

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 ITS CAPACITY AS MONITOR, REGARDING STAYING THE ALBERTA PROCEEDING & THE BC PROCEEDING ISSUED PURSUANT TO *CLASS PROCEEDINGS ACT***

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
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SCHEDULED TO BE HEARD BEFORE THE HONOURABLE MADAM JUSTICE ROMAINE AT 2:00 P.M. ON MONDAY, FEBRUARY 29, 2016

I. INTRODUCTION

1. Deloitte Restructuring Inc., in its capacity as monitor (the “**Monitor**”) of Lutheran Church – Canada, The Alberta – British Columbia District (the “**District**”), Encharis Community Housing and Services, Encharis Management and Support Services and Lutheran Church – Canada, The Alberta – British Columbia District Investments Ltd. (“**DIL**”) (collectively the “**Applicants**”) respectfully submits that this Honourable Court should stay the AB-BC Proceedings (as defined below) pending further Order of this Honourable Court.
2. Despite being afforded the opportunity to have direct consultation with the DIL creditors’ committee (the “**DIL Committee**”), and attending and being involved in significant deliberations in relation to the Amended Amended Plan of Compromise and Arrangement of DIL (the “**DIL Plan**”), on 22 and 23 February, 2016, certain plaintiffs commenced proceedings against various defendants by issuing a Statement of Claim in the Court of Queen’s Bench of Alberta pursuant to the *Class Proceedings Act*, S.A. 2003, c. C-16.5 (Alberta) (the “**Alberta Proceeding**”) and a Notice of Civil Claim in the Supreme Court of British Columbia pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (British Columbia) (the “**BC Proceeding**”, and together with the Alberta Proceeding, the “**AB-BC Proceedings**”).
3. The percentage and dollar value of the claims of the Plaintiffs in the AB-BC Proceedings, while personally important, are negligible in value in the context of global creditor claims in relation to the Applicants and their CCAA proceedings.
4. Of the affected creditors of DIL (the “**DIL Depositors**”) that voted on the DIL Plan, 92% in number and 87% in dollar value voted in favour of the DIL Plan. Additionally, the DIL Committee approved the DIL Plan and have been actively involved in the preparation of the DIL Plan. The DIL Plan provides for the appointment of a Representative Action sub-committee in relation to a future legal action or actions, which may be undertaken on behalf of DIL Depositors as a class proceeding (the “**Representative Action**”). That sub-committee is tasked with selecting counsel as part of a competitive bidding process, instructing, and supervising the Representative Action.

Twelfth Report of the Monitor at paras 25 and 26.
5. The AB-BC Proceedings are directly contrary to the process for litigation contemplated by the DIL Plan, which creditors overwhelmingly approved. Accordingly, the AB-BC Proceedings undermine the collective will of the DIL creditors and are an improper collateral attack on the integrity of the CCAA process. Accordingly, the AB-BC Proceedings ought to be stayed in the interests of preserving the *status quo* in respect of DIL and District while they continue to advance their respective plans through this proceeding.

6. The Monitor is bringing this application for a stay of proceedings in respect of the AB-BC Proceedings in its capacity as an Officer of this Honourable Court and in light of its mandate to assist the parties and the Court in preserving the integrity of the CCAA process.
7. The Monitor seeks the stay of proceedings in respect of the AB-BC Proceedings on the following basis:
 - (a) the proceedings potentially frustrate the restructuring and liquidation purposes of this CCAA proceeding and the creditor-supported DIL Plan;
 - (b) the proceedings prejudice both DIL and District Depositors;
 - (c) the proceedings import inefficiency and confusion into the Applicants' CCAA proceedings and Representative Actions as provided for under the DIL Plan and Plan of Compromise and Arrangement of the District (the "**District Plan**");
 - (d) the proceedings could serve to distract District Depositors from considering the District Plan in a clear and objective way, including the inclusion of a Representative Action in the District Plan;
 - (e) the causes of action in the AB-BC Proceeding comprise the categories and types of claims that would be available in the Representative Action pursuant to the DIL Plan and the District Plan;
 - (f) the facts underlying the AB-BC Proceedings are many of the same facts that will inform the Representative Action as provided for under the DIL Plan and the District Plan;
 - (g) the Representative Action mechanism was structured with input from a diverse group of stakeholders with a view to avoiding a multiplicity of proceedings; and
 - (h) the AB-BC Proceedings are unwarranted, unnecessary, duplicative, and administratively burdensome.

