

COURT FILE NUMBER: 1501-0095

COURT: COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE: CALGARY

IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, RSC 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: **BRIEF OF THE RESPONDENTS ELVIRA KROEGER AND
RANDALL KELLEN IN SUR-REPLY TO THE
SUBMISSIONS OF THE MONITOR ON THE
APPLICATION FOR JUDICIAL SANCTION OF THE
PLAN OF COMPROMISE AND ARRANGEMENT OF THE
LUTHERAN CHURCH – CANADA, ALBERTA-BRITISH
COLUMBIA DISTRICT**

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File No. K-5820(1)

Attention: Errin A. Poyner

**PURSUANT TO THE RULING OF THE HONOURABLE MADAM JUSTICE
ROMAINE DATED JULY 20, 2016 GRANTING LEAVE TO MAKE
ADDITIONAL WRITTEN SUBMISSIONS IN SUR-REPLY**

1. On the hearing of the ABC District's application for judicial sanction, a submission was made on behalf of Mrs. Kroeger and Mr. Kellen that cl. 5.5 of the Plan (the "sole recourse" clause) abrogates creditors' constitutional rights of access to the courts, as creditors having individual claims which the Subcommittee declines to pursue have no right to retain counsel and commence those claims on their own behalf. The Monitor submitted in reply that the Plan did not prevent creditor from pursuing his individual claim within the context of the Representative Action by independently retaining and paying legal fees to the Representative Counsel.

2. In fact, the Plan does not allow this to occur. The definition of "Representative Action" encompasses "that legal action or actions undertaken in respect of the Representative Action Claims", which are in turn defined as "any and all potential claims of District Depositors...to recover the amounts of their Claims paid under this Plan...". Art. 5.3 grants the Subcommittee power to retain and instruct Representative Counsel on behalf of the Representative Action Class, including the power to settle all or part of the Representative Action.

3. The Subcommittee Order further particularizes the powers of the Subcommittee and the duties of Representative Counsel. Cl. 10 authorizes the Subcommittee to retain and instruct the Representative Counsel. Cls. 12(e) provides that the Representative Counsel will "take instructions with respect to the Representative Action from the Subcommittee". Cl. 13 provides that the Subcommittee "shall be deemed to be the client of the Representative Counsel with respect to the Representative Action with respect to privilege" and that Representative Counsel "shall have no obligation to consult with nor take instructions from individual members of the Representative Action Class in conjunction with the Representative Action."

4. Accordingly, any individual claim advanced by a creditor is a "Representative Action Claim" and any action commenced in respect of that Claim is a "Representative Action" within the meaning of the Plan. However, only the Subcommittee (and not an individual creditor) is authorized to retain and instruct counsel to commence a Representative Action. The Representative Counsel is not obliged to take instructions from an individual creditor in connection with a Representative Action Claim, even where the Subcommittee has declined to advance that claim and the creditor has separately retained and paid Representative Counsel to do so (which is itself impossible). Further, an individual creditor cannot be the client of the Representative Counsel, and communications between them would not be privileged. Finally, the Subcommittee would have the power to settle any individual creditor's claim, despite the fact that the creditor had retained and paid the Representative Counsel independently, and therefore would reasonably wish to have sole authority to settle his or her claim.

5. Accordingly, under the terms of the Plan an individual creditor cannot independently retain Representative Counsel to advance a Representative Action. The submission of the Monitor must be rejected.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: JULY 21, 2016.


Errin Poyner
Counsel for Elvira Kroeger and Randall Kellen