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. REGARDING THE SANCTION HEARING FOR THE DIL PLAN OF COMPROMISE AND ARRANGEMENT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Gowling WLG (Canada) 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 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 "**Debtors**") respectfully submits that this Honourable Court should approve the Amended Amended Plan of Compromise and Arrangement of DIL (the "**Plan**") and grant an order sanctioning the Plan (the "**Sanction Order**").

2. The Monitor supports the application to sanction the Plan on the following basis:

   (a) the Plan complies with all of the statutory requirements as well as the previous orders of the Court;

   (b) nothing has been done or purported to be done that is not authorized by the *Companies' Creditors Arrangement Act* (Canada) ("***CCAA***"); and

   (c) the Plan is fair and reasonable.

3. The focus of the Monitor's submissions relate to the provisions in the Plan dealing with releases (Plan Article 8) and the Representative Action (Plan Article 5).

II. FACTS

Background

4. 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 ["**Initial Order**"].

5. The Initial Order appointed Deloitte Restructuring Inc. as Monitor of the Debtors.

> Initial Order at para 29.

6. As set out in the Initial Order, an initial stay of proceedings was imposed until February 20, 2015 (the "**Stay**"), or such later date as a Court may order.

> Initial Order at para 19.

7. Six extensions of the Stay have since been granted. The most recent extension granted an extension of the Stay until April 29, 2016.

> Order of Justice K.D. Yamauchi, filed January 20, 2016, Court of Queen's Bench Action No. 1501-00955.

8. Two orders of the Honourable Justice C.M. Jones were granted on February 20, 2015. The purpose of these orders was to, *inter alia*, allow for the appointment of a DIL creditors' committee (the "**DIL Committee**") to represent the interests of the depositors of DIL, and authorize the appointment of a chief restructuring officer ("**CRO**") of DIL and the District.

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

DIL Plan

9. Under the supervision of the Monitor and the Court, and in consultation with the DIL Committee and the CRO, DIL formulated the Plan for the affected creditors of DIL (the "**DIL Depositors**").

10. The Plan was originally dated November 21, 2015 and was filed on November 23, 2015.

> Plan of Compromise and Arrangement of DIL, dated November 21, 2015, Court of Queen's Bench Action No. 1501-00955.

11. On November 30, 2015, the Court granted an Order authorizing and directing DIL to present the Plan to the DIL Depositors for approval (the "**DIL Meeting Order**"). The DIL Meeting Order set out, *inter alia*, how the DIL Depositors were to receive notice of the meeting to vote on the Plan.

> Order of Justice B.E.C. Romaine, granted November 30, 2015, Court of Queen's Bench Action No. 1501-00955.

12. An amended version of the Plan was dated December 5, 2015 and filed on December 8, 2015.

> Amended Plan of Compromise and Arrangement of DIL, dated December 5, 2015, Court of Queen's Bench Action No. 1501-00955.

13. On December 8, 2015, the Monitor prepared a report for the DIL Depositors for the purpose of providing the DIL Depositors with specific information relating to the Plan.

> First Report to the Creditors of DIL, dated December 8, 2015, Court of Queen's Bench Action No. 1501-00955.

14. A further amended version of the Plan was dated and filed on January 11, 2016.

> Amended Amended Plan of Compromise and Arrangement of DIL, dated January 11, 2016, Court of Queen's Bench Action No. 1501-00955 at Article 1.1 [the "**Plan**"].

15. The Plan generally contemplates the liquidation of the assets held by DIL and the distribution of those proceeds to DIL Depositors through accounts established with Great-West Life Assurance Company. The Monitor estimates, prior to any recovery under the Representation Action that DIL Depositors will recover between 77% and 83% of their original investment as of the filing date.

> Tenth Report of the Monitor, para 32.

16. As mentioned previously, the focus of the Monitor's submissions relates to provisions in the Plan dealing with releases and the Representative Action, which are summarized below.

<u>The Release Provisions</u>

17. The Plan releases (or partially releases) two categories of persons: the "Released Representatives" and the "Partially Released Parties".

> Plan at Article 8.

18. The Released Representatives consist of the Monitor, the Monitor's counsel, DIL's counsel, the CRO, the DIL Committee members and legal counsel for the DIL Committee. Broadly speaking, the Released Representatives are released from all liability relating to the business and affairs of DIL and the restructuring of the Debtors other than liability arising out of fraud, gross negligence or willful misconduct. The Released Representatives are also not released from conduct that is unrelated to the *CCAA* proceedings.

