Form 27
[Rules 6.3 and 10.52(1)]

COURT FILE NUMBER	0901-11866	Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	Calgary	
ACTION	IN THE MATTER OF THE ***COMPANIES' CREDITORS ARRANGEMENT ACT***, R.S.C. 1985, c. C-36, AS AMENDED, ***THE JUDICATURE ACT***, R.S.A. 2000, c. J-2, AS AMENDED AND ***THE BUSINESS CORPORATIONS ACT***, R.S.A. 2000, C. B-9, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **SHIRE INTERNATIONAL REAL ESTATE INVESTMENTS LTD., SHIRE CAPITAL LTD., HALAMA GARDENS LLC, SHIRE ASSET MANAGEMENT LTD., WINN RIVER RESORT LTD., FORT MCMONEY PROPERTIES II LTD., HALAMA GARDENS LTD., MAPLES AND WHITE SANDS INVESTMENT LTD., FORT MCMONEY PROPERTIES LTD., CHEMAINUS PROPERTIES LTD., SKAHA LAKE DEVELOPMENT LTD., TSEHUM HARBOUR LTD., BEARSPAW AT 144TH AVENUE LTD., BEARSPAW AT 144TH EQUITIES LTD., BEARSPAW AT 144TH BONDS INC., TSEHUM HARBOUR EQUITIES LTD., TSEHUM HARBOUR BONDS LTD., ORILLIA INVESTMENTS LTD., 0726028 B.C. LTD., 0675816 B.C. LTD. and BOSUN'S HOLDINGS LTD.**	
DOCUMENT	**BRIEF OF ROMSPEN INVESTMENT CORPORATION**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Owen Bird Law Corporation 2900-595 Burrard Street Vancouver, BC V7X 1J5 Attention: Scott H. Stephens	

BRIEF OF ROMSPEN INVESTMENT CORPORATION
APPLICATION SCHEDULED FOR AUGUST 24, 2011 AT 10:00 A.M.
BEFORE THE HONOURABLE MADAM JUSTICE C.A. KENT

I. INTRODUCTION

1. This brief is submitted by Romspen Investment Corporation ("**Romspen**") in response to the application of 613790 Saskatchewan Ltd., Blair Betts, Willie Unger, Shari Bedient & Cheryl Lang filed July 25, 2011 (the "**Application**"). Romspen does not oppose the appointment of MacPherson Leslie & Tyerman LLP ("**MLT**") as representative counsel. Romspen opposes the orders sought at paragraphs 4 and 5 of the Application, namely:

   "4. An order providing that MLT shall be paid its reasonable fees and disbursements in connection with these proceedings at its standard rates; and

5. An order providing that MLT shall be entitled to the benefit of a charge on the net remaining proceeds of the sale of the Sorrento Inn which are currently being held under court supervision pursuant to an Order of the Honourable Madam Justice C.A. Kent of the Court of Queen's Bench of Alberta dated April 21, 2011 (the "**Net Sale Proceeds**"), to the maximum amount of Seventy-Five Thousand ($75,000) Dollars, as security for the reasonable fees and disbursements of MLT in acting as representative counsel to the MAWSIL Retail Investors (including its fees and disbursements for commencing, preparing materials in support of and arguing this application), such fees and disbursements incurred at is standard rates and charges (the "**Representative Counsel Charge**"), with such Representative Counsel Charge standing as a first ranking charge on the Net Sale Proceeds and ranking in priority to all other claims, interests and encumbrances in, to or against the Net Sale Proceeds."

II. FACTS

Background

2. These *CCAA* proceedings – and the granting of the DIP and administrative charges – were initially premised on a belief that the secured creditors' security was not in jeopardy. The secured creditors vigorously opposed these proceedings on the basis that their security was, in fact, in jeopardy.

3. Ultimately, after a number of procedural skirmishes, the secured creditors prevailed. The stay of proceedings was set aside, the DIP facility was not extended, the Receiver was discharged (retaining only limited functions), etc.

4. The order reflecting that outcome was entered on March 2, 2010. Since that time, Romspen (the DIP lender) and the debtors' other secured creditors have focused their efforts on liquidating the debtors' estate.

5. Pursuant to the March 2, 2010 order, the DIP loan is to be paid out first from any equity in the debtors' lands. Any outstanding balance on the DIP loan after the sale of the debtors' properties will be borne by the secured creditors proportionally in accordance with this court's "DIP Allocation" order of September 23, 2010.

6. As at July 28, 2011, the outstanding balance on the DIP loan was $1,750,692.91 with interest continuing to accrue at 18% per annum, $847.11 per diem.

7. Based on current information, it appears that:

a. the sale of the debtors' unencumbered properties is unlikely to give rise to sufficient proceeds to retire the DIP loan (the Chemainus Property is the only remaining property without a financial encumbrance – the market value of the Chemainus Property, between $0 and $760,000, largely depends on the outcome of an appeal of the order obtained by Romspen cancelling a statutory right of way registered against title to that property); and

b. there is little or no equity in any of the encumbered properties owned by the debtors.

The Sorrento Property and the Holdback Proceeds

8. Romspen obtained an approval and vesting order in respect to the Sorrento Property on April 21, 2011. Pursuant to that order, $608,738 of the sale proceeds were held back and posted with the Receiver pending resolution of the issue of whether any monies, apart from the administrative costs of Olympia Trust Company ("**Olympia**"), were secured by the mortgage registered against title.

