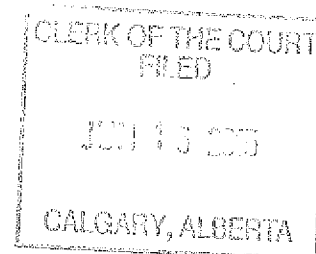


COURT FILE NUMBER 1501-00955
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY



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 **BRIEF OF DELOITTE RESTRUCTURING INC. IN
RESPONSE TO THE APPLICATION OF RANDY KELLEN**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
Gowling Lafleur Henderson LLP
1600, 421 7th Ave SW
Calgary, AB T2P 4K9
Telephone (403) 298-1000
Facsimile (403) 263-9193
File No. A135752

Attention: Jeffrey L. Oliver

**SCHEDULED TO BE HEARD BEFORE THE HONOURABLE MADAM J. STREKAF
AT 10:00 AM ON THURSDAY JUNE 18, 2015**

I. INTRODUCTION

1. Deloitte Restructuring Inc., in its capacity as the Monitor (the “**Monitor**”) of 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 “**Debtors**”) requests that this Honourable Court adjourn the application of Randy Kellen to lift the stay of proceedings in order to pursue claims against the directors and officers of the Debtors (the “**Kellen Claim**”). The Monitor requests that this adjournment be granted until the later of the disclosure of additional information in relation to the Kellen Claim and after the Debtors’ plans of arrangement (the “**Plans**”) have been filed and considered at meetings of creditors.
2. The Monitor opposes lifting the stay of proceedings in relation to the Kellen Claim at this time as a result of the following:
 - (a) the Debtors have been acting in good faith and with due diligence in pursuing the Plans and there is no evidence that the Plans are likely to fail;
 - (b) Mr. Kellen will not suffer any hardship or significant prejudice by a refusal to lift the stay of proceedings, as the Initial Order expressly permits Mr. Kellen to file a Statement of Claim to preserve any limitation periods;
 - (c) the Debtors are actively working on the Plans and there has not been a lapse of a significant time period since the Initial Order was granted;
 - (d) lifting the stay of proceedings will disrupt and prejudice the Debtors ability to restructure, as the commencement of the Keller Claim in the midst of restructuring will cause unnecessary confusion to the creditors and could place a strain on the Debtors’ limited resources; and
 - (e) the restructuring efforts of the Debtors will be prejudiced if attention, time and resources are diverted from the restructuring process and redirected towards defending a complex claim.

II. FACTS

3. On January 23, 2015, an initial order (the “**Initial Order**”) was granted pursuant to the *Companies’ Creditors Arrangement Act*, RSC 1985 c C-36 (“**CCAA**”) with respect to the Debtors.

Initial Order of Justice K.D. Yamauchi, filed January 23, 2014,
Court of Queen’s Bench Action No. 1501-00955.

4. The Initial Order appointed Deloitte Restructuring Inc. as monitor over the Debtors.

Initial Order of Justice K.D. Yamauchi, filed January 23, 2014,
Court of Queen's Bench Action No. 1501-00955.

5. As set out in the Initial Order:

- (a) until and including February 20, 2015, or such later date as a Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court could be commenced or continued against or in respect of the Debtors, among others;
- (b) nothing in the Initial Order prevented any party from taking an action against the Debtors where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps be taken by such party except in accordance with the other provisions of the Initial Order and notice in writing; and
- (c) during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 21 of the Initial Order, no proceeding could be commenced or continued against any of the former, current or future directors or officers of the Debtors with respect to any claim against the directors or officers that arose before the date of the Initial Order and that related to any obligations of the Debtors whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers.

Initial Order of Justice K.D. Yamauchi, granted January 23,
2014, Court of Queen's Bench Action No. 1501-00955
paragraphs 19, 21 and 25.

6. Two orders of the Honourable Justice C.M. Jones were granted on February 20, 2015. The purpose of these orders was to:

- (a) extend the Stay Period in the Initial Order to March 27, 2015; and
- (b) allow for the appointment of two creditors' committees, the District Creditors' Committee and the DIL Creditors' Committee (collectively, the "**Committees**"), to represent the interests of the investors in the District's CEF and depositors of DIL, respectively; and
- (c) authorize the appointment of a chief restructuring officer ("**CRO**") of the District and DIL having several powers and obligations, including:
 - (i) to assist in and direct the restructuring on behalf of the District and DIL;

- (ii) to report to the Court, the District and DIL, and other stakeholders as the CRO, in its discretion, considers appropriate;
- (iii) to consider the interest of and take direction from, subject to the Monitor's approval, the District and DIL; and
- (iv) to assist the Debtors in the preparation and implementation of any Plan.

Order of Justice C.M. Jones, granted February 20, 2015, Court of Queen's Bench Action No. 1501-00955.