> Plan at Articles 8.1 and 8.2.

19. The Partially Released Parties consist of DIL, the D&O Parties (those parties who are insured parties under the D&O Insurance), the directors and officers, volunteers and employees of the Debtors and independent contractors of DIL who

are individuals and who were employed three days or more a week on a regular basis.

Plan at Article 1.1.

20. The Plan releases the Partially Released Parties from all liability relating to the business and affairs of DIL and the restructuring of the Debtors other than:

(a) claims against the directors as set out in s. 5.1(2) of the *CCAA*;

(b) claims prosecuted by the Alberta or British Columbia Securities Commission arising from compliance requirements of the *Securities Act* (Alberta) and the *Financial Institutions Act* (British Columbia) and the Superintendent of Financial Institutions arising from compliance requirements with the *Loan and Trust Corporations Acts* of British Columbia and Alberta;

(c) any Representative Action Claims that are advanced as part of the Representative Action (as discussed below); and

(d) any D&O Insured Claims advanced as part of the Representative Action (and subject to certain conditions as set out in the Plan).

Plan Articles 8.3 and 8.4.

21. As discussed below, as part of the Representative Action, DIL Depositors can seek to recover any claims not paid under the Plan and not released by Articles 8.1 and 8.3 of the Plan. As such, the Partially Released Parties are not released from any claims of DIL Depositors, except to the extent such claims are not advanced pursuant to the Representative Action.

The Representative Action

22. The Plan governs the procedural rights surrounding the commencement of any litigation, including representative or class action litigation (collectively, the "**Representative Action**") taken in respect of representative action claims (the "**Representative Action Claims**"), as defined in the Plan.

Plan at Article 1.1.

23. The Representative Action Claims include any potential claims of DIL Depositors (whether pursued as part of the Representative Action or not) that seek or could seek to recover the amounts of the claims of DIL Depositors not paid under the Plan and not released by Articles 8.1 and 8.3 of the Plan. In other words, any claim that has not otherwise been compromised as part of the *CCAA* proceedings can be pursued as part of the Representative Action.

Plan at Article 1.1.

24. With respect to the Representative Action, the Plan provides, *inter alia*, that:

(a) A subcommittee (the "**Subcommittee**") will be established by the Sanction Order in accordance with the terms of the Plan. The Subcommittee is authorized to take all necessary steps to commence and prosecute the Representative Action on behalf of the Representative Action Class, including selecting representative counsel ("**Representative Counsel**");

(b) The Representative Action is governed by the terms of the Plan and any subsequent Order within the DIL CCAA proceedings. Should class proceedings be commenced, the *Class Proceedings Act* (Alberta) and the *Class Proceedings Act* (British Columbia) govern the Representative Action except to the extent that such legislation is inconsistent with, or is modified by, the Plan or the Sanction Order;

(c) Those DIL Depositors who elect not to participate in, or opt out of, the Representative Action are not eligible to be members of any class pursuant to the *Class Proceedings Act* (Alberta) or the *Class Proceedings Act* (British Columbia), or any other similar legislation, with respect to any claim that was, or could have been, a Representative Action Claim in any other legal proceedings(s) other than the Representative Action, except for any representative action commenced pursuant to the District plan of compromise and arrangement; and

(d) No legal proceedings shall be commenced by any DIL Depositor or any other person for a claim that is an actual or potential Representative Action Claim, except for any representative action commenced pursuant to the District Plan.

Plan at Article 5.

25. In addition to the representative action provisions in the plan, DIL has also prepared a DIL Subcommittee Order and Charter of the DIL Subcommittee (collectively the "**Subcommittee Documents**"), which will govern the operations and the conduct of the Subcommittee. The Subcommittee Documents will impose obligations upon the members of the DIL Subcommittee to ensure that the Representative Action is managed and overseen by independent DIL Depositors who are acting in the best interests of the participants in the Representative Action.