II. FACTS

Background

8. The Monitor repeats and adopts the facts and definitions set out in (a) the Brief of Deloitte Restructuring Inc. regarding the Sanction Hearing for the DIL Plan of Compromise and Arrangement, (b) the Monitor's Twelfth Report to Court, and (c) the Monitor's Fifteenth Report to Court.

Brief of Deloitte Restructuring Inc. Regarding the Sanction Hearing for the DIL Plan of Compromise and Arrangement, filed February 24, 2016.

Twelfth Report of the Monitor, filed January 27, 2015 (“Twelfth Report”).

Fifteenth Report of the Monitor, filed February 25, 2016 (“Fifteenth Report”).

Issuance of AB-BC Proceeding

9. On February 22, 2016, Sharon Sherman and Marilyn Huber, as plaintiffs, commenced the Alberta Proceeding pursuant to the *Class Proceedings Act* (Alberta) by issuing a Statement of Claim in the Court of Queen’s Bench of Alberta naming as defendants: Lutheran Church – Canada, Lutheran Church – Canada Financial Ministries, Francis Taman, Bishop & McKenzie LLP, John Williams, Roland Chowne, Prowse Chowne LLP, Concentra Trust, and Shepherd’s Village Ministries Ltd. Counsel to the Plaintiffs in the Alberta Proceeding is Mr. Allen Garber (“**Mr. Garber**”) of Allan Garber Professional Corporation (“**Garber**”).

Fifteenth Report at para 14.

Statement of Claim dated February 22, 2016.

10. On February 23, 2016, Elvira Theodora Kroeger and Randall Scott Kellen, as plaintiffs, commenced the BC Proceeding pursuant to the *Class Proceedings Act* (British Columbia) by issuing a Notice of Civil Claim in The Supreme Court of British Columbia naming as defendants the same defendants as in the Alberta Proceeding, being: Lutheran Church – Canada, Lutheran Church – Canada Financial Ministries, Francis Taman, Bishop & McKenzie LLP, John Williams, Ronald Chowne, Prowse Chowne LLP, Concentra Trust, and Shepherd’s Village Ministries Ltd. (collectively, the “**Named Defendants**”). Counsel to the Plaintiffs in the BC Proceeding is Ms. Errin Poyner (“**Ms. Poyner**”) of Sugden McFee & Roos LLP (“**Sugden**”).

Fifteenth Report at para 14.

Notice of Civil Claim dated February 23, 2016.

11. In the aggregate, the percentage and dollar value of the claims of the Alberta Proceeding claimants and the BC Proceeding claimants, while personally important, are negligible in value in the context of global creditor claims.
12. The categories and types of claims advanced in the AB-BC Proceedings are the same categories and types of claims that would be available to be advanced in the Representative Action.

13. Despite having had direct consultation with the DIL Committee, and attending and being involved in significant deliberations in relation to the DIL Plan, the Plaintiffs issued the AB-BC Proceedings.

Statement of Claim dated February 22, 2016.

Notice of Civil Claim dated February 23, 2016.

14. Following the filing of the DIL Plan, Ms. Poyner, raised several concerns regarding the DIL Plan and specifically those provisions of the DIL Plan related to the Representative Action. Ms. Poyner had the opportunity to communicate with all stakeholder groups with respect to these concerns, as summarized below:
- (a) Ms. Poyner met with the Applicant's legal counsel, the Monitor, the Monitor's legal counsel, legal counsel to the DIL Committee and legal counsel for the District Committee on November 30, 2015;
 - (b) Ms. Poyner met with the DIL Committee and their legal counsel on December 4, 2015;
 - (c) Ms. Poyner met with the District Committee and their legal counsel on December 15, 2015. Although the District Plan had not yet been finalized, it was known that the provisions of the District Plan related to the Representative Action were going to mirror those in the DIL Plan;
 - (d) Ms. Poyner had ongoing correspondence with the Applicant's legal counsel, the Monitor, the Monitor's legal counsel and legal counsel for each of the Committees related to her comments on the DIL Plan. Selected correspondence provided by Ms. Poyner is attached as Exhibits to the Affidavit of Courtney Clark sworn on February 23, 2016. The Monitor also forwarded correspondence provided by Ms. Poyner to the Committees at Ms. Poyner's request. Certain revisions were made to both the DIL Plan and the District Plan based on comments raised by Ms. Poyner;
 - (e) There have been fulsome discussions between the DIL and District Committees, their legal counsel and the Monitor related to Ms. Poyner's concerns regarding the DIL Plan and the District Plan; and
 - (f) Ms. Poyner attended the creditors' meeting for DIL (the "DIL Meeting") and voiced her concerns regarding the DIL Plan at the DIL Meeting. The minutes of the DIL Meeting (the "Minutes") are attached as "Schedule 6" to the Twelfth Report of the Monitor. The discussion with Ms. Poyner at the DIL Meeting was extensive and is documented on pages 8 to 12 of the Minutes.

