COURT FILE NUMBER	1501-00955
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
	IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended
APPLICANTS	LUTHERAN CHURCH – CANADA, THE ALBERTA – BRITISH COLUMBIA DISTRICT, ENCHARIS COMMUNITY HOUSING AND SERVICES, ENCHARIS MANAGEMENT AND SUPPORT SERVICES, AND LUTHERAN CHURCH – CANADA, THE ALBERTA – BRITISH COLUMBIA DISTRICT INVESTMENTS LTD.
DOCUMENT	**SPECIAL CHAMBERS APPLICATION APPLICANT'S BRIEF – COMMERCIAL LIST**
	February 29, 2016 at 2:00 p.m.
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Bishop & McKenzie LLP Barristers & Solicitors 1700, 530 – 8th Avenue SW Calgary, Alberta T2P 3S8 Attention: Francis N. J. Taman/Ksena J. Court Telephone: 403 237-5550 Facsimile: 403 263-3423 File: 103,007-003

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I. FACTS

Procedural History

1. The Applicants in these proceedings are Lutheran Church – Canada, the Alberta British Columbia District (the "**District**"), EnCharis Community Housing and Services ("**ECHS**"), EnCharis Management and Support Services ("**EMSS**") and Lutheran Church – Canada, the Alberta - British Columbia District Investments Ltd. ("**DIL**") (collectively, the "**District Group**").

2. On January 23, 2015 an Initial Order was granted by Justice K.D. Yamauchi (the "**Initial Order**") at the Alberta Court of Queen's Bench under the *Companies' Creditor Arrangement Act*,

R.S.C. 1985, c. C-36, as amended ("***CCAA***"). The Initial Order provided for an initial stay of proceedings until February 20, 2015. The Court of Queen's Bench has granted six extensions of the stay with the most recent extending the stay to April 29, 2016.

Factual Background

3. The District is one of three districts in Canada. The other two are the Central district and the East district. Each district is independently incorporated with its leadership elected by the members who reside in the designated geographic region.

Evidence Book Tab 1 - Affidavit of Kurtis Robinson, filed January 23, 2015 ("January 23 Affidavit"), at paras. 4 and 5

4. The first congregations of the Lutheran Church were established in Alberta and British Columbia in 1894, but only became organized in 1921. At that time, the District was organized under the St. Louis, Missouri based Lutheran Church – Missouri Synod. In 1944, the District was legally incorporated as the Alberta and British Columbia District of the Evangelical Lutheran Synod of Missouri, Ohio, and Other States by an act of the Legislature of Alberta, S.A. 1944, c. 82. In 1991, the District was renamed pursuant to the *Lutheran Church – Canada, The Alberta British Columbia District Corporation Act,* S.A. 1991, c. 42.

Evidence Book Tab 1 - January 23 Affidavit, at paras. 4, 8, and 9

5. There is also a national Lutheran Church – Canada ("**LCC**" or the "**Synod**") which was founded in 1988 and contains 325 congregations across Canada. The LCC is not party to these proceedings. Each of the districts, including the District, are organized to work with congregations and to advance the Synod in their designated geographic region, but they are not subsidiaries of LCC and are not controlled by it. The districts run autonomously from the Synod and in operation. The relationship is closer to the relationship between the Federal government and the Provinces than to a traditional parent/subsidiary relationship. Member congregations are also self-governing and autonomous. Their relationship is one of voluntary membership in LCC and the districts.

Evidence Book Tab 1 - January 23 Affidavit, at paras. 4 to 7

6. The District is extra-provincially registered in British Columbia and is a registered charity. It is controlled by a 12 person Board of Directors.

Evidence Book Tab 1 - January 23 Affidavit, at para. 14 and Exhibit "A"

7. The District provides resources, vision, leadership and encouragement to 127 churches in Alberta and British Columbia (collectively the "**Churches**") through the means of three internal ministries: (i) the Department of Stewardship and Financial Ministries, (ii) the Outreach Department, and (iii) the Parish and School Services Department. The Department of Stewardship and Financial Ministries is responsible for finances in general, the Church Extension Fund ("**CEF**"), communications, public relations and development.

Evidence Book Tab 1 - January 23 Affidavit, at paras. 15 and 16

8. There are 2,674 depositors in CEF (the "**District Depositors**") with:

i. 60% of District Depositors (based on dollar value) over 70 years of age; and

ii. The District Depositors residing in eight provinces and eleven U.S. states.