26. The Subcommittee Documents set out, *inter alia*:

(a) certain procedural requirements surrounding the establishment and composition of the Subcommittee;

(b) the duties and responsibilities of the Subcommittee, including:

(i) providing regular information and updates to DIL Depositors with respect to the Representative Action;

(ii) acting honestly, in good faith and with a view to the best interests of DIL Depositors taking part in Representative Action; and

(iii) ensuring that the Subcommittee is free of conflicts of interest;

(c) the mandate of the Subcommittee, which will include factors such as:

(i) maximizing funds available for distribution; and

(ii) serving in a fiduciary capacity to all DIL Depositors with respect to the Representative Action.

DIL Meeting

27. A meeting of the DIL Depositors to vote on the Plan was held on January 23, 2016 (the "**DIL Meeting**"). The Monitor complied with the notice requirements prescribed in the DIL Meeting Order.

> Twelfth Report of the Monitor, dated January 27, 2016, Court of Queen's Bench Action No. 1501-00955 at paras 18 and 23 [Twelfth Report].

28. During the DIL Meeting, opposition to certain provisions of the Plan dealing with the Representative Action were raised by a limited number of DIL Depositors. The provisions relating to the Representative Action were debated during the DIL Meeting prior to a vote being held on the Plan.

> Twelfth Report, Schedule 6.

29. At the DIL Meeting, 53% of DIL Depositors voted on the Plan and the claims of those DIL Depositors who voted represented 65% of the total proven claims of DIL Depositors. Of the DIL Depositors who voted in person and by election letter, approximately:

(a) 92% in number and 87% in dollar value voted in favour of the Plan; and

(b) 8% in number and 13% in dollar value voted against the Plan.

As such the Plan was approved by the required majority, being two-thirds in dollar value and a majority in number of voting DIL Depositors.

Twelfth Report at paras 25 and 26.

30. In accordance to the resolution that was passed at the DIL Meeting, the DIL Depositors agreed to and accepted the Plan and requested that the Court sanction the Plan.

Twelfth Report at para 26.

III. ISSUE

31. Should the Plan as approved by the DIL Depositors during the DIL Meeting be sanctioned by the Court?

IV. SUBMISSIONS

A. THE REQUIREMENTS FOR PLAN APPROVAL HAVE BEEN MET

32. Pursuant to section 6(1) of the *CCAA*, the Court has the discretion to sanction a plan of compromise or arrangement where the requisite double majority of creditors has approved the plan. The effect of the Court's approval is to bind the company and its creditors.

Companies' Creditors Arrangement Act, RSC 1985 c C-36, s 6(1) [*CCAA*].

33. The general requirements for court approval of a *CCAA* plan are well established:

(a) there must be strict compliance with all statutory requirements;

(b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the *CCAA*; and

(c) the plan must be fair and reasonable.

Olympia & York Developments Ltd v Royal Trust Co (1993), 17 CBR (3d) 1 (Ont Ct J (Gen Div)) at para 17 [*Olympia*].

Canadian Airlines Corp, Re, 2000 ABQB 442 at para 60, leave to appeal refused 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal refused [2001] SCCA No 60 [*Canadian Airlines*].

Canwest Global Communications Corp, Re, 2010 ONSC 4209 at para 14 [*Canwest*].

i) There has been strict compliance with statutory requirements

34. The first and second requirements of the test for the sanction of a plan of compromise or arrangement under the *CCAA* relate to compliance with the procedural requirements of the *CCAA* and of court orders granted during the *CCAA* proceedings. With respect to the first part of the test, factors that may be considered by the courts include whether:

(a) the applicant comes within the definition of "debtor company" under section 2 of the *CCAA*;

(b) the applicant has total claims in excess of $5 million;

(c) the notice calling the creditors' meeting was sent in accordance with the applicable order of the court;

(d) the creditors were properly classified;

(e) the meeting of creditors was properly constituted;

(f) the voting was properly carried out; and

(g) the plan was approved by the requisite double majority.

Olympia at paras 19-21.

Canadian Airlines at paras 62-63.

35. Since the commencement of the *CCAA* proceedings, the Debtors have complied with the procedural requirements of the *CCAA*, the Initial Order and the subsequent Orders granted by the Court during the *CCAA* proceedings.

36. Sections 6(3), 6(5) and 6(6) of the *CCAA* provide that the Court may not sanction a plan unless the plan contains certain specified provisions concerning crown claims, employee claims, and pension claims, which the Plan includes.

CCAA, ss 6(3), 6(5) and 6(6).

