

Action No.: 1501-00955
E-File No.: CVQ16LUTHERAN
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c.C-36, as amended

CLERK OF THE COURT
FILED
JUL 07 2016
JUDICIAL CENTRE
OF CALGARY

AND IN THE MATTER OF 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.

PROCEEDINGS

Calgary, Alberta
March 9, 2016

Transcript Management Services, Calgary
Suite 1901-N, 601-5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392 Fax: (403) 297-7034

TABLE OF CONTENTS

Description	Page
March 9, 2016 Morning Session	1
Order	1
Certificate of Record	5
Certificate of Transcript	6

1
2 It is also clear that while there is some precedent for similar types of provisions in CCAA
3 plans of arrangement, the representative action provisions are unusual, as they limit at
4 least procedural, and perhaps substantive, rights of DIL Creditors to independently retain
5 counsel and commence proceedings against DIL.
6

7 The Monitor recommends the Plan with these provisions for the reasons set out in its
8 reports and briefs, and the Plan was approved by 92 percent in number and 87 percent in
9 dollar value of creditors who voted on the Plan. It is also apparent that there was wide
10 consultation with creditor groups and individual creditors, including the Objecting
11 Creditors, when the Plan was formulated.
12

13 After the DIL Plan was approved at the Creditors Meeting, the Objecting Creditors, who
14 are a small group of creditors, commenced class action proceedings in British Columbia
15 and Alberta against third parties involved with DIL and the District. If the Plan is
16 sanctioned, such proceedings would be barred.
17

18 The Objecting Creditors oppose the sanctioning of the Plan, alleging that the Plan, with its
19 representative action provisions, improperly compromises their procedural rights to pursue
20 legal claims against parties other than the Applicant, that it is inappropriate and not
21 advanced in good faith, and thus is not fair and reasonable.
22

23 I received briefs and heard argument from a number of interested parties. I am satisfied
24 that I have the necessary authority as a CCAA Court to approve the Plan with the
25 representative action provisions if I find that the Plan advances the purpose or goals of the
26 CCAA. The issue is whether, in the context of this Applicant and its specific
27 circumstances, the Plan can be said to advance those purposes.
28

29 The problem is that the Applicant is one of a group of related applicants. The Objecting
30 Creditors characterize this as a liquidating CCAA and question whether the representative
31 action provisions are appropriate in a liquidation or, perhaps more accurately, a
32 distribution of assets scenario. I understand, however, that it is intended that the District
33 as an entity survive the CCAA process as a more limited entity, having shed its
34 obligations under DIL and with respect to other investment activities through a
35 combination of plans. I also understand that the District Plan, which is still being
36 negotiated, will likely contain the same kind of representative action and release
37 provisions as are in the DIL Plan. In my view, it is appropriate that I consider these
38 provisions of the DIL Plan in that context.
39

40 I understand that the District would like a positive decision on the DIL Plan as a useful
41 precedent with respect to the District Plan, but in my view, it is not fair to the District

1 Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary,
2 Alberta

3

4 March 9, 2016

Morning Session

5

6 The Honourable

Court of Queen's Bench of Alberta

7 Madam Justice Romaine

8

9 F.N.J. Taman

For the Lutheran Church Canada

10 C.L. Nicholson

For the Lutheran Church Canada

11 J.L. Oliver

For the Monitor

12 D.S. Nishimura

For the DIL Creditor Committee

13 C.D. Simard

For the District Creditors

14 A. A. Garber (by telephone)

For the Objecting Creditors

15 E.A. Poyner (by telephone)

For the Objecting Creditors

16 H. O'Hara

Court Clerk

17

18

19 THE COURT CLERK:

Order in court.

20

21 THE COURT:

Good morning.

22

23 UNIDENTIFIED SPEAKER:

Good morning, My Lady.

24

25 THE COURT:

Please be seated. Ms. Poyner, I understand you

26 are on the line and Mr. Garber?

27

28 MS. POYNER:

Yes. Thank you, My Lady.

29

30 THE COURT:

Okay. Thank you. And you can hear me?

31

32 MS. POYNER:

Yes. Thank you.

33

34 THE COURT:

Okay. Thank you.

35

36 **Order**

37

38 THE COURT:

It is clear that the only real issue in this

39 application for sanctioning of the DIL Plan relates to the representative action provisions

40 of the Plan, although the Objecting Creditors also have comments with respect to the

41 releases of third parties.

1 Creditors for me to decide an issue that may affect their rights without knowing the
2 details of the District Plan and the level of creditor support for that plan, which I
3 understand will be put to creditors for consideration in April.

4
5 I therefore direct that the DIL sanction application be deferred, to be heard by me at the
6 same time as the District sanction application. Any prejudice to DIL Creditors can be
7 alleviated by an application for another interim distribution if and when funds are
8 available, and the deferral of the sanction hearing does not require the Applicant to stop
9 liquidation of asset proceedings.

10
11 To be clear, the deferral of the sanction hearing does not require another meeting of
12 creditors to consider the Plan. I have reviewed the Minutes of the Creditors meeting and I
13 agree that the Objecting Creditors and their counsel had a full opportunity to put their
14 objections to the Creditors in attendance.