Evidence Book Tab 1 - January 23 Affidavit, at para. 22
Evidence Book Tab 2 - Affidavit of Cameron Sherban sworn February 18, 2016 (the "February 18 Affidavit") at paras. 4 and 5

9. The District receives income from loans made through CEF; however, the bulk of its revenue is generated by donations from the Churches, which average $1.3 million on an annual basis. Of the $1.3 million received by the District, approximately $500,000 is, in turn, paid up to LCC. Historically 35% of the donations received by the District are paid to LCC. The total donations to LCC are listed on all financial reporting that is provided to the members. For the period ended November 30, 2014, approximately $946,356.00 in donations were received by the District of which $433,333.30 has been paid to LCC.

Evidence Book Tab 1 - January 23 Affidavit, at para. 20 and Exhibits "A" and "D"

10. In order to carry out its purposes, the District uses the donations that it receives from members to do the following:

i. supervise and support areas of Parish education of worship, missions, stewardship, evangelism, youth, young adults, as well as seniors;

ii. provide student aid and fund church worker recruitment as well as supporting campus ministries and Lutheran schools;

iii. subsidize parishes, coordinate the establishment of new congregations and the development of external ministries including cross-cultural ministries, ministries for special needs groups, volunteer ministries and social ministries;

iv. handle the administrative operation of assisting congregations with the operation of their churches; and

v. supply the major forms of inter-District communication and organize all major District meetings, workshops, seminars and conventions.

Evidence Book Tab 1 - January 23 Affidavit, at para. 21

ECHS

11. EnCharis Community Housing and Services ("**ECHS**") was incorporated in 2005 under the *Companies Act*, R.S.A. 2000, c. C-21 (the "***Companies Act***"), as a not-for-profit corporation. ECHS is operated by an eight person board of directors. It is controlled by the District.

Evidence Book Tab 1 - January 23 Affidavit, at para. 40 and Exhibit "A"

12. ECHS was incorporated in order to take over ownership and complete development of the Prince of Peace Development, which was originally owned by the District and which is comprised of the following:

i. The Manor, a 159 unit seniors' complex focused on the delivery of a variety of independent living alternatives.

ii. The Harbour, a dementia care centre for seniors.

iii. The Church and School, which houses a Lutheran congregation and collaborates with the Rocky View School Division to provide an alternate program from Kindergarten to Grade 9.

iv. The Condos, a series of plus-55 housing complexes.

v. The Expansion Lands, 15 acres of land surrounding the Harbour and Manor which has been designated for their expansion.

vi. The Development Lands, the balance of the quarter section upon which the Prince of Peace Development was developed.

Evidence Book Tab 1 - January 23 Affidavit, at para. 41

EMSS

13. EMSS operates the Manor and the Harbour and was incorporated in 2006 under the *Companies Act* as a registered charity. It is controlled by the District. EMSS is operated by an eight person board of directors. EMSS and ECHS are collectively referred to as the "**EnCharis Group**".

Evidence Book Tab 1 - January 23 Affidavit, at para. 49 and Exhibit "A" and "H"

DIL

14. In 1996, the District incorporated DIL under Part 9 of the *Companies Act*. DIL was created to offer Registered Retirement Savings Plans ("**RRSPs**"), Registered Retirement Income Funds ("**RRIFs**"), and Tax Free Savings Accounts ("**TFSAs**") (collectively the "**Registered Accounts**"). DIL is controlled by the District.

Evidence Book Tab 1 - January 23 Affidavit, at para. 57 and Exhibit "A"
Evidence Book Tab 3 - Supplemental Affidavit of Kurtis Robinson, filed January 23, 2015 at para. 4

15. Concentra Trust ("**Concentra**") is the named Trustee for the Registered Accounts. Under the trust agreements with Concentra and the depositors, DIL acts as the depositors' and Concentra's agent in performing most of the administrative and investment duties.

Evidence Book Tab 1 - January 23 Affidavit, at para. 58 and Exhibits "K" and "L"

16. The current application before the Court is with respect to the DIL plan of compromise and arrangement as amended, dated and filed on January 11, 2016 (the "**DIL Plan**"). On January 20, 2016, Justice K.D. Yamauchi granted an order sanctioning the ECHS plan of compromise and arrangement and the EMSS plan of compromise and arrangement. The District plan of compromise and arrangement (the "**District Plan**") is being dealt with in separate proceedings.