Fifteenth Report at para. 27.1.1 – 27.1.6.

Affidavit of Courtney Clark, sworn February 23, 2016.

Twelfth Report, Schedule 6.

15. The Monitor is of the view that Ms. Poyner has had an ample opportunity to participate in the CCAA proceedings. In addition, Ms. Poyner is familiar with the provisions of the DIL Plan and the District Plan related to the Representative Action, as well as with the outcome of the DIL Meeting and the DIL Sanction Application. Although the Monitor only recently became aware of the nature of Mr. Garber's involvement in the process, the Monitor understands that Ms. Poyner, on behalf of her clients, Randall Kellen and Elvira Kroeger (the "**Sugden Plaintiffs**"), and Garber, on behalf of his clients Sharon Sherman and Marilyn Huber (the "**Garber Plaintiffs**"), are working together to advance the AB-BC Proceedings. As such, the Monitor is concerned that the AB-BC Proceedings have been commenced with full knowledge of the status of the CCAA proceedings in an attempt to frustrate the DIL Plan and the District Plan (including the Representative Action sections therein) or to obtain a competitive advantage in relation to carriage of the Representative Action established for DIL or for the District, or alternatively in other potential proceedings outside of the DIL Plan or District Plan in the event that such plans are not approved.

Fifteenth Report at para. 27.2.

16. The Monitor is of the view that allowing the AB-BC Proceedings to continue at this time could be detrimental to the ability of DIL Depositors and District Depositors to advance the Representative Action for the following reasons:
- (a) It creates uncertainty for the defendants named in the AB-BC Proceedings (the "**Named Defendants**") in relation to who has legitimate carriage of Representative Action Claims. This is of particular concern in the event that such Named Defendants wish to resolve or have settlement negotiations prior to the process set out in the DIL Plan to advance the Representative Action (the "**Representative Action Process**") being commenced;
 - (b) Absent the stay being extended to the AB-BC Proceedings, the Sugden Plaintiffs and the Garber Plaintiffs will be free to take any step available to them in relation to their interests as District Depositors until the District Plan is sanctioned, which will likely not occur until late Spring 2016. The Monitor is concerned that steps taken in the AB-BC Proceedings could prejudice the ability of future Representative Counsel to advance a Representative Action, including but not limited to issues arising out of potential admissions, release of parties, pursuit of particular strategies and settlement discussions arising out of the AB-BC Proceedings;
 - (c) District Depositors may be confused about whether the AB-BC Proceedings are in fact the Representative Action contemplated in either the DIL Plan or District Plan. This will make it increasingly difficult for

the Applicants and the Monitor to communicate with stakeholders in relation to the District Plan, and may confuse consideration of the District Plan on its merits;

- (d) The Named Defendants will need to expend time and money in defending themselves in a proceeding that, should the DIL Plan and the District Plan be sanctioned, will ultimately be stayed. Any additional expense incurred by the Named Defendants in advancing this defense may be factored into a future settlement, which is ultimately negotiated pursuant to the Representative Action;
- (e) The claims being advanced in the AB-BC Proceedings do not include any claims that would be released by the DIL Plan. As such, the Monitor is not aware of any prejudice to any parties as a result of the Stay being extended to the AB-BC Proceedings. In addition, the Monitor is not aware of any limitation periods that would require the claims being made by the Sugden Plaintiffs and the Garber Plaintiffs to be advanced prior to that time; and
- (f) The AB-BC Proceedings have been advanced under class action legislation in Alberta and British Columbia. As such, the Sugden Plaintiffs and the Garber Plaintiffs presumably intend to seek certification of a class that would include all of the DIL and District Depositors. Doing so would involve all of the DIL Depositors in litigation, even when they have already communicated a desire to opt-out of such litigation by opting out of the Representative Action.

