

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

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.

APPLICANT **DISTRICT SUBCOMMITTEE**

RESPONDENTS THE APPLICANTS IN THESE CCAA
PROCEEDINGS AND ALL DEFENDANTS IN
THE DISTRICT REPRESENTATIVE ACTIONS
NUMBERED: 1603-03142 (ALBERTA QB),
S1611798 (BC SC), S1611966 (BC SC), 1603-
22816 (ALBERTA QB).

DOCUMENT **BRIEF OF THE DISTRICT SUBCOMMITTEE
REGARDING THE APPLICATION TO
EXTEND TIME FOR SERVICE OF
STATEMENTS OF CLAIM**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS
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I. Introduction

1. The District Subcommittee brings this application for extensions for time for service the Statement of Claim, as amended, in the Alberta Court of Queen's Bench Numbered 1603-03142 (the "Alberta District Class Action") pursuant to Rule 3.26 and for an extension for time for service of the Notice of Civil Claim, in the Supreme Court of British Columbia Numbered S1611798 (the "BC District Class Action") pursuant to Supreme Court Civil Rule 3-2.

II. Factual Background

2. The Statement of Claim in the Alberta District Class Action was filed and served on February 22, 2016 and was amended as follows:
 - a. December 16th, 2016 by adding further Defendants and various body amendments (the "First Amended SoC");¹
 - b. December 23rd, 2016 by adding further Defendants and further body amendments (the "Second Amended SoC");
 - c. February 13th, 2017 by making body amendments;
 - d. December 8th, 2017 by adding two proposed Representative Plaintiffs and further related body amendments.
3. The Statement of Claim in the BC District Class Action was filed on December 22nd, 2016.
4. The Statement of Claim as amended in the Alberta District Class Action and the Notice of Civil Claim in the BC District Class Action were not served prior to December 8, 2017 because the previous counsel was of the view that he was prohibited from doing so under the Stay granted under the Initial Order in these CCAA proceedings on January 23, 2016 which Stay was continued until it was lifted by Order of this Court on October 25, 2017.
5. There is a pressing need to have the time for service of the Statements of Claim extended. Without the requested extension, the Statement of Claim as amended in the Alberta District Class Action must be served on the Defendants added by the First Amended SoC by December 15th, 2017 and on the Defendants added by the Second Amended SoC by December 22, 2017 or "no further proceeding may be taken in the action against a defendant who was not served in time",

¹ Affidavit of Glen Mitchell, filed December 11, 2017, paragraph 16.

pursuant to Rule 3.28.² Similarly, the Notice of Civil Claim in the BC District Class Action under the BC Rule 3-2, does not remain in force for more than 12 months unless it is renewed. While under that Rule a renewal can be applied for after the expiration of 12 months, that is discretionary, so the prudent course is to apply for an extension prior to the anniversary of filing December 21, 2017.

6. The Representative Counsel, Higgerty Law, were engaged by the District Subcommittee on November 7, 2017 and had applied for directions of this Court to ensure that there were no procedural concerns and for this application. However, that application was adjourned *sine die* at the court appearance on December 7, 2017 with exception of this application which Your Ladyship directed be heard on Wednesday, December 13th, 2017.
7. Service of the Statement of Claim, as amended, in the Alberta District Class Action and the Statement of Claim in the BC District Class Action were initiated on December 8, 2017 and it is expected that many of the Defendants in each action will have been served by the time of hearing on December 13th, 2017. However, not all the Defendants will have been served. In addition to the potential for defects in attempted services, the following Defendants will not have been served by then, namely:
 - a. David Bode, Roland Kubke, Bill Morgan, John Mueller, Glenn Schaeffer, Marvin Mutschler, Steven Grande, Paul Eifert, Hans Heumann, Grant McMaster, James Werschler, David Schoepp, whose addresses are unknown or uncertain at this time;³ (These individuals were named as directors and Officers of the Encharis Defendants. Unlike other defence counsel who have agreed to accept service on behalf of other Directors and Officers, counsel for Encharis has failed to do so.)
 - b. Shepherd's Village Ministries, which is currently in liquidation and may be subject to a Stay of proceedings.
8. Such service was not initiated sooner than December 8th, 2017 as District Representative Counsel was seeking directions from the Court regarding various procedural steps previously taken in the Representative Action, to ensure that they were in order and to any extent not, to seek the Court's remedial directions. This is particularly important as the Class Members in the Representative Action are typically elderly and their recovery should not be unnecessarily delayed by procedural matters.⁴

² Rule 3.76(2) states that "the action against the new defendant starts on the day on which the new party is added..." , so that is the date from which the one year to serve a statement of claim on such defendants pursuant to Rule 3.26.