Canwest at para 16.

37. Accordingly, it is submitted that the statutory requirements for the sanction of the Plan under section 6 of the *CCAA* have been satisfied as no such claims exist.

ii) Nothing has been done or purported to be done that is not authorized by the *CCAA*

38. With respect to the second part of the test for sanction of a plan of compromise or arrangement under the *CCAA*, courts ought to rely on the reports of the Monitor and on other parties in assessing whether anything has been done or purported to have been done that is not authorized by the *CCAA*.

Canadian Airlines at para 64.

Canwest at para 17.

39. The Debtors have kept the Court apprised of ongoing developments throughout the *CCAA* proceeding by way of several affidavits filed with the Court.

40. The Monitor has also made regular reports to the Court and has made no reference to any conduct or action by the Debtors that is not authorized by the *CCAA*. In connection with motions for extensions of the Stay Period, the Monitor has reported on several occasions that in its view the Debtors have been acting in good faith and with due diligence throughout the course of these proceedings.

41. Accordingly, it is submitted that the second part of the plan sanction test has been met.

iii) The Plan is fair and reasonable

42. When considering whether a plan is fair and reasonable, the Court does not require perfection. Rather the Court will measure the fairness and reasonableness of a plan against the available commercial alternatives, and weigh the equities and balance the relative degrees of prejudice that would flow from granting or refusing the relief being sought under the *CCAA*.

Olympia at para 29.

Canadian Airlines at para 3.

Canwest at para 19.

43. In assessing the fairness and reasonableness of a plan of compromise or arrangement, the Court's discretion ought to be guided by the purpose of the *CCAA* — namely "to enable compromises to be made for the common benefit of the creditors and of the company, particularly to keep a company in financial difficulty alive and out of the hands of liquidators". Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable to liquidation. Courts have also recognized that fulfilling the purpose of the *CCAA* may involve a liquidation, provided the same is proposed in the best interests of creditors generally.

> *Northland Properties Ltd v Excelsior Life Insurance Co of Canada* (1989), 73 CBR (NS) 195 (BC CA) at para 27.
>
> *Anvil Range Mining Corp, Re* (2002), 34 CBR (4th) 157 (Ont CA) at para 32.
>
> *Canadian Airlines* at para 95.
>
> *Canwest* at para 20.
>
> *Lehndorff General Partner Ltd, Re*, 17 CBR (3d) 24 (Ont C J (Gen Div – Commercial List)) at para 7.

44. Factors considered by the courts in considering whether a plan is fair and reasonable in the circumstances of a particular case have included:

(a) classification of creditors and creditor approval;

(b) what creditors would receive on liquidation or bankruptcy compared to the plan;

(c) alternatives to the plan and bankruptcy;

(d) oppression;

(e) unfairness to shareholders; and

(f) the public interest.

> *Canadian Airlines* at paras 96, 137, 143, 145 and 179.
>
> *Canwest* at para 21.

45. A plan need not necessarily provide equal treatment to all parties in order to be equitable. In fact, equal treatment may at times be contrary to equitable treatment. Courts have approved plans of arrangement with differing treatment among creditors where any differences have been disclosed.

> *Keddy Motor Inns Ltd, Re* (1992), 13 CBR (3d) 245 (NS CA) at para 37 and 49.
>
> *Sammi Atlas Inc, Re* (1998), 3 C.B.R. (4th) 171 (Ont Gen Div [Commercial List]) at para 4.
>
> *Canadian Airlines* at para 179.
>
> *Central Guaranty Trustco Ltd, Re* (1993), 21 CBR (3d) 139 (Ont Gen Div [Commercial List]) at para 8-9 [*Central Guaranty*].
>
> *Canwest* at paras 22-24.

46. An important measure of whether a plan is fair and reasonable is the level of approval by creditors. Creditor support for a plan creates an inference that the plan is fair and reasonable and economically feasible.

> *Olympia* at para 36.
>
> *Canadian Airlines* at para 97.

47. As discussed above, of those DIL Depositors that voted on the Plan, 92% in numbers and 87% in dollar value voted in favour of the Plan. Additionally, the DIL Committee approves of the Plan and has been actively involved in the preparation of the Plan. This creates a strong inference that the Plan is fair and reasonable.

> Twelfth Report at paras 25 and 26.