Evidence Book Tab 4 - The Amended Amended Plan of Compromise and Arrangement of Lutheran Church – Canada, the Alberta – British Columbia District Investments Ltd., filed January 11, 2016 (the "DIL Plan")

The DIL Plan

17. The DIL Plan includes only one class of affected creditors consisting of depositors who have Registered Accounts with DIL (the "**DIL Depositors**"). There are 896 DIL Depositors who have claims totaling approximately $38.0 million The DIL Depositors reside in eight provinces and territories in Canada and in three U.S. states. Most of the accounts are RRSP and RRIF accounts.

Evidence Book Tab 5 - The Twelfth Report of the Monitor, filed January 27, 2016 (the "12th Report of the Monitor"), at paras. 17 and 21
Evidence Book Tab 1 - January 23 Affidavit, at para. 59
Evidence Book Tab 2 - February 18 Affidavit, at para. 4

18. On December 1, 2015, the Court of Queen's Bench granted an order authorizing and directing the presentation of the DIL plan to creditors for their approval (the "**DIL Meeting Order**"). Notice of the DIL creditors meeting was sent out according to the requirements of the DIL Meeting Order.

Evidence Book Tab 6 - Order, granted by Justice B.E.C. Romaine, November 30, 2015 (the "DIL Meeting Order")

19. The DIL Plan contains provision for the orderly transition of the Registered Accounts from Concentra to a new trustee and administrator (the "**Replacement Fund Manager**"). As part of this transition, the cash and short-term investments held by DIL will be transferred, net of holdbacks outlined in the DIL Plan, to the Replacement Fund Manager. The mortgages held by Concentra and administered by DIL will be converted to cash over time and paid to the Replacement Fund Manager.

Evidence Book Tab 4 - The DIL Plan at paras. 4.2 and 4.3.

20. At the time the Initial Order was granted, there was a dispute between the DIL Depositors and the District Depositors as to priorities or entitlement to some of the assets of ECHS. These disputes have been settled and will be dealt with pursuant to the Order of Justice K.M. Horner granted January 4, 2016.

Evidence Book Tab 7 - Order, granted by Justice K.M. Horner, on January 4, 2016

21. In addition to setting out how the plan distributions will be paid, the DIL Plan establishes an exclusive process (the "**Representative Action**") whereby one or more legal proceedings can be undertaken on the behalf of and for the benefit of those DIL Depositors who elect or are

deemed to elect to participate (the "**Representative Action Class**"). The Representative Action will include claims by DIL Depositors that are not paid under the DIL Plan or released by the DIL Plan and specifically includes the following:

i. Claims related to a contractual right of one or more of the DIL Depositors;

ii. Claims based on allegations of misrepresentation or wrongful or oppressive conduct;

iii. Claims for breach of any legal, equitable, contractual or other duty;

iv. Claims pursuant to which DIL has coverage under the Applicants' directors' and officers' liability insurance; and

v. Claims to be pursued in DIL's name, including any derivative action (whether statutory or otherwise) or any claims that could be assigned to a creditor pursuant to Section 38 of the *Bankruptcy and Insolvency Act*, if such legislation were applicable

(the "**Representative Action Claims**").

Evidence Book Tab 4 - The DIL Plan, at p. 9.

22. With respect to the Representative Action:

i. DIL Depositors will have the ability to opt in or opt-out of the Representative Action using a representative action letter (the "**Representative Action Letter**"). In addition, DIL Depositors may also opt-out of the Representative Action by using a notice of opting out (a "**Notice of Opting Out**"). Those DIL Depositors who do not submit a Representative Action Letter will be deemed to have opted-in to the Representative Action unless they have filed a Notice of Opting Out. Those DIL Depositors who opt-in will constitute the Representative Class. Those Depositors, who explicitly opt-out of the Representative Action will be forever barred from participating in the Representative Action, including receiving any proceeds that may become payable pursuant to the Representative Action.

Evidence Book Tab 4 - The DIL Plan, at paras. 5.5 and 5.7.

ii. A subcommittee will be established to choose legal counsel to represent the Representative Class in the Representative Action (the "**Subcommittee**"). The Subcommittee will include between three and five individuals, potentially including initially at least one member of the creditors committee representing the DIL Depositors established pursuant to the Orders of Justice C.M. Jones on February 20, 2015 and Justice P.R. Jeffrey on June 26, 2015 (the "**DIL Committee**"). All members of the Subcommittee will be appointed by the DIL Committee.

