



COURT FILE NUMBER: 1501-00955
COURT: COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE: CALGARY

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: **APPLICATION BY ELVIRA KROEGER
AND RANDY KELLEN**

(Appointment of Limited Purpose Monitor)

ADDRESS FOR SERVICE Sugden, McFee & Roos LLP
AND CONTACT Barristers & Solicitors
INFORMATION OF PARTY #700 – 375 Water Street
FILING THIS DOCUMENT Vancouver, B.C. V6B 5C6

Attention: Errin A. Poyner

Telephone: 604-687-7700

Fax: 604-687-5596

File No. K-5820(1)

NOTICE TO RESPONDENT(S)

This application is made against you. You are the respondent.

You have the right to state your side of this matter before the judge.

To do so, you must be in Court when the application is heard as shown below:

Date: July 15, 2016

Time: 10:00 am

Where: Calgary Courts Centre, 601 – 5th Street SW, Calgary, Alberta

Before Whom: The Honourable Justice B.E.C. Romaine in Chambers

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. An Order :

- (a) Removing Deloitte Restructuring LLP as Monitor in these proceedings and replacing it with Ernst & Young LLP (“EY”) in its place; or alternatively
- (b) Appointing EY as a Limited Purpose Monitor for the purpose of reviewing the Representative Action provisions of the Fifth Amended Plan of Compromise and Arrangement of Lutheran Church-Canada, the Alberta-British Columbia District (the “ABC District” and the “District Plan”) dated June 10, 2016 and rendering its opinion to the Court upon any application for judicial sanction of that Plan pursuant to s.6 of the CCAA with respect to whether the District Plan (“Representative Action”) is fair and reasonable to the District Depositors;
- (c) Authorizing EY to retain legal counsel to assist it in rendering its opinion to the Court if it considers it reasonable and necessary to do so; and
- (d) That EY’s fees and those of its counsel, to a maximum amount of \$150,000.00 plus applicable taxes, shall be paid by the Applicants and be secured under the current Administration Charge or under a second Administration Charge to rank *pari passu* with the current Administration Charge.

Grounds for making this application:

- 2. Pursuant to the Initial Order of Mr. Justice Yamauchi filed on January 23, 2015, Deloitte Restructuring Ltd. (“DRL”) was appointed Monitor in these proceedings.
- 3. In its Fourth Report dated June 24, 2015, DRL disclosed a “Potential Conflict of Interest”. DRL advised that it had recently determined that it had acted as auditor for the District from 1990 to 1998 or 1999. DRL further stated that while its former role as auditor to District did not preclude it from acting as Monitor in these proceedings, it might preclude it from conducting a preliminary review of the District’s expenditures in relation to the Prince of Peace development (the “Review”) for the period during which it had acted as auditor.
- 4. However, given that the District had failed to produce documentation to support the monies expended on the Prince of Peace development prior to 2006 (the “Advances”),

DRL took the position that “it was not conflicted from completing the Review to the extent that they can for the period for which documentation is available.”

5. The District Plan contains Article 5 (“Representative Action”) which, *inter alia*, governs and regulates claims against third parties, including derivative claims brought in the name of District against parties whose acts and omissions have caused or contributed to its insolvency and the resulting claims of its depositors. The Plan contemplates that conduct of the Representative Action (including derivative claims) will be carried by a Subcommittee of the District Creditors’ Committee, and that the Representative Action will be the “sole recourse” of the depositors for their claims not otherwise paid or released under the Plan.
6. Mrs. Kroeger and Mr. Kellen have, through counsel, have made demand upon District to commence proceedings in negligence against a professional accounting firm related to DRL, Deloitte & Touche (now Deloitte LLP), in relation to acts and omissions arising in the course of its engagement as auditor to District during the period 1990 to 1998/9, or alternatively to assign to them the District’s right of action.
7. In the event that the District Plan is approved by the depositors and sanctioned by the Court, the prosecution of District’s claim against Deloitte LLP will be governed by the Representative Action provisions of the Plan.
8. Art. 5.6 of the District Plan contemplates that as Monitor DRL will have an ongoing role in communicating to the depositors about the Representative Action, including opting out of the Representative Action.
9. Pursuant to s.23(1)(i) of the *Companies’ Creditors’ Arrangement Act*, R.S.C. 1985, c. C-36 (“*CCAA*”), DRL has a duty to neutrally and objectively advise the Court as to the reasonableness and fairness of the District Plan of Arrangement..
10. As a result of its conflict of interest arising from the potential liability of Deloitte LLP to ABC District, DRL is unable to carry out its duty under s. 23 the CCAA to neutrally and objectively review and opine upon the fairness and reasonableness of the Representative Action provisions of the District Plan, which if approved by the depositors and sanctioned by the Court will govern the prosecution of the claim against Deloitte LLP.
11. DRL provided consulting services to the ABC District between February 6, 2014 and the date of the Initial Order. Those services included developing potential options for the Prince of Peace Development.