48. The Court ought not to second guess the business decisions reached by stakeholders as a body when considering whether a plan of compromise is fair and reasonable by "descending into the negotiating arena and submitting [the court's] own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants." The courts have noted that a vote by sophisticated parties "speaks volumes as to fairness and reasonableness" and, accordingly, there is a heavy onus on parties objecting to a plan that has been approved by the required majority of creditors.

> *Olympia* at para 37.
>
> *Central Guaranty* at paras 3-4.
>
> *Muscletech Research & Development Inc, Re* (2007), 30 CBR (5th) 59 (Ont Sup Ct J [Commercial List]) at para 18 [*Muscletech*].

49. It is submitted that the Plan is fair and reasonable in the circumstances.

B. RELEASES ARE APPROPRIATE IN THE CIRCUMSTANCES

50. As noted previously, the Released Representatives consist of the Monitor, the Monitor's counsel, DIL's counsel, the CRO, the DIL Committee members and legal counsel for the DIL Committee. The Released Representatives are only released from conduct that is directly or indirectly related to the *CCAA* proceedings other than liability arising out of fraud, gross negligence or willful misconduct.

> Plan at Articles 81. And 8.2.

51. The release of insolvency professionals for liability relating to the insolvency proceedings (other than for fraud, gross negligence or willful misconduct) is common practice. Additionally, Canadian courts have on several occasions approved plans containing broad third party releases.

> *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587 at paras 74-75, leave to appeal refused (2008), 257 OAC 400 (SCC) [*Metcalfe*].
>
> *Angiotech Pharmaceuticals Inc Re,* 2011 BCSC 450 [*Angiotech Pharmaceuticals*].
>
> *AbitibiBowater Inc, Re*, 2010 QCCS 4450 [*AbitibiBowater*].

Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation, 2013 ONSC 1078, at para 36 [*Labourers' Pension Fund*].

52. Claims, including contingent claims, are regularly compromised and settled within *CCAA* proceedings. This includes outstanding litigation claims against the debtor and third parties. Such compromises fully and finally dispose of such claims, and it follows that there are no continuing procedural or other rights in such proceedings. Simply put, there are no "opt-outs" in the *CCAA*.

Labourers' Pension Fund at para 36.

53. It is well established that class proceedings can be settled in a *CCAA* proceeding. As noted by Pepall J. (as she then was) in *Robertson*:

> When dealing with the consensual resolution of a *CCAA* claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceedings settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

Robertson v ProQuest Information and Learning Co, 2011 ONSC 1647, at para 8.

Labourers' Pension Fund at paras 37-38.

54. In the *MuscleTech* proceedings, Ground J. noted that it is "not uncommon in *CCAA* proceedings, in the context of a plan of compromise or arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made." After review of U.S. and Canadian authorities, Ground J. further found that it appeared that "the jurisdiction of the courts to grant Third Party Releases has been recognized both in Canada and the U.S.".

MuscleTech paras 23 and 26.

MuscleTech Research and Development Inc, Re (2006), 25 CBR (5th) 231 (Ont Sup Ct J) at para 8-9.

55. In the *Metcalfe* decision, the Ontario Court of Appeal considered the question of whether a plan of compromise or arrangement under the *CCAA* would contain a release of claims against parties other than the debtor company or its directors and found that:

> On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible

> character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on *all* creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.
>
> *ATB Financial* at para 43.

56. The courts have adopted the findings in the *Metcalfe* decision on several occasions, approving plans of compromise or arrangement in *CCAA* proceedings containing releases of claims against third parties.

> *Canwest* at paras 28-30.
>
> *Angiotech Pharmaceuticals* at paras 12-15.
>
> *AbitibiBowater* at para 73.
>
> *Labourers' Pension Fund.*

57. In considering the appropriateness of the terms and scope of third party releases, the courts will take into account the particular circumstances of a case and the purpose of the *CCAA*:

> The concept that has been accepted is that the Court does have jurisdiction, taking into account the nature and purpose of the CCAA, to sanction the release of third parties where the factual circumstances are deemed appropriate for the success of a Plan.
>
> *ATB Financial* at paras 66, 70-71, 73.
>
> *Labourers' Pension Fund.*