9. That is to say, the present Application is a prelude to another application, the subject of which will be the determination of whether the applicants (and the other MAWSIL investors) are secured or unsecured creditors. If it is found that the Olympia mortgage does not secure any further monies, then the $608,738 held by the Receiver constitutes equity and, accordingly, will be applied towards the outstanding balance on the DIP loan – i.e. reducing the amount of the shortfall that will ultimately be borne by the secured creditors.

10. The competition is, then, between the MAWSIL investors and the secured creditors. Either the $608,738 will go to the MAWSIL investors or it will pay down the DIP loan. Under no circumstances will the funds form any part of the debtors' estate. If the orders sought in paragraphs 4 and 5 of the Application are granted, and the secured creditors are ultimately successful arguing that the investments were not secured by the Olympia mortgage, then the secured creditors will have funded an application that they oppose and which is in direct conflict to their interests.

III. LAW

11. In the cases cited by the applicants, *Re Residential Warranty Co. of Canada Inc.*, [2006] A.J. No. 872 (Q.B.) and *Re Westar Mining Ltd.*, [1999] B.C.J. No. 2169 (S.C.), the court granted an order appointing representative counsel but refused to grant an order for a charge securing representative counsel's fees. In both cases, the primary basis for the court's refusal to grant the charge was due to a lack of clarity as to whether the work to be performed by representative counsel would benefit the estate.

12. The relevant passages in the *Re Westar Mining* decision are found at paras 24 to 26, where the court held as follows:

> **24** In the present case, the work that is being undertaken by Ladner Downs will not benefit the Westar Estate. Ladner Downs will be contending, on behalf of the Greenhills Mine Suppliers Group, that $1.6 million should be excluded from the Westar Estate. Therefore, <u>if successful, the work done by Ladner Downs will reduce the Westar Estate, not enhance it</u>.
>
> **25** Similarly, the work to be done by Ladner Downs on behalf of the Greenhills Mine Suppliers Group is not work that would have to be undertaken by someone because it is necessary for the preservation or management of the Westar Estate. Instead, <u>the work undertaken by Ladner Downs is directed at depleting, rather than preserving, the assets of the Westar Estate</u>.
>
> **26** Furthermore, <u>to permit these legal expenses to be paid from the Westar Estate would be neither fair nor equitable to the owners, that is the creditors</u>, of the Westar Estate.
>
> [emphasis added]

13. The court in *Re Residential Warranty Co. of Canada Inc.* reached a similar conclusion. At para 14 the court held:

> **13** The court's inherent jurisdiction to grant a charge over trust assets was invoked in *Eron Mortgage Corp. (Trustee of) v. Eron Mortgage Corp* (1998), 2 C.B.R. (4th) 184 (B.C.S.C.), which involved an application similar to the present one. The court in that case appointed a judicial trustee and creditors' committee. The creditors' committee applied for a charge over trust assets to fund its fees and expenses. The court acknowledged that its inherent jurisdiction permitted the granting of the charge, but it declined to do so because the application was premature and there was insufficient evidence to warrant it. <u>Tysoe J. stated that he could not ascertain at that time what, if any, of the committee's efforts would benefit the trust assets</u>, and suggested (at para. 38) that the issue likely would have to be dealt with on an instance-by-instance basis.
>
> **14** <u>The individual Builder Claimants in the present case do not have a large stake in the outcome of these proceedings, and there is no evidence before me to show that they are in any different position than the creditors who were represented by a committee in *Eron Mortgage*. As in *Eron Mortgage*, there is nothing at this stage to show that the Committee's efforts will benefit the trust</u>. If the assets sought to be charged eventually fall to the Bankrupts' estates because of the claims barred date or the inability of any given builder to establish a security or trust claim, the charge will have eroded the assets available for creditors of the estates. If Kingsway proves its claim, the same, of course, holds true.
>
> [emphasis added]

14. The present case is not analogous to the situation that the court was faced with in *Nortel Networks Corp.*, [2009] O.J. No. 2166 (S.C.). That case involved an unopposed application for the appointment of representative counsel to enable the employees and retirees of Nortel (found to have limited means) to participate in the ongoing restructuring efforts of a multi-billion dollar corporation.

15. In the present case:

a. The applicants are, at best (i.e. if ultimately successful), entitled to a priority rank equivalent to the other secured creditors – no better. There is no basis for this class of creditors to receive preferential treatment.

b. The *CCAA* proceedings have substantially concluded. The remaining efforts relate to the liquidation of the debtors' estate. The applicants' are interested in only one, discrete issue – whether or not the Olympia mortgage secures their investments.

c. There is no evidence to the effect that the applicants will be unable to prosecute their claim in the absence of a charge securing representative counsel's fees.

d. Even if one assumes that the investors do not have the means to prosecute their claim, there are alternatives to a charge prejudicial to the secured creditors. Examples include a contingency fee arrangement or an arrangement similar to that taken under s. 38 of the *Bankruptcy and Insolvency Act* (i.e. those that "opt in" fund the application and, if successful, share the proceeds obtained rateably until their claims are paid in full with only the remainder going to those that did not "opt in).

All of which is respectfully submitted at Vancouver, B.C. this 22nd day of August, 2011

Estimated time for argument: 15 minutes