12. On November 28, 2014, ABC District sent a letter to CEF Depositors stating that it had “accumulated excess funds with very few ministry projects to fund” which resulted in a lower rate of return for CEF depositors. Accordingly, the District advised depositors that it would no longer be accepting deposits to the CEF. This was untrue.
13. In December 2014, ABC District filed a Master Site Development Plan (“MSDP”) regarding the undeveloped Prince of Peace lands with Rocky View County.
14. The MSDP contains information material to the development potential of the Prince of Peace Properties, including potable water, sanitary sewer and wastewater infrastructure demands that must be met before development can proceed.
15. DRL was aware that that the MSDP had been filed with and approved by Rocky View County.
16. On March 28, 2016, DRL filed its First Report to the District Creditors. DRL endorsed the District Plan on the basis of “potential upside opportunities that that may be available such as...through a joint venture to further develop the Prince of Peace Properties”.
17. Neither DRL, ABC District, nor the Chief Restructuring Officer disclosed the MSDP and related municipal planning documents to the District Depositors.
18. DRL’s prior consulting relationship with ABC District has impaired its neutrality and objectivity in this matter. It is unable to carry out its duty under s. 23 of the CCAA to neutrally and objectively advise the Court as to the reasonableness and fairness of the NewCo provisions of the Plan.
19. Further, by failing to disclose the MSDP, DRL has breached its fiduciary duty to the District Depositors and to the Court to ensure full disclosure of all facts material to the restructuring of the ABC District.
20. Accordingly, DRL must be removed as Monitor in these proceedings. Alternatively, EY must be appointed to provide the Court with a neutral and objective opinion as to whether the District Plan is fair and reasonable to the District Depositors.
21. The fees of EY (and its legal counsel, should counsel be required), estimated at \$150,000.00 plus applicable taxes, are properly payable by the Applicants and secured by the Administrative Charge already in place over the Applicants’ property, or alternatively by a second Administrative Charge ranking *in pari passu* with the first Administrative Charge.

Material to be relied on:

- (a) Monitor's Pre-Filing Report dated January 22, 2015;
- (b) Monitor's Fourth Report dated June 24, 2015;
- (c) Monitor's First Report to the Creditors of ABC District, dated March 28, 2016;
- (d) Affidavit of Elvira Kroeger sworn February 23, 2016
- (e) Affidavit of Randy Kellen filed May 21, 2015, para. 13
- (f) Affidavit of Marilyn Huber, sworn February 24, 2016
- (g) Affidavit of Lorraine Giese sworn June 17, 2016;
- (h) Affidavit #3 of Courtney Clark sworn March 4, 2016;
- (i) Affidavit of Marilyn Huber sworn June 26, 2016;
- (j) Affidavit #5 of Courtney Clark sworn June 27, 2016;
- (k) Affidavit #2 of Randy Kellen sworn June 28, 2016.

Applicable rules:

Part 6, Division 1, Rule 13.5

Part 6, Division 4

Applicable Acts and regulations:

Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended

Any irregularity complained of or objection relied on:

None

How the application is proposed to be heard or considered:

In person

WARNING:

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.

A person may make an application for an order restricting publication if a judge has authority to make such