58. *CCAA* courts have approved third party releases in the context of plans of arrangement and settlement agreements where the releases are rationally related to a resolution of the debtors' claims, the releases will benefit creditors generally, and the releases are not overly broad. Factors considered by courts in determining whether to approve third party releases include:

(a) whether the parties to be released are necessary and essential to the restructuring of the debtor;

(b) whether the claims to be released are rationally related to the purpose of the plan and necessary for it;

(c) whether the plan would fail without the releases;

(d) whether the parties who are to have claims against them released are contributing in a tangible and realistic way to the plan;

(e) whether the plan would benefit not only the debtor companies but creditors generally;

(f) whether the creditors voting on the plan had knowledge of the nature and effect of the releases; and

(g) whether the releases are fair and reasonable and not overly broad.

ATB Financial at paras 70-71, 143.

Nortel Networks Corporation, Re, 2010 ONSC 1708 at paras 79-82.

Labourers' Pension Fund.

59. No single factor listed above is considered determinative, and the Court's analysis must take into account the circumstances of each applicable claim.

Kitchener Frame Ltd, Re, 2012 ONSC 234 at para 82.

60. The releases contained in the Plan are appropriate in the circumstances.

61. The Plan represents a compromise that balances the rights and sacrifices of different participants, while bringing resolution to the disputes surrounding the Debtors' operations. The extent of the releases of Released Representatives provided for in the Plan are comparable to the releases provided for in model insolvency orders in Alberta. The release afforded to Partially Released Parties does not impair the ability of any DIL Depositor to pursue a claim against the Partially Released Parties within the Representative Action. The releases contained in the Plan are therefore appropriate in the circumstances.

C. THE REPRESENTATIVE ACTION PROCESS IS FAIR AND REASONABLE

62. As discussed in paragraph 24 of this brief, the Plan establishes a process (the "**Representative Action Process**") whereby the Representative Action can be undertaken for the benefit of those DIL Depositors who elect, or are deemed to elect, to participate.

> Plan at Article 5.

63. There is nothing in the *CCAA* that precludes a plan of compromise and arrangement from setting out a process that impacts a creditor's procedural rights. The *CCAA* is a skeletal statute designed to give flexibility and expediency in the ability of the debtor, with the concurrence if its creditors, to accomplish a restructuring. It does not contain a comprehensive code that sets out all that is permitted or barred.

> *ATB Financial* at para 44.
>
> *Ted Leroy Trucking [Century Services] Ltd, Re*, 2010 SCC 60 at para 57 [*Ted Leroy*].

64. *CCAA* courts have been called upon to exercise their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for a reorganization, and have been asked to sanction measures for which there is no explicit authority in the *CCAA*.

> *Ted Leroy* at para 61.

65. Plans of compromise and arrangement that establish processes that impact or compromise creditors' procedural rights have previously been sanctioned by Canadian courts. For example:

(a) In *Re Stelco Inc.*, the Ontario Court of Appeal upheld a previously sanctioned plan of compromise and arrangement that established a mechanism for resolving entitlements to certain proceeds. Certain creditors argued that the plan should be overturned on the basis that, *inter alia*, the plan denied the creditors the full rights of process to which they would otherwise be entitled under the Rules of Civil Procedure. In upholding the Plan, the Court noted that had the parties and the court intended for this issue to be resolved by way of regular lawsuit, the plan would have contemplated this or the plan would have been silent on the issue such that the affected parties would have been left to their normal remedies.

> *Stelco Inc, Re*, 2006 CarswellOnt 3050 (Ont CA) at para 9.

(b) In *Re Sino-Forest Corp.*, the Ontario Superior Court of Justice denied a request for an adjournment of a proposed sanction order. Certain parties opposed the sanctioning of a plan of compromise and arrangement for several reasons, including that the plan unnecessarily fettered the powers of a future court, namely, a class action case management court, by assigning to the *CCAA* court the power to approve and effectuate class-wide settlements without regard to established statutory and rule-based procedural safeguards found in the Ontario *Class Proceedings Act*. The Court denied the adjournment on the basis that the Court was not being asked to approve the settlement. Rather, what was before the court was a motion to approve the plan, which included the approval of a framework with respect to a proposed settlement of claims against third party defendants.

Sino-Forest Corp, Re, 2012 ONSC 7041 at paras 16 and 19.