Fifteenth Report at para. 29.1 – 29.6.

- 17. To date, the Sugden Plaintiffs and the Garber Plaintiffs have refused to agree to a consensual stay of the AB-BC Proceedings, save and except on an interim basis. The Monitor is not aware of any prejudice that those parties would suffer as a result of the Stay being extended to the AB-BC Proceedings.

Fifteenth Report at para. 30.

- 18. In addition to the Monitor's concerns related to the Representative Action, the Monitor has the following additional concerns related to the stay not being extended to the AB-BC Proceedings:
 - (a) Paragraph 19 of the Initial Order provided for the stay, which applied to proceedings or enforcement processes in any Court commenced or continued against or in respect of the Applicants or the Monitor. The Monitor is of the view that, although the Applicants are not Named Defendants, the AB-BC Proceedings involve claims that could be viewed as being in respect of the Applicants and claims that are clearly intended to be addressed by the Representative Action Process established in the DIL Plan and the District Plan;

- (b) The Monitor is concerned with preserving the legitimacy and integrity of the CCAA proceedings. As reported above, the DIL Plan was approved by 92% in number and 87% in dollar value of voting DIL Depositors. The DIL Depositors are aware of and should be able to rely on the DIL Plan, including the Representative Action, being advanced as anticipated, subject to the DIL Sanction Order being granted. In particular, the Monitor notes that the AB-BC Proceedings do not provide, at least at this time, DIL Depositors with the transparency or protections offered under the Representative Action Process, as outlined in the DIL Plan, including the establishment of the Subcommittee and the establishment of a competitive process to retain Representative Counsel. Both of these processes were clearly outlined in the DIL Plan and formed part of the process approved by DIL Depositors;
- (c) The allegations contained in the Statements of Claim in the AB-BC Proceedings may be misinterpreted by DIL and District Depositors as statements of fact. The perception of the allegations in a pleading against the Named Defendants at this stage of the restructuring may create uncertainty for District Depositors in considering the District Plan. Extending the stay to the AB-BC Proceeding will allow the District Plan to advance in a more controlled fashion and facilitate future communication between the Monitor and DIL and District Depositors;
- (d) Based on the claims process that was approved by the Court of Queen's Bench of Alberta on February 20, 2015, of the Garber Plaintiffs, only Ms. Huber has a claim against DIL. As such, collectively, the Garber and Sugden Plaintiffs represent only three out of 896 DIL Depositors and, as further detailed in the Confidential Supplement, their claims constitute a negligible percentage of the total proven claims of DIL Depositors. While the CCAA proceedings provide a forum for all DIL Depositors to express their views, the Monitor is of the view that, based on the results of the DIL Meeting, the views of the Sugden Plaintiffs are not those of the larger body of DIL Depositors. Ms. Huber and the Sugden Plaintiffs voted on the DIL Plan. As such, they have had the opportunity to participate in the CCAA process; and
- (e) Should Ms. Poyner or Mr. Garber choose to do so, they have the opportunity to put their name forward to be considered as Representative Counsel by the Subcommittee.

Fifteenth Report at para 31.1 - 31.5.

III. ISSUE

19. Should the AB-BC Proceedings be stayed pending further Order of this Honourable Court?

IV. SUBMISSIONS

A. RELIEF SOUGHT IS AVAILABLE AND CONSISTENT WITH PURPOSE AND POLICY OF CCAA

The CCAA is Flexible and Remedial Legislation

20. The CCAA is remedial legislation, intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy. During periods of financial hardship, debtors may turn to the Court so that the Court may apply the CCAA in a flexible manner in order to accomplish the statute's goals. The Court should give the CCAA a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

Elan Corporation v Comiskey (Trustee of) (1990), 1 OR (3d) 289, 1990 CarswellOnt 139 at paras 22 and 56-61 (Ont CA).

Re Lehndorff General Partners Ltd. (1993), 17 CBR (3d) 24, 9 BLR (2d) 275 at para 5 (Ont Gen Div) [*Lehndorff*].

Chef Ready Foods Ltd. v Hongkong Bank of Canada (1990), 4 CBR (3d) 311, 1990 CarswellBC 394 at paras 10 and 22-23 (BCCA).

