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 – CANDA, 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. ("DIL")
DOCUMENT:	**BRIEF OF THE RESPONDENTS ELVIRA KROEGER AND RANDALL KELLEN IN SUR-REPLY TO THE APPLICATION FOR JUDICIAL SANCTION OF THE PLAN OF COMPROMISE AND ARRANGEMENT OF THE LUTHERAN CHURCH – CANADA, ALBERTA-BRITISH COLUMBIA DISTRICT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Sugden, McFee & Roos LLP Barristers & Solicitors #700 – 375 Water Street Vancouver, B.C. V6B 5C6 Telephone: 604-687-7700 Fax: 604-687-5596 File No. K-5820(1) Attention: Errin A. Poyner

SCHEDULED TO BE HEARD BEFORE THE HONOURABLE MADAM JUSTICE ROMAINE AT 9:00 AM ON FRIDAY, JULY 15, 2016

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1. District Depositors Elvira Kroeger and Randy Kellen make the following submissions in sur-reply to the submissions of the Monitor in reply with respect to the application for judicial sanction of the Fifth Amended Plan of Compromise and Arrangement of Lutheran Church – Canada, the Alberta – British Columbia District ("ABC District"), filed on June 10, 2016 (the "District Plan").

2. At para. 8 of its reply brief, the Monitor cites authority for the proposition that Convenience Payments are "regular features" in many plans of compromise and arrangement filed in CCAA proceedings. However these decisions offer no guidance to the Court as to the circumstances under which a Convenience Payment will be fair and reasonable.

3. In the first case cited by the Monitor, *Contech Enterprises Inc. (Re)*, 2015 BCSC 129 at para. 27, the proposal before the Court for consideration was a proposal made pursuant to s.55 of the *Bankruptcy and Insolvency Act*. The test for approval, pursuant to s.59(2), was whether the proposal was "reasonable" and whether it was "calculated to benefit the general body of creditor" (at para. 125). The proposal contemplated payment in full to creditors with proven claims of $1,500.00 or less, or who elected to reduce their claims to $1,500.00 (at para. 27).

4. The Court was not asked to consider whether the inclusion of this term in the proposal was unduly prejudicial to the creditors with proven claims in excess of $1,500.00 (significantly less than the Convenience Payment included in the District Plan), whether it put the smaller creditors in a conflict with the larger creditors, or whether it improperly influenced the outcome of the vote. Accordingly, the decision provides little guidance to the Court on the issues before it on this application.

5. In the second case cited by the Monitor, *Target Canada Co. (Re)*, 2016 CarswellOnt 8815, the Court simply reproduces the order sanctioning the debtor company's plan of compromise and arrangement. The order attaches the plan itself, which contemplates a convenience payment of $25,000.00. However, the published case report does not include any reasoning which would assist this Court in determining whether the Convenience Payment included in the District Plan is fair and reasonable.

6. In the third case cited by the Monitor, *Nelson Financial Group (Re)*, 2011 ONSC 2750 at para. 14, the debtor company's plan of compromise and arrangement contemplated a $1,000.00 convenience payment. Again, the court was not asked to consider the fairness of this term to the larger creditors, and there is insufficient information in the reasons to determine the impact of the convenience payment on the larger creditors.

7. At para. 13 of the Monitor's reply brief, the Monitor takes issue with the Kroeger/Kellen submission that value attributable to the NewCo Shares is the same as the value that would be recovered on a forced sale of the Prince of Peace Properties. The Monitor states that the valuation of the NewCo Shares will be based on the CWPC Appraisal and the Colliers Appraisal (neither of which have been disclosed to the creditors), which reflect "a range of forced sale values". The Monitor states also that "it is unlikely that the values attributed to the Prince of Peace Properties in calculating the value of the NewCo Shares will reflect the lowest forced sale values reflected in the CWPC Appraisal and the Colliers Appraisal." The Monitor also notes that the appraised forced sale values do not include costs of marketing and sale.

8. While it <u>may</u> be the case that the value attributed to the Prince of Peace Properties for the purposes of valuing the NewCo Shares will not reflect the lowest appraised forced sale values (whatever those may be), it <u>may</u> also be the case that the actual forced sale price of the Prince of Peace Properties is higher than the lowest appraised forced sale price. These are matters which cannot be predicted with any degree of certainty, and should therefore not form the basis of the Court's decision in this matter.

9. Further, the costs of marketing and sale on a forced sale by a receiver would be equal to the costs of marketing and sale by NewCo, which would also incur management fees during the period of ownership. Accordingly, it is not a valid consideration.

10. At paras. 14 – 18 of the Monitor's reply brief, the Monitor takes issue with the Kroeger/Kellen submission that the sole purpose of the NewCo provisions of the District Plan is to allow for profit speculation by creditors, which is not a legitimate purpose of the CCAA. The Monitor advances the argument that debt-to-equity conversion is a "very common feature of CCAA plans" and that Courts have recognized that debt-to-equity conversions "can be critical to restructurings" (at para. 15).

11. However, the Monitor neither provides any examples of other cases in which similar debt-to-equity conversions were sanctioned, nor does it explain how this particular debt-to-equity conversion is "critical" to the restructuring of the District. In *843504 Alberta Ltd. (Re)*, 2003 ABQB 1015 at para. 14 (upon which the Monitor relies at para. 16) Topolniski J. refers to debt-to-equity conversions as one possible form of restructuring solution, but provides no guidelines as to how the fairness and reasonableness of any particular debt-to-equity conversion may be assessed by the Court.