7. An order of the Honourable Justice K.D. Yamauchi was granted on March 27, 2015. The purpose of this order was to:

- (a) extend the Stay Period in the Initial Order to June 26, 2015; and
- (b) appoint Kluane Partners as the CRO of the District and DIL.

Order of Justice K.D. Yamauchi, granted March 27, 2015, Court of Queen's Bench Action No. 1501-00955.

8. The CRO, in conjunction with counsel for the Debtors and Monitor, are currently in the process of preparing four separate plans of arrangement, one for each of the Debtors.

9. On May 21, 2015, Mr. Kellen, the Church Extension Representative of the St. Luke Lutheran Church congregation, filed an application seeking to have the stay of proceedings as against the officers and directors of the District and DIL lifted in order to pursue the Kellen Claim.

Application by Randy Kellen, filed May 21, 2015, Court of Queen's Bench Action No. 1501-00955.

10. The Monitor has requested but has not yet received the following additional information from Mr. Kellen's legal counsel in relation to the Kellen Claim:

- (a) a final copy of the intended Statement of Claim Mr. Kellen wishes to file so that the Monitor may fully consider and advise the Court and stakeholders in relation to the nature and extent of the claims being advanced by Mr. Kellen; and
- (b) clarification as to the specific parties against who Mr. Kellen wishes to lift the stay and the other parties against whom Mr. Kellen intends to advance his claims.

III. ISSUE

11. The issue before the Court is whether the stay of proceedings against the directors and officers of the Debtors should be lifted at this time so as to allow Mr. Kellen to pursue the Kellen Claim.

IV. SUBMISSIONS

A. Test for lifting a stay of proceedings under the CCAA

12. Lifting a stay of proceedings is discretionary. In determining whether to lift a stay of proceedings, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA.

Canwest Global Communications Corp, Re, [2009] OJ No 5379 at para 32 [*Canwest*].

ICR Commercial Real Estate (Regina) Ltd v Bricore Land Group Ltd, 2007 SKCA 72 [*ICR Commercial*].

13. The CCAA is remedial legislation intended to permit the court to make orders that will maintain the status quo for a period of time while the insolvent company attempts to develop a plan to compromise its debts and ultimately continue its operations.

Canadian Airlines Corp, Re, [2000] AJ No 1692 at para 12 [*Canadian Airlines*].

14. A stay of proceedings is a key element in the CCAA process and is generally essential to allow for a debtor to attempt to enter into a compromise with its creditors and successfully restructure.

Canadian Airlines Corp at para 13.

15. The Alberta Court of Queen's Bench set out various situations in which a court might lift a CCAA stay of proceedings, including:

- (a) when the plan is likely to fail;
- (b) the applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
- (c) the applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor

would cause it to close and thus jeopardize the debtor's company's existence);

- (d) the applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
- (e) it is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time; and
- (f) after the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

Canadian Airlines at para 20.

16. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action.

Canwest at para 32.

ICR Commercial.

B. There is no evidence that the Plans are likely to fail

17. The Debtors have been acting in good faith and with due diligence in pursuing the Plans.
18. The CRO, in conjunction with counsel for the Debtors and Monitor are currently in the process of preparing the Plans and the Plans will be put before the creditors as soon as practicable.
19. No evidence has been put forward by Mr. Kellen to suggest that the Plans are likely to fail. This circumstance therefore does not suggest that the stay should be lifted to permit the Kellen Claim to be advanced.

C. Mr. Kellen will not suffer any hardship or significant prejudice by a refusal to the lift the stay

20. As noted above, paragraph 21 of the Initial Order expressly states that nothing in the Initial Order will prevent any party from taking an action against the Debtors where such action must be taken in order to comply with statutory time limitations and to preserve their rights at law.

Initial Order of Justice K.D. Yamauchi, granted January 23,
2014, Court of Queen's Bench Action No. 1501-00955

paragraph 21.

21. The Initial Order does not prevent Mr. Kellen from filing a statement of claim to preserve any limitation period at risk of expiring.
22. The Kellen Claim is not being precluded by the operation of the Stay Period, rather its prosecution is merely being postponed.
23. There is no evidence that any other form of hardship or significant prejudice that will befall Mr. Kellen if the stay of proceedings is not lifted prior to the consideration of the Plans by the creditors. These circumstances suggest that there is no urgency to the stay being lifted at this time.

D. A significant time period has not elapsed since the Initial Order was made and the Debtors are actively working on Plans

24. The Initial Order was granted on January 23, 2014. Since the Initial Order, the Stay Period has been extended twice and is set to expire on June 26, 2015.

Initial Order of Justice K.D. Yamauchi, granted January 23, 2014, Court of Queen's Bench Action No. 1501-00955 paragraphs 19, 21 and 25.

Order of Justice C.M. Jones, granted February 20, 2015, Court of Queen's Bench Action No. 1501-00955.