21. It is well-established that the CCAA is a flexible instrument and that a debtor company is entitled to seek its protection in the context of a very wide range of restructuring options. As Topolniski J. of the Alberta Queen's Bench has stated,

“... reorganization of a company's affairs under the CCAA may take many forms. There is no one solution that will apply for every company. Solutions may vary from organization and management restructuring, downsizing, refinancing, or debt to equity conversion – **the solutions are generally limited only by the creativity of those structuring the plan of arrangement.**”
[**Emphasis added**].

Re 843504 Alberta Ltd., 2003 ABQB 1015 at para. 14.

22. The Supreme Court of Canada expressly noted in *Century Services* that “[c]ourts frequently observe that ‘[t]he CCAA is skeletal in nature’ and does not ‘contain a comprehensive code that lays out all that is permitted or barred.’” The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more “rules-based” approach of the BIA.

Century Services Inc v Canada (Attorney General), 2010 SCC 60 [*Century Services*] at para. 57, citing *ATB Financial v*

Metcalf & Mansfield Alternative Investments II Corp, 2008
ONCA 587 at para 44 and 61.

23. On numerous occasions, Courts have held that Section 11 of the CCAA provides the Court with a broad and liberal power, which is at their disposal in order to achieve the overall objective of the CCAA. Accordingly, an interpretation of the CCAA that facilitates restructurings and approvals of plans of arrangements accords with its purpose.

Re Sulphur Corporation of Canada Ltd., 2002 ABQB 682, AJ
No 918 (OL) at para 26 [cited to AJ].

24. Judges enjoy great discretion under the CCAA. The purpose of the CCAA is to preserve the *status quo* to enable a plan of compromise to be prepared, filed, and considered by the creditors:

“In the interim, a judge has great discretion under the CCAA to make orders so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.” [Emphasis added].

Lehndorff at para 5.

Re Canwest Global Communications Corp. (2009), 59 CBR (5th) 72, 2009 CarswellOnt 6184 at para 27 (Ont SCJ) [*Canwest Global*].

CCAA, Section 11.

25. The Court has broad inherent jurisdiction to impose stays of proceedings that supplement the statutory provisions of Section 11 of the CCAA, providing the Court with the power to grant a stay of proceedings where it is just and reasonable to do so.

Lehndorff, supra at paras 5 and 16.

Re T Eaton Co (1997), 46 CBR (3d) 293, 1997 CarswellOnt 1914 at para 6 (Ont Gen Div) [cited to OJ].

26. In light of the nature and purpose of the CCAA, this Honourable Court has the authority and jurisdiction to expand the scope of the stay of proceedings, if necessary, to apply to the Alberta Proceeding and BC Proceeding. This expansion of the stay of proceedings is reasonable and necessary in order to achieve a successful implementation of the DIL Plan. The DIL Plan was structured for the purpose of implementing a fair, controlled, and orderly process for the selection, instruction, and ongoing supervision of the Representative Counsel and the Representative Action. Further, the AB-BC proceedings could serve to distract

District Depositors from considering the District Plan in a clear and objective way, including whether to approve the inclusion of a Representative Action in the District Plan. Accordingly, the expansion of scope of the protections and flexibility of the stay of proceedings afforded by the CCAA is entirely appropriate in the circumstances.

Expansion of Scope of the Stay of Proceedings is Appropriate

27. The Monitor submits that the AB-BC Proceedings ought to be stayed and the expansion of the scope of the Stay to apply to the AB-BC Proceedings is appropriate in the circumstances of these CCAA proceedings.
28. It is well established that the Court has the general and inherent jurisdiction to grant a stay of proceedings. The power to grant a stay of proceedings extends to, *inter alia*, parties who could potentially jeopardize the success of the plan. In this regard, Justice Farley stated as follows:

“The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. **The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan** and thereby the continuance of the company.” **[Emphasis added]**.

Lehndorff, at para. 10.

29. A CCAA stay of proceedings has frequently been extended to non-applicants where such an order furthers the purpose of the CCAA stay. In fact, a number of cases have imposed a stay of proceedings affecting the rights of creditors to recover against a non-applicant that acts as guarantor for obligations of a CCAA debtor. For example, in *Tamerlane Ventures*, the applicants requested that the CCAA stay of proceedings be extended to two non-applicant parties on the basis that the operations of the applicants and the non-applicants were intertwined and that the stay was necessary to maintain stability and value in the CCAA process. The non-applicant parties included a US subsidiary of the applicants that had guaranteed the applicants' secured loans.