Evidence Book Tab 4 - The DIL Plan, at para. 5.2.
Evidence Book Tab 8 - Orders, granted by Justice C.M. Jones on February 20, 2015 and Justice P.R. Jeffrey on June 26, 2015.

23. The duties and responsibilities of the Subcommittee will include the following:

i. Reviewing the qualifications of at least three lawyers and selecting one lawyer to act as legal counsel for the Representative Action Class (the "**Representative Counsel**");

ii. With the assistance of Representative Counsel, identifying a party willing to act as the Representative Plaintiff;

iii. Remaining in place throughout the Representative Action with their mandate to include the following:

1. Assisting in maximizing the amount available for distribution to the Representative Class;

2. Replacing Representative Counsel;

3. Serving in a fiduciary capacity on behalf of the Representative Class;

4. Establishing the amount of the holdback to fund the Representative Action (the "**Representative Action Holdback**") and directing that payments be made to the Representative Counsel from the Representative Action Holdback; and

5. Bringing any matter before the Court by way of an application for advice and direction.

Evidence Book Tab 4 - The DIL Plan, at para. 5.3.

24. Those DIL Depositors who elect to participate in the Representative Action will have a portion of their distributions under the DIL Plan withheld to fund the Representative Action Holdback. The Subcommittee will estimate the value of the Representative Action Holdback in consultation with the Representative Counsel. The estimate of the Representative Action Holdback will be provided to the Representative Action Class prior to the deadline to opt out of the Representative Action.

Evidence Book Tab 4 - The DIL Plan, at para. 4.5.

25. The Representative Action will represent the sole recourse available to DIL Depositors with respect to the Representative Action Claims.

Evidence Book Tab 4 - The DIL Plan, at para. 5.6

26. The Monitor is of the view that the inclusion of the Representative Action in the DIL Plan is beneficial to DIL Depositors for the following reasons:

i. It provides a streamlined process for the establishment of the Representative Action Class and the funding of the Representative Action;

ii. It allows for ongoing involvement of members of the DIL Committee who have information and insight into the CCAA proceedings that may provide useful information to the Subcommittee; and

iii. Selected depositors have indicated that they view any involvement in litigation as inconsistent with their personal religious beliefs. The Representative Action process allows DIL Depositors to opt-out of the Representative Action before litigation is ever commenced, should that be their preference.

Evidence Book Tab 9 – The Ninth Report of the Monitor dated November 26, 2015, at para. 29

DIL Depositors

27. Pursuant to Court of Queen's Bench Orders, DIL was authorized to make distributions to DIL Depositors totaling approximately $15.6 million (the "**DIL Distributions**"). These Distributions were comprised of the following:

i. An interim distribution of $15.0 million;

ii. Statutory annual minimum payments to RRIF holders in 2015; and

iii. Selected DIL Depositors received payments pursuant to an emergency fund.

Evidence Book Tab 10 - Initial Order
Evidence Book Tab 11 - Orders, granted by Justice B.E.C. Romaine on August 28, 2015 and Justice G.A. Campbell on November 5, 2015
Evidence Book Tab 5 - 12th Report of the Monitor, at para. 22

Outcome of the DIL Meeting

28. The DIL creditors' meeting (the "**DIL Meeting**") was conducted in compliance with the terms of the DIL Meeting Order and was held on January 23, 2016 at 10:00 a.m. at the Prince of Peace Church and School located in Calgary. There were 87 attendees at the DIL Meeting.

Evidence Book Tab 5 - 12th Report of the Monitor, at para. 23

29. The Monitor received a total of 472 votes from DIL Depositors with claims totaling approximately $14.5 million. Of these votes, 410 were received via election letters submitted in advance of the DIL Meeting and 62 were received via election letters or via written ballots submitted in person or by proxy at the DIL Meeting.

Evidence Book Tab 5 - 12th Report of the Monitor, at para. 25

30. In total, 53% of DIL Depositors voted and the claims of those DIL Depositors who voted represented 65% of the total proven claims of DIL Depositors.

Evidence Book Tab 5 - 12th Report of the Monitor, at para. 25

31. Of the 472 DIL Depositors who voted, 434, or approximately 92%, voted in favour of the DIL Plan and 38 DIL Depositors, or approximately 8%, voted against the DIL Plan.