Order of Justice K.D. Yamauchi, granted March 27, 2015, Court of Queen's Bench Action No. 1501-00955.

25. As noted above, the Plans are in progress, and will be put before the creditors as soon as practicable. This is a complex restructuring, with significant issues and thousands of stakeholders. In such circumstances, the time that has lapsed since the Initial Order was issued is not significant enough to warrant the lifting of the stay.

E. Lifting the stay of proceedings will likely prejudice the Debtor's ability to restructure

26. The Debtors would be prejudiced if attention, time and resources are diverted away from the ongoing restructuring process and redirected towards defending a complex action, such as the Kellen Claim.

Campeau v Olympia & York Developments Ltd, [1992] OJ No 1946 at para 24.

27. The District's Church Extension Fund ("CEF") contains approximately 6,083 accounts with 60% of depositors being over the age of 70 while the DIL fund

contains approximately 1,139 accounts with 65% of depositors being between the ages of 50 and 70.

Affidavit of Kurtis Robinson, sworn January 22, 2015, paras 22 and 59.

28. If the stay of proceedings is lifted and the Kellen Claim is allowed to proceed, it will result in unnecessary confusion to the depositors of CEF and DIL due to the large number of accounts and the age of CEF and DIL depositors.
29. Due to the complex nature of these restructuring proceedings and the fact that four separate legal entities have filed for CCAA protection, the Monitor anticipates that creditors will be voting on four separate Plans. Requiring such a large number of creditors, most of whom are above the age of 70, to vote on four Plans while receiving communications from counsel to Mr. Kellen in relation to the Kellen Claim may overwhelm creditors, be unnecessarily confusing and could hinder the successful restructuring of the Debtors.
30. Further, the Monitor has had discussions with representative counsel for each of the Committees, and based upon those discussions understands that representative counsel are reviewing potential claims against directors and officers, and may recommend an approach to and negotiation with the directors' and officers' insurer following this review, among other various options. This may provide additional recovery to creditors pursuant to the Plans. Should the Kellen Claim be approved, it may impact the ability of representative counsel to undertake such negotiations.

F. There is insufficient information available on the Kellen Claim

31. Further, the Monitor is unable to consider the full extent and nature of the Kellen Claim because it has not yet been provided with a complete Statement of Claim clearly naming the parties against whom relief will be sought. Without this information, the Monitor is unable to:
 - (i) determine the complete extent to which the subject matter of the Kellen Claim may be subject to compromise within the CCAA proceedings. To the extent that the Kellen Claim (in whole or in part) is subject to compromise under the CCAA, the Monitor is of the view that the stay of proceedings should not be lifted in relation to such claims, as it may confuse creditors in relation to which claims are compromised in a potential Plan and which ones are not; and
 - (ii) fully assess the impact of the Kellen application on the CCAA proceedings and on the Debtors' ability to restructure. If the Kellen Claim names as a party an individual(s) who continues to be employed by the Debtors and are currently assisting in the ongoing

operations of the Debtors and the formulation of the Plans, this could negatively impact the Debtors' restructuring efforts by forcing those parties to redirect their attention to defending themselves against the Kellen Claims. The ability of the CRO to mitigate against such risks is not known.

32. These circumstances suggest that it would be more appropriate for Mr. Kellen's application be adjourned on the terms requested by the Monitor, rather than risk that the Kellen Claim be advanced in these unknown circumstances.
33. Further, the Committees have been appointed pursuant to court orders dated February 20, 2015, and representative legal counsel have been chosen for each of the Committees. Should statements of claim need to be filed to preserve limitation periods related to the Kellen Claims, it may be more appropriate and efficient for these statements of claim to be filed by the Committees on behalf of all depositors. The Committees serve in a fiduciary capacity to all creditors, and their mandate is to maximize the amount of money that is available for distribution to creditors.

V. RELIEF REQUESTED

34. It is respectfully requested that the Randy Kellen application be adjourned until the later of the delivery of the additional information requested by the Monitor from Mr. Kellen's counsel, and after Plans have been filed for each of the Debtors and voted upon at duly convened meetings of creditors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of June, 2015.

Gowling Lafleur Henderson LLP

Per:


For: Jeffrey L. Oliver

Counsel for the Monitor,

Deloitte Restructuring Inc.

INDEX OF AUTHORITIES

1. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.
2. *Canwest Global Communications Corp, Re*, [2009] OJ No 5379 (Ont Sup Ct J).
3. *ICR Commercial Real Estate (Regina) Ltd v Bricore Land Group Ltd*, 2007 SKCA 72.
4. *Canadian Airlines Corp, Re*, [2000] AJ No 1692 (Alta QB).
5. *Campeau v Olympia & York Developments Ltd*, [1992] OJ No 1946 (Ont Ct J Gen Div).