Re Tamerlane Ventures Inc., 2013 ONSC 5461 at para. 21.

See also *Re Cinram International Inc.*, 2012 ONSC 3767 at paras. 61 to 65 (stay extended to a number of non-applicant entities, including subsidiaries of the debtor company that were parties to an agreement with an applicant as surety, guarantor or otherwise);

See also *Re Sino-Forest Corp.*, 2012 ONSC 2063 at paras. 26-29 (stay extended to a number of non-applicant subsidiaries that acted as guarantor for the obligations of the applicant).

30. Canadian courts have held that extension of the stay of proceedings to partnerships is appropriate relief where “the operations of the debtor companies are so intertwined with those of the partnerships or limited partnerships in question, that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor companies.”

Re Prism Income Fund, 2011 ONSC 2061 at para. 27.

31. In *Re First Leaside Wealth Management Inc.*, in the context of considering whether a related partnership ought to be afforded protection of the stay of proceedings, the Court stated the stay of proceedings could be extended beyond the debtor company to necessary entities, in a practical sense, in order to ensure the stay is effective. In this regard, the Court stated as follows:

“...The jurisprudence under the CCAA provides that the protection of the Act may be extended not only to a “debtor company”, **but also to entities who, in a very practical sense, are “necessary parties” to ensure that that stay order works.**” [Emphasis added].

Re First Leaside Wealth Management Inc., 2012 ONSC 1299 at para 29.

32. In *Target Canada Co. (Re)*, the Court extended the stay of proceedings to certain limited partnerships, the co-tenancy rights of third party tenants, and to Target Corporation in relation to claims derivative of the claims against the Target Canada Entities.

Re Target Canada Co., 2015 ONSC 303 at para. 42-50.

33. The Monitor is not aware of any prejudice to staying the AB-BC Proceeding pending further order of this Honourable Court.
34. Any prejudice to the claimants in the AB-BC Proceedings is significantly outweighed by the benefits of the stay to all of the stakeholders of the Applicants during the DIL Plan sanction, wind-down, and liquidation period, as well as District Depositors.
35. Further, any prejudice to proposed class proceedings claimants is therefore significantly outweighed by the benefits of the expanded stay afforded to all of the stakeholders. Any prejudice is significantly ameliorated, if not eliminated, by the Representative Action process set out in the DIL Plan.
36. The balancing of relative prejudice favours this relief in the circumstances of this case. As a general matter, CCAA courts have held that subjecting plaintiffs to a

temporal stay of their rights to bring legal actions causes no prejudice to such plaintiffs because their actions are not being precluded, but simply postponed. Claims are not otherwise impaired by the proposed extension of the applicability of the stay.

Re Nortel Networks Corp, 57 CBR (5th) 232, 2009 CarswellOnt 4806 (Ont SCJ) at para. 36.

Campeau v Olympia & York Developments Ltd (1992), 14 CBR (3d) 303, 1992 CarswellOnt 185 (Ont Gen Div) at para. 24.

37. Any prejudice associated with the extension of the stay in relation to any claims or derivative claims to be advanced in the AB-BC Proceedings is far outweighed by the benefits to stakeholders as a whole. The Monitor supports the request for this stay of proceedings and the views of the Monitor should not lightly be disregarded.

Re Grant Forest Products Inc., 57 CBR (5th) 128, 2009 CarswellOnt 4699 (Ont SCJ) [*Grant Forest Products*] at para. 19, citing *Royal Bank v Soundair Corp* (1991), 4 OR (3d) 1 (Ont CA).

Initial Order Entitles Applicants & Other Parties to Broad Stay of Proceedings

38. In the event this Honourable Court finds elects not to exercise its discretion to stay the AB-BC Proceedings, the Monitor submits that the Initial Order arguably stays the AB-BC Proceedings.
39. The CCAA stay of proceedings has been described as "the engine that drives a broad and flexible statutory scheme".

Re Nortel Networks Corp., 2010 ONSC 1304 at para. 34.

Re Stelco Inc, 9 CBR (5th) 135, 2005 CarswellOnt 1188 (Ont CA) at para 36.