Evidence Book Tab 5 - 12th Report of the Monitor, at para. 26

32. The DIL Depositors who voted in favour of the DIL Plan had claims totaling approximately $12.7 million, or approximately 87% of the claims.

Evidence Book Tab 5 - 12th Report of the Monitor, at para. 26

33. The DIL Depositors who voted against the DIL Plan had claims totaling approximately $1.8 million, or approximately 13% of the claims.

Evidence Book Tab 5 - 12th Report of the Monitor, at para. 26

34. Pursuant to the resolution that was passed, the DIL Depositors agreed to and accepted the DIL Plan and requested that the Court sanction the DIL Plan.

Evidence Book Tab 5 - 12th Report of the Monitor, at para. 26

II. ISSUE

35. The DIL Plan should be sanctioned by the Court.

III. ANALYSIS OF THE LAW

A. CCAA Purpose and Court Jurisdiction

36. The purpose of the CCAA has been stated repeatedly by the Courts. At the most basic level, the CCAA aims at permitting debtor companies or groups to continue to carry on business and, where possible, avoid the social and economic costs of liquidating their assets. Reorganization recognizes the complex web of relationships that are impacted by an insolvency.

TAB A - *Re: Ted Leroy Trucking [Century Services] Ltd.*, 2010 S.C.C. 60 ("*Leroy Trucking*") at paras. 15 and 18

37. The Supreme Court has noted that the purpose of the CCAA is carried out through a specific legal framework:

> While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

> The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the CCAA and the BIA allow a court to order all actions against a debtor to be stayed while a compromise is sought.

TAB A - *Leroy Trucking,* at para. 22

38. One mechanism that the Court uses in order to establish this single proceeding framework is the initial stay. The stay helps fulfill part of the purpose of the CCAA:

i. To provide breathing room for the debtor company to allow it to focus its attention on restructuring; and

ii. To avoid allowing more aggressive creditors to obtain recovery against the debtor company at the expense of other creditors who choose to work with the debtor company to restructure.

39. In effect, it requires the various creditors to deal with the company within the CCAA proceedings. As within the current proceedings, the ability to exercise rights outside of the process is restricted by the terms of the Initial Order.

40. There is no set methodology within this framework for achieving the CCAA's purposes. It is well established that the CCAA is a remedial statute which is skeletal in nature. As a result of these features, the Court is permitted broad and flexible authority to achieve the objectives of the CCAA. The Supreme Court of Canada in *Leroy Trucking* states:

> CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions

> one practitioner aptly described as "the hothouse of real time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (internal citations omitted).
>
> ... When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the Debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA.

TAB A - *Leroy Trucking,* at paras. 58 and 61

41. The Supreme Court continued by stating that any reorganization will always be governed by the achievement of the CCAA objectives, including avoiding the social and economic losses arising from restructuring proceedings. The Court also emphasized the guiding considerations of appropriateness, good faith, and due diligence:

> The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

TAB A - *Leroy Trucking,* at para. 70

42. Nonetheless, in assessing the appropriateness of an order, the Court has recognized that given the circumstances, every party is giving something up. Put simply by the Ontario Court of Appeal in *ATB Financial v. Metcalfe and Mansfield Alternative Investments II Corp.,* 2008 ONCA 587 ("*ATB*"):

> In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions

that CCAA proceedings involve "a balancing of prejudices," in as much as everyone is adversely affected in some fashion.

TAB B - *ATB Financial v. Metcalfe and Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) ("*ATB*"), at para. 117

43. The fact that an arrangement may alter the rights of a creditor against a third party also does not put it outside the ambit of what the Court may order.

TAB B - *ATB* at paras. 66 and 67, citing the decision under appeal.

44. Further, the Court recognizes that when dealing with creditors under the CCAA, the circumstances may result in different treatment. As such, equitable treatment cannot necessarily be defined as equal treatment. Rather, the Court's objective should always be guided by what is reasonable and equitable.

TAB C - *Re: Air Canada*, 2003 CarswellOnt 5296 (Ont. S.C.), at para. 7 citing *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. S.C.) ("*Sammi Atlas*")

B. Sanction of the DIL Plan

45. The test for the sanctioning of a plan of arrangement is well established in the jurisprudence. The three prongs are:

i. there has to be strict compliance with all statutory requirements and adherence to previous orders of the court;

ii. nothing has been done or purported to be done that is not authorized by the CCAA; and

iii. the plan is fair and reasonable.