12. While the CCAA may permit a flexible and innovative approach to restructuring, the Court's jurisdiction to sanction such solutions is limited to those which fulfil the

legitimate purposes and goals of the Act: in the words of the Monitor, those which are "critical to restructuring". The NewCo provisions of the District Plan do not meet that criteria. The only "restructuring" of the District that is contemplated by the Plan is the divestiture of substantially all of its assets, and the cessation of its lending business. Whether the Prince of Peace Properties are sold now and the proceeds distributed, or transferred to NewCo and shares issued to the creditors, is inconsequential to those goals. Accordingly, the Court has no jurisdiction under the CCAA to impose this debt-for-equity conversion upon the minority creditors who oppose the Plan.

13. At paras. 19-22 of its reply brief, the Monitor takes issue with the Kroger/Kellen submission that the District Plan should not be sanctioned because it is merely a "plan to make a plan" which defers the ultimate disposition of the Prince of Peace Properties to the NewCo shareholders and therefore deprives the Court to exercise its jurisdiction to determine whether that disposition is fair and reasonable. The Monitor relies on the decision in *Stelco Inc. (Re)* (2006), 14 B.L.R. (4th) 260 at paras. 4 and 41, for the proposition that the court may approve plans which leave certain aspects to be resolved at a later time.

14. While the court in *Stelco* was content to leave the future corporate structure of the debtor company for later determination, Farley J. strongly rejected the submission of dissident shareholders who opposed the plan on the basis that further attempts to attract investment in the debtor company could in the future result in an infusion of capital sufficient to restore some share value, whereas the plan under consideration would see their shares eliminated in favour of the creditors. His Lordship stated:

> [18] If the existing equity has no value at present, then what is to be gained by putting off to tomorrow...what should be done today. The [dissident shareholders] speculate, with no concrete basis for foundation...that something good might happen. I am of the view that that approach was accurately described in court by one counsel as a desperation Hail Mary pass and the willingness of someone, without any of his own chips, in the poker game willing to bet the farm of someone else who does have an economic interest in [the debtor company].
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> [19] I also think it fair to observe that in the determination of whether someone has an economic value, that analysis should be conducted on a reasonable and probable basis. In a somewhat different context, I observed in *New Quebec Raglan Mines Ltd. v. Blok-Andersen*, [1993] OJ No. 727 (Ont. Gen. Div.) at p. 3:
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>> The "highest price" is not the price which could be derived on the basis fo the most optimistic and risky assumptions without any regard as to their

> likelihood of being realized. It also seems to me that prudence would involve a consideration that there be certain fall back positions. Even in betting on horses, the most savvy and luckiest punter will not continue to stake all his winnings of the previous race on the next (and so on). If he does, he will go home wearing the barrel before the last race is run.

Alternatively there is a saying, "If wishes were horses, then beggars would ride".

15. In other words, the benefit of NewCo Shares to creditors must be assessed on a "reasonable and probable" basis. There is no "concrete foundation" for the Monitor's assumptions that the value of the Prince of Peace Properties may increase, either as a result of market forces or through development. The value of the Properties is just as likely to decline, either as a result of market forces, mismanagement or bad luck. As stated in *Anvil Range Mining Corp.* (2001) 25 C.B.R. (4th) 1 at para. 6 (upon which the Monitor relies at para. 23), baseless scenarios as to future values are of little assistance to the Court. Rather, "...one has to look at the situation based upon what is currently known as to existing facts and what is realistic in the foreseeable future" (at para. 6).

16. The Monitor states that is a "realistic possibility" that the market will improve in the near term. There is no foundation whatsoever for that assertion. What is known now is that the Prince of Peace development, which cannot bring potable water on site or take wastewater off site without the expenditure of many millions of dollars, has been a financial disaster from its very inception. If history is any guide, this development is more likely to continue to founder than to thrive.

17. At paras. 25 – 28 of the Monitor's reply brief, it advances the argument that the Representative Action provisions of the Plan do not compromise claims against third parties or against directors contrary to s.5.1(2) of the CCAA because they vest the right to pursue those claims in the Subcommittee, which has a fiduciary duty to the Representative Action Class.

18. While the Plan gives the Subcommittee the authority to advance claims against third parties and against directors, it does not oblige them to do so. The Subcommittee's fiduciary duties to the Representative Action Class may well come into conflict with their duties to an individual depositor, for example where the Subcommittee declines to pursue a small individual claim in favour of conserving its resources to advance a larger class-wide claim. In those circumstances, the individual depositor has no recourse, except to apply to the court for an order directing the Subcommittee commence his or her action. However, it is the role of the Court to hear and decide claims, not to decide which actions are worthy of being commenced at all. Unimpeded access to the Court is a fundamental constitution right. In order to respect that right, the Court would have to order the

Subcommittee to commence proceedings on every application by a disaffected member of the Representative Action Class. At that point, the entire foundation of the Representative Action provisions of the Plan falls away and it is rendered meaningless.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED: July 14, 2016

Errin A. Poyner
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