40. The stay is the principal tool by which the Court exercises its supervisory jurisdiction over a CCAA debtor. The stay facilitates successful CCAA restructurings by maintaining the *status quo* and preventing creditors from taking unilateral steps that impair the debtor's ability to focus on its restructuring efforts in the interests of all stakeholders. The stay prevents creditors from taking unilateral steps that would undermine the fairness of the CCAA process by giving an aggressive creditor a leg up or advantage over the other creditors and stakeholders. The stay is therefore interpreted and applied broadly and liberally to maintain a level playing field among the creditors while the debtor tries to successfully complete its restructuring efforts to maximize recovery for all.

41. At all times, the Court has the authority to oversee the CCAA proceedings and — principally through application of a broadly applied stay of proceedings — to prevent chaos, unfairness or interference with the objects of the CCAA.
42. The stay of proceedings is intended to be interpreted to apply broadly with a view to facilitating creditor approval of plans of compromise and arrangement. The terms of the Initial Order entitle the Applicants and other parties to a broad stay of proceedings which ensures a robust and flexible framework in order to facilitate DIL Plan and District Plan sanction following creditor approval.
43. The Stay in the Initial Order applies to the AB-BC Proceedings. The Initial Order provides that no proceeding or enforcement process in a court shall be commenced or continued against or in respect of the Applicants or affecting the Business or Property absent leave of the Court. In this regard, the Initial Order provides as follows:

No Proceedings against the Applicant or Property

Until and including February 20, 2015, or such later date as this Court may order (the “Stay Period”), **no proceeding or enforcement process in any court (each, a “Proceeding”) shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property**, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court. **[Emphasis added]**.

Initial Order, at para. 19.

44. Although the Applicants are not Named Defendants, the AB-BC Proceedings involve claims that could be viewed as being in respect of the Applicants and are clearly intended to be addressed by the Representative Action Process established in the District Plan and the DIL Plan.

Fifteenth Report of the Monitor at para 30.

45. Further, the Initial Order also provides that all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities in respect of the Applicants or the Monitor, or affecting the Business of the Property, are hereby stayed and suspended and shall not be commenced, proceeded with, or continued except with leave of the Court. In this regard, the Initial Order provides as follows:

No Exercise of Rights or Remedies

During the Stay Period, **all rights and remedies** of any individual, firm, corporation, governmental body or agency, or

any other entities (all of the foregoing, collectively being "Persons" and each being a "Person"), whether judicial or extra-judicial, statutory or non-statutory **against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court...** [Emphasis added].

Initial Order, at para. 20.

46. In *Credit Suisse AG v Great Basin Gold Ltd.* the Court discussed the meaning of the phrase "in respect of" as being "words of the widest possible scope" which, at minimum, should be viewed to signal "an intent to convey a broad set of connections". In this regard, the Court stated as follows:

In *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743 (S.C.C.), at 751, Major J. discussed the Court's earlier consideration of the phrase "in respect of":

[A plain] reading is supported by Dickson J.'s interpretation of almost identical language in *Nowegijick v. The Queen* [1983] 1 S.C.R. 29, at p. 39:

The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. [Emphasis added.]

The extent of the scope of that phrase was, however, tempered by the later comments of the Court in *Sarvanis v. Canada*, 2002 SCC 28 (S.C.C.):

[22] **It is fair to say, at the minimum, that the phrase "in respect of" signals an intent to convey a broad set of connections.** The phrase is not, however, of infinite reach. Although I do not depart from Dickson J.'s view that "in respect of" is among the widest possible phrases that can be used to express connection between two legislative facts or circumstances, the inquiry is not concluded merely on the basis that the phrase is very broad. [Emphasis added].

Credit Suisse AG v Great Basin Gold Ltd., 2015 BCSC 1199 at paras 48-49.

47. Further, the Court in *Sarvanis v. Canada* advised that the phrase "in respect of" must be considered by "looking to the context in which the words are found". This has powerful implications in CCAA proceedings under the design of a

statutorily mandated flexible and practical framework to arrive at the efficient and streamlined resolution of a plan of compromise or arrangement.

Sarvanis v Canada, 2002 SCC 28 (S.C.C.) at paras 23-26.

48. The inclusion of defendants in the Alberta Proceeding and the BC Proceeding who comprise categories of potential defendants in the contemplated Representative Action(s) under the DIL Plan and District Plan seeks to circumvent the process, import confusion, and add unnecessary cost to claimants, the estate, and stakeholders.

