The claims arise out of proposed shareholder class actions for misrepresentation.
>
> …
>
> [37] We agree with the supervising judge that the definition of equity claim focuses on the nature of the claim, and not the identity of the claimant. In our view, the appellants' claims for contribution and indemnity are clearly equity claims.
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> …
>
> [56] In our view, in enacting s. 6(8) of the *CCAA*, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest not diminish the assets of the debtor available to general creditors in a restructuring. If a shareholder sues auditors and underwriters in respect of his or her loss, in addition to the debtor, and the auditors or underwriters assert claims of contribution or indemnity against the debtor, the assets of the debtor available to general creditors would be diminished by the amount of the claims for contribution and indemnity.

[58] In *Return on Innovations Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 5018, it did not matter that a claim by a shareholder seeking recovery of share purchase proceeds in the amount $50 million USD was founded on breach of contract and fraud. The legal basis for the claim was not the "deciding factor". Nor were the "legal tools" used by the claimant because Mr. Justice Newbould said at para. 59, they were being used to recover an equity investment.

[59] In my prior reasons (2019 BCSC 1488), I concluded with these comments:

> [49] Accordingly, while the 2009 amendments did represent in part a codification of the previous case law concerning equity claims, they also represent a more concrete definition of "equity claims" and by such definition a broadening and more expansive definition of such claims: *Sino-Forest* (ONCA) at paras. 24, 34-60. 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 by caught by the *CCAA*.

[60] None of the circumstances which could give rise to a change in status from equity claimant to creditor, which are discussed at length in 2019 BCSC 1488, are engaged in this case.

[61] Here, the genesis of any claim Parkland may have against ACIC is as an equity claimant. Its claim in the Lawsuit for specific performance of its redemption of preferred shares in the amount of $200,000 is founded on that relationship. The Lawsuit was a legal tool used to recover a purported equity investment in ACIC. Even if Parkland was a shareholder in ACIC after October 2013 with a right to redeem shares, its purported settlement in February 2016 was a legal tool to recover its equity interest. The substance or true nature of its claim in this insolvency proceeding is for an equity interest.

[62] In *Bul River*, Fitzpatrick J. pointed out that an equity claimant should not be viewed differently because it was fortunate enough or sufficiently prescient to obtain judgment prior to the date the debtor initiated its *CCAA* proceeding:

> [107] I see no principled basis upon which a different approach should be taken in respect of an equity claimant who has had the foresight, energy or just plain luck to seek and obtain a judgment prior to the filing date.

[63] Applying the policy objectives of the *CCAA* to the facts of this case, there is no principled basis to take a different approach to Parkland who, as an equity claimant, purported to settle a lawsuit for recovery of an alleged equity interest in ACIC prior to the filing date.

[64] Parkland should not be treated differently because it was able to reach a purported settlement agreement in respect of an unfilled redemption request: *Bul*

River, paras. 54-56, 110, 114-115. It should be treated the same way as all of ACIC's preferred shareholders who advance claims in this insolvency proceeding for unfilled redemption requests.

[65] The analysis in *Lessing Brandon*, which dealt with a claim initially brought under the *Legal Professions Act*, S.B.C. 1998, c. 9, has no application to this case.

[66] In conclusion, the true nature or substance of Parkland's claim never rose beyond an equity claim for ACIC's alleged failure to honour its redemption request.

Conclusion

[67] The Monitor did not err in his decision to reject Parkland's claim as a creditor of ACIC. He correctly applied the law of contract to the facts of the case. It was not an error to consider Parkland's prior status as a preferred shareholder of ACIC. His analysis was rational and logical and his decision was reasonable.

[68] The appeal is dismissed.

"Walker J."

The Honourable Mr. Justice Walker