³ Affidavit of Glen Mitchell, filed December 11, 2017, paragraph 15.

⁴ Affidavit of Glen Mitchell, filed December 11, 2017, paragraph 16.

9. As such, further time is required for service for Statements of Claim in both class actions to address service deficiencies and procedural matters as apparent and may arise, including but not limited to the following:
 - a. Shepherd's Village Ministries' is in liquidation and therefore may be subject to a stay of proceedings, and so additional time is required to assess whether an application in those proceedings to lift such stay to allow for service of the Statements of Claim in the Alberta District Class Action and BC District Class Action is recommended and if so, to do so.
 - b. Investigation will be required to attempt to locate and serve, with substitutional service as required, those 12 unrepresented individual Defendants, which may take up to the extended time being sought to do so.

III. Application of Case Law

10. The underlying purpose of the requirement to obtain leave of the court to extend time for service remains, as described by the Court of Appeal in *Oberg v. Foothills Provincial General Hospital* (1999), 232 A.R. 263 as:

"a need to balance the ease of meeting a plaintiff's needs with the prevention of undue delay" [paragraph 10]

[And that the rule]

"merely requires that an applicant provide enough information from which it can be inferred that the application for renewal is not simply a delay tactic. An inference that the extension is more than a stalling tactic is sufficient" [paragraph 14]

11. In *Padget Estate v. Padget Estate*, [2014] A.J. No. 1377, the Court states the following principles for the application of Rule 3.64:

"a. there should be some evidence showing attempts to serve;

b. ideally, there should be some explanation for why the defendant has not been served;

c. the purpose of renewal cannot be to delay (Franssen v Thule Towing Systems LLC, 2012 ABQB 657, 84 Alta LR (5th) 316, also requires sufficient information to know that an extension would not constitute a delay tactic); and

d. there should be no prejudice arising to the defendant."[paragraph 33]

12. The above mentioned principles relate to the circumstances of this application as follows:

- a. Service has been attempted and effected on most but not all Defendants;
- b. As previously mentioned, the reason for not serving some of the Defendants was due to a change in District Representative Counsel, the procedural impediment by way of the stays of proceedings, a lack of information regarding the addresses of unrepresented individual Defendants and the failure of Defence counsel to accept service on their behalves. In *Oberg v. Foothills Provincial General Hospital*, the explanation given for requesting an extension for time for service was simply because there was a change of solicitors and that the solicitors required additional time for service. This was sufficient evidence to allow the Court to infer that an extension was required and that the application was not for delay only;
- c. The purpose for renewal is not to delay but to obtain further information as to the whereabouts of the 12 unrepresented individual Defendants, address potential service of the Defendant Shepherds Village Ministries, and to address service deficiencies and procedural matters as apparent and may arise.⁵ In *681210 Alberta Ltd. v. 1335422 Alberta Ltd.*, [2015] A.J. No. 31, the Plaintiff's reason for requesting additional time for service was to make amendments to the pleadings;
- d. There is no actual or apparent prejudice to the Defendants. The onus is on the Defendants to establish prejudice during the proposed renewal period.⁶ In *Padget Estate v. Padget Estate*, [2014] A.J. No. 1377, "the type of of prejudice that must be shown to defeat an application for extension of time brought within the year is prejudice caused by the three month extension itself" [paragraph 37]. Further, "the fact that time for service would have expired but for the extension order is not considered prejudice to the defendant arising from the granting of the order" [681210 *Alberta Ltd. v. 1335422 Alberta Ltd.*, paragraph 23]

13. Further, in *681210 Alberta Ltd. v. 1335422 Alberta Ltd.*, [2015] A.J. No. 31, Justice Prowse found that "the threshold for obtaining an extension of time to serve a statement of claim is low" [paragraph 21].

⁵ Affidavit of Glen Mitchell, filed on December 11, 2017, paragraph 18 and 19.

⁶ *Padget Estate v. Padget Estate*, [2014] A.J. No. 1377, paragraph 23