TAB D - *Re: Nortel Networks*, 2009 CanLII 31600 (Ont. S.C.) ("*Nortel 2009*") at para. 79, citing *Sammi Atlas*

C. Third Party Releases

46. It is well established that third party releases are common in complex restructurings and permissible within the general remedial purpose of the CCAA.

TAB B - *ATB*, at para. 74

47. The leading case on third party releases in CCAA proceedings is the Ontario Court of Appeal decision in *ATB*. *ATB* involved a plan which released for claims against banks and dealers in negligence, misrepresentation, and fraud, with a minimal carve out allowing fraudulent misrepresentation claims. The plan received a majority of votes in favour. The minority who opposed the plan objected on the basis of the releases. At first instance, the Court sanctioned the plan and the minority appealed. The Court of Appeal denied the appeal and upheld the plan and the third party releases.

TAB B - *ATB,* at paras. 7 to 9, 29, 33 to 38.

48. During their analysis, the Ontario Court of Appeal affirmed their inherent jurisdiction with respect to third party releases:

> On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

TAB B - *ATB,* at para. 43

49. The Appeal Court continued to note that there is no reason that third party releases cannot fall within the framework of the statute:

> The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the

> comprehensive and flexible concepts of a "compromise" and "arrangement". I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

TAB B - *ATB,* at para. 61

50. In applying the broad and flexible purpose of the CCAA, the Court of Appeal reiterated the particular guidelines by which the inclusion of third party releases should be assessed:

> In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).
>
> The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan ...
>
> I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it...
>
> ... I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

TAB B - *ATB,* at paras. 69 to 78

51. In considering whether the releases are fair and reasonable, the Courts have looked at the specific fact situation and the terms of the plan of arrangement and compromise. Two of the factors that the Court have noted as being relevant to the analysis have been:

i. "the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs"; and

TAB E – *Re: Nortel Networks Corp.*, 2010 ONSC 1708 *("Nortel 2010")*, at para. 81

ii. Whether the releases are overly broad or offend public policy.

TAB E – *Nortel 2010*, at para. 82; and TAB B - *ATB*, at para. 113

IV. Application of Law to Facts

A. Should the Court Sanction the DIL Plan?

52. The first two aspects of the test for sanction have been met. The District Group were declared to be insolvent by the Initial Order. There was more than $5,000,000.00 in debt owing. None of these findings have been challenged.

53. The procedures with respect to the claims process and the creditors' meeting for DIL have been carried out pursuant to the CCAA and the applicable Orders granted in the CCAA proceedings. DIL achieved a far greater level of support at the DIL creditors' meeting than is required by the CCAA.

54. The Court clearly has the jurisdiction to sanction the DIL Plan and grant the Orders requested. The question is whether the plan is fair and reasonable.

55. This CCAA proceeding involves four affiliated companies: the District, DIL, ECHS and EMSS. DIL, ECHS and EMSS are all companies controlled by the District and conceptually can be understood as subsidiaries of the District.

56. All of the creditors of DIL are being treated the same.

57. The DIL Plan is part of a larger, four component conceptual plan of arrangement and compromise that is designed to permit the District to continue to carry out its core operations as a church entity without the CEF and DIL functions that it had previously carried out and without the seniors' care ministry component it had carried out through ECHS and EMSS. One aspect of the overall conceptual plan of arrangement and compromise is the Representative Action process within the DIL Plan and the District Plan.

58. The essence of the Representative Action is to restrict the DIL Depositors under the DIL Plan and the District Depositors under the District Plan to suing collectively under their respective Representative Actions.

59. There is clearly a nexus between the recovery of any shortfall remaining after the monetization of the DIL mortgages and other assets and the potential for recovering such shortfall through litigation.

60. The only releases granted under the DIL Plan to the Partially Released Parties relate to causes of action that the DIL Depositors, in their capacity as DIL Depositors, could not pursue in any event. Additionally, these releases are far narrower than releases commonly seen in CCAA proceedings.

61. The releases granted under the DIL Plan to the various professionals participating in the CCAA are limited to their actions as professionals within the CCAA proceedings and have the exclusions associated with the template Receivership Orders regularly granted by this Court. They are in line with the releases to professionals common in the CCAA.