Conclusion

49. The CCAA framework is intended to facilitate a streamlined, efficient, and comprehensive process for the ultimate resolution of rights *vis-a-vis* the Applicants and its stakeholders. The DIL Plan, following comprehensive consultation, is fair and reasonable and contains a mechanism for bringing the Representative Action. To permit the AB-BC Proceeding would undermine the purpose of the CCAA and the substantial effort devoted to achieving DIL Plan creditor approval, and cause disruption to the process while the District attempts to advance the District Plan.
50. The legitimacy of the CCAA proceedings must be preserved. The DIL Plan was approved by 92% in number and 87% in dollar value of voting DIL Depositors. The DIL Depositors are aware of and should be able to rely on the DIL Plan, including the Representative Action, being advanced as anticipated, subject to the DIL Sanction Order being granted.
51. The stay of the AB-BC Proceedings is fair and reasonable in the circumstances for the reasons set out above and articulated in the Monitor's Fifteenth Report to Court. The AB-BC Proceedings are directly contrary to the process for litigation contemplated by the DIL Plan, which creditors overwhelmingly approved. Accordingly, the AB-BC Proceedings undermine the collective will of the DIL creditors and are an improper collateral attack on the integrity of the CCAA process. Accordingly, the AB-BC Proceedings ought to be stayed.

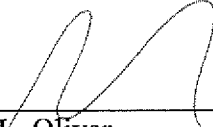
V. RELIEF REQUESTED

52. It is respectfully requested that this Honourable Court stay and suspend the Alberta Proceeding and BC Proceeding pending further Order of this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of February, 2016.

Gowling WLG (Canada) LLP

Per:



Jeffrey L. Oliver
Counsel for the Monitor,
Deloitte Restructuring Inc.

INDEX OF AUTHORITIES

1. *Companies' Creditors Arrangement Act*, RSC 1985 c C-36, ss 11.
2. *Elan Corporation v Comiskey (Trustee of)* (1990), 1 OR (3d) 289, 1990 CarswellOnt 139 (Ont CA)
3. *Re Lehndorff General Partners Ltd* (1993), 17 CBR (3d) 24, 9 BLR (2d) 275 (Ont Gen Div)
4. *Chef Ready Foods Ltd. v Hongkong Bank of Canada* (1990), 4 CBR (3d) 311, 1990 CarswellBC 394 (BCCA)
5. *Re 843504 Alberta Ltd*, 2003 ABQB 1015
6. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60
7. *Re Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587
8. *Re Sulphur Corporation of Canada Ltd*, 2002 ABQB 682
Re Canwest Global Communications Corp (2009), 59 CBR (5th) 72, 2009 CarswellOnt 6184 (Ont SCJ)
9. *Re T Eaton Co* (1997), 46 CBR (3d) 293, 1997 CarswellOnt 1914 (Ont Gen Div)
10. *Re Nortel Networks Corp*, 57 CBR (5th) 232, 2009 CarswellOnt 4806 (Ont SCJ)
11. *Re Tamerlane Ventures Inc*, 2013 ONSC 5461
12. *Re Cinram International Inc*, 2012 ONSC 3767
13. *Re Sino-Forest Corp*, 2012 ONSC 2063
14. *Re Prizm Income Fund*, 2011 ONSC 2061
15. *Re First Leaside Wealth Management Inc*, 2012 ONSC 1299
16. *Re Target Canada Co*, 2015 ONSC 303
17. *Campeau v Olympia & York Developments Ltd* (1992), 14 CBR (3d) 303, 1992 CarswellOnt 185 (Ont Gen Div)
18. *Re Grant Forest Products Inc*, 57 CBR (5th) 128, 2009 CarswellOnt 4699 (Ont SCJ)

19. *Re Grace Canada Inc*, 17 CBR (5th) 275, 2005 CarswellOnt 6648 (Ont SCJ)
20. *Re Nortel Networks Corp*, 2010 ONSC 1304
21. *Re Stelco Inc*, 9 CBR (5th) 135, 2005 CarswellOnt 1188 (Ont CA)
22. *Credit Suisse AG v Great Basin Gold Ltd*, 2015 BCSC 1199
23. *Sarvanis v Canada*, 2002 SCC 28