15
16 The issue of a possible Monitor conflict with respect to the District was completely
17 disclosed in the Monitor's 4th Report. I note that, yesterday, I received a letter from
18 Mr. Oliver advising that Deloitte & Touche LLP was also the auditor for DIL in 1998 and
19 1999, which had been missed in the conflict check until early this week. While
20 unfortunate, this additional information does not add any material concern with respect to
21 the possibility of conflict as the audit engagement with respect to the District between
22 1990 and 1999 was previously disclosed and handled appropriately, as described in the
23 15th Report.

24
25 I also note that whatever response may have been given by Mr. Taman about Bishop &
26 McKenzie's pre-CCAA involvement, the fact is that the limited releases in the Plan do not
27 preclude litigation against him for any previous involvement.

28
29 I therefore find that there was no relevant or material information that was not disclosed
30 to the DIL Creditors at the meeting before the vote and the results of that vote will
31 continue to be a factor at the sanction hearing.

32
33 So, turning to the stay application, I find that I have the authority to make stay orders
34 against third parties, both on the basis of a broad and liberal interpretation of section 11
35 and on the basis of inherent jurisdiction: *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236;
36 *Re Lehndorff General Partners Ltd.* (1993), 17 C.B.R. (3d) 24; *Norcen Energy Resources*
37 *Ltd. v. Oakwood Petroleums Ltd.*, 63 Alta. L.R. (2nd) 301.

38
39 In deciding whether to exercise that authority, I must weigh the interests of the Applicant
40 Debtors against the interests of the third parties who will be affected by the stay. In this
41 case, the prejudice to the Objecting Creditors is slight, while the prejudice to the CCAA

1 Debtors and the DIL Creditors who voted for the proposed Plan is substantial. DIL's Plan,
2 which includes the representative action provisions relating to the same categories and
3 types of claims alleged in the class action proceedings, has been approved by a clear
4 majority of DIL Creditors and is in the final stages of seeking approval. The District is in
5 the process of preparing a plan and seeking approval of its creditors, and that plan will
6 also include representative action provisions. A stay of the proceedings brought by the
7 Objecting Creditors is necessary in order to maintain the status quo while the DIL Plan
8 and the proposed District Plan are undergoing the final stages of consideration by
9 Creditors and the Court.

10
11 The Objecting Creditors submit that they are prejudiced by the passage of time prior to
12 the resolution of the CCAA process. However, Ms. Poyner candidly admits that the
13 chances of obtaining a certification hearing date with respect to the B.C. action in the next
14 two months is slim to none, and I can make the same observation with respect to the
15 Alberta action.

16
17 It is also noteworthy that it is anticipated that even without the representative action,
18 recovery for DIL Creditors under the Plan is estimated to be between 77 and 83 percent
19 of their claims. Thus, DIL Creditors will not have to rely on subsequent proceedings to
20 recover more than about 23 percent of their investment, such that, in that case, any small
21 delay in litigation does not have the same dire consequences that a complete loss of
22 investment funds would have.

23
24 In the circumstances, a stay is reasonable and necessary. The stay will extend not only to
25 the class actions brought by the Objecting Creditors in B.C. and Alberta and to the
26 recently threatened action against the DIL and District auditors, but with respect to any
27 proceedings that would fall within the scope of the representative action provisions of the
28 DIL Plan and with respect to the same scope of potential litigation with respect to the
29 District. A stay will be in force until the sanction hearings with respect to DIL and the
30 District can be heard and decided.

31
32 Okay, are there any questions? No? Okay. Okay, thank you. Thank you, everybody, for
33 your very thorough briefing and submissions on the issue, and I imagine I will see you
34 early May. Thank you.

35
36 THE COURT CLERK:

Order in court.

37
38
39 PROCEEDINGS CONCLUDED
40
41

1 **Certificate of Record**

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41

I, Heather O'Hara, certify this recording is the record made of the evidence in the proceedings in the Court of Queen's Bench, held in courtroom 1603, at Calgary, Alberta, on the 9th day of March, 2016, and that I was the court official in charge of the sound-recording machine during the proceedings.

1 **Certificate of Transcript**

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41

I, Danica Dolenc, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Digitally Certified: 2016-05-04 13:33:40
Danica Dolenc, Transcriber
Order No. 3197-16-1

Pages:	8
Lines:	291
Characters:	9260

File Locator:	0e9e2108122611e6aa550017a4770810
Digital Fingerprint:	3564089b94350de97ee441c1ef7043616580f94884c5260a5e0991d869ed531e

Detailed Transcript Statistics

Order No. 3197-16-1	
Page Statistics	
Title Pages:	1
ToC Pages:	1
Transcript Pages:	6
Total Pages:	8
Line Statistics	
Title Page Lines:	60
ToC Lines:	4
Transcript Lines:	227
Total Lines:	291
Visible Character Count Statistics	
Title Page Characters:	738
ToC Characters:	72
Transcript Characters:	8450
Total Billable Characters:	9260
Multi-Take Adjustment: (-) Duplicated Title Page Characters	8522