62. The Representative Action itself is not a form of release. The Representative Action simply applies the Single Proceeding Model mentioned in *Re: Leroy Trucking*, which is at the heart of the CCAA. As noted in paragraph 37 of this brief, the Single Proceeding Model is "a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies."

TAB A - *Leroy Trucking*, at para. 22

63. The rationale is that the application of the Single Proceeding Model to the Representative Action parallels the underlying rationale of the CCAA in the following ways:

i. It permits the Applicants to focus on carrying out their ministry by minimizing the resources it must expend on dealing with lawsuits following the CCAA; and

ii. It avoids more aggressive creditors from achieving recovery from the Applicants' directors and officers insurance policy (the "**D&O Policy**") or from other potential defendants before less organized or less aggressive creditors.

64. As of November of 2014, there were DIL Depositors in eight provinces and territories in Canada and in three U.S. states. Without the Representative Action provisions, there remains the risk of one or more class actions being commenced in each province or state, as well as the risk of individual DIL Depositors commencing an action against DIL and the District.

65. As of November of 2014, there were District Depositors in eight provinces and eleven U.S. states. Approximately 60% of these individuals are over 60 years of age and a number of them are quite senior.

66. The D&O Policy places the duty to defend all of the Insureds, which includes both the District's and DIL's directors, officers, employees and volunteers, upon the District. While the policy contains an indemnification of the District for legal fees, the District will be responsible for carrying out the defence.

67. The Representative Action has a number of further advantages for the DIL Depositors:

i. The Subcommittee will be organized by the DIL Committee. The DIL Committee has been involved in the CCAA process since its organization and has developed a level of knowledge with respect to DIL and the District which will be an important resource for the Subcommittee.

ii. No single individual or group of DIL Depositors will be able to make recovery from the D&O Policy or from any third party at the expense of other DIL Depositors.

iii. The ability to opt out permits DIL Depositors who, based upon their religious or personal beliefs, do not wish to be involved in lawsuits, to act in accordance with those beliefs.

iv. DIL Depositors will not receive multiple communications from a variety of counsel. The Subcommittee, which will be made up of representatives of the DIL Depositors, will be the single source of information, with a duty to generally keep the DIL Depositors updated. This shall reduce confusion as the Subcommittee will be aware of all of the causes of action and will be able to shape their communications more clearly.

v. The concentration of all the possible causes of action in the hands of the Subcommittee will give the Subcommittee significant negotiating leverage to obtain the best possible representation at the best cost.

vi. The Representative Action can incorporate causes of action, such as derivative actions, which are normally outside of the scope of a class action.

vii. The litigation will be complex commercial litigation involving large numbers of documents. A focused litigation strategy with one set of counsel, directed by the Subcommittee, will be more efficient and more effective in obtaining recovery from all the potential defendants for the Representative Action Class.

68. The incorporation of the right to apply to the Court within these CCAA Proceedings provides a wide scope to fine tune the Representative Action to meet with various contingencies which may arise through the course of the process.

69. No individual or entity is outside of the scope of the Representative Action and the releases from liability are quite restricted. All individuals or entities must merely be pursued through the Representative Action.

IV. CONCLUSION

70. The Representative Action and the four plans being promulgated as part of these CCAA proceedings are appropriate in that they promote the purposes of the CCAA in ways consistent with the Act and its application. There is the required nexus between the Representative Action and the CCAA proceedings before the Court.

71. The DIL Plan demonstrates good faith in that the releases granted to DIL, its directors, officers, employees and volunteers are extremely narrow. In addition, DIL has demonstrated that the DIL Plan has taken into account the interests of the DIL Depositors in creating a Representative Action structure that provides advantages to the DIL Depositors as outlined above.

72. The DIL Plan facilitates an efficient and effective transfer of the Registered Accounts to a Replacement Fund Manager. It also liquidates the existing assets held within the Registered Accounts.

73. The Representative Action fairly balances the interests of all the stakeholders, providing benefits to each. The restrictions included are to focus the exercise of rights by the DIL Depositors rather than diminishing or eliminating them.

74. The DIL Plan, including the Representative Action provisions, received overwhelming support of the DIL Depositors when voted upon.

75. It is respectfully submitted that the Sanction Order is just and appropriate in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Bishop & McKenzie LLP

Per: _____
Francis N. J. Taman
Solicitors for the Applicants

Table of Authorities

Cases