(c) In *Re Mid-Bowline Group Corp.*, the Ontario Superior Court of Justice found that a plan of compromise and arrangement made pursuant to section 182 of the Ontario *Business Corporations Act*, which released a creditor's constructive trust claim over certain shares but preserved their right to pursue claims for the profit earned on those shares, was fair and reasonable. The plan was found to be fair and reasonable despite an argument by the creditor that the Court did not have the authority under section 182 to exterminate the substantive or procedural rights of third parties.

Mid-Bowline Group Corp, Re, 2016 ONSC 669 at paras 8 and 45.

66. The Representative Action Process is beneficial to DIL Depositors, the vast majority of whom are seniors, because:

(a) it provides a streamlined process for the commencement of the Representative Action;

(b) it prevents a situation where DIL Depositors are being contacted by multiple groups in relation to class proceedings or otherwise;

(c) increased recoveries may be achieved in settling the Representative Action Claims on the basis that such settlements will be a resolution of any and all claims of DIL Depositors;

(d) it allows for ongoing involvement on the subcommittee of at least one member of the DIL Committee who would have the benefit of information and insight into the *CCAA* proceedings; and

(e) selected DIL Depositors have indicated that they view any involvement in litigation as inconsistent with their personal religious beliefs. The Representative Action Process allows DIL Depositors to opt-out of the Representative Action before litigation is even commenced, should that be their preference.

Ninth Report of the Monitor, dated November 26, 2015, Court of Queen's Bench Action No. 1501-00955 at para 29.

67. Although the Plan modifies some of the processes typically associated with the commencement of class action proceedings, the Plan does not completely remove the Representative Action from the requirements of the Alberta and British Columbia *Class Proceedings Act*. To the extent class proceedings are commenced, the relevant *Class Proceeding Act* will continue to apply to the Representative Action, except to the extent that such legislation is inconsistent with or modified by the DIL Plan or the DIL Sanction Order.

Plan at Article 5.

68. By voting in favour of the Plan containing the Representative Action Process, DIL Depositors are not forfeiting their right to pursue legal action for any shortfall in their claim. Rather, DIL Depositors are agreeing to a process that would see them pursue legal action as a consolidated group under the Representative Action Process.

69. The primary procedural rights that are being altered by the Representative Action (the "**Altered Procedural Rights**") provisions of the Plan are the rights of DIL Depositors to independently retain counsel and commence a representative proceeding without the oversight of the DIL Subcommittee and the direct right to retain and instruct counsel in relation to individual claims that constitute Representative Action Claims.

Plan Article 5.

70. The absence of a unified process similar to the Representative Action Process could operate so as to:

(a) reduce the recoveries available to DIL Depositors on an individual and/or aggregate basis;

(b) result in confusion to DIL Depositors if DIL Depositors are being contacted by multiple different law firms who wish to represent or are representing overlapping actions in multiple jurisdictions; and

(c) result in the inclusion within classes of DIL Depositors who object on moral or religious grounds to their inclusion within such class.

71. Relative to a standard trade creditor, the DIL Depositors are in a particularly vulnerable position. The DIL Depositors are overwhelmingly senior citizens. The funds invested by them in the DIL registered plans represent, in certain cases, the DIL Depositor's retirement funds. The importance of this interest suggests that such individuals should have more transparency into litigation decisions made which affect them and their investments.

72. In the absence of a Representative Action controlled by a subcommittee, it is likely that the interests of DIL Depositors will be represented by class action counsel and a representative plaintiff(s). There may be multiple actions commenced in multiple jurisdictions, of which court intervention may be required in order to resolve carriage of such actions. The parties to such actions may differ. The representative plaintiffs chosen, instructions to counsel and strategies chosen, may conflict. Settlement, if available, may be delayed or more difficult to achieve as a such of the number of parties involved and the different strategies undertaken.

73. All of the DIL Depositors who will be impacted by the Representative Action Process have been provided with the opportunity to file claims, to consider and to vote on the Plan and to elect to opt in or out of the Representative Action Process. The Representative Action Process is not removing any substantive rights from DIL Depositors. Rather, the Representative Action Process is ensuring procedural consistency and an efficient and singular method for dealing with the Representative Action.

74. In such circumstances, the increased transparency and oversight provided by the Representative Action Process and the Subcommittee Documents is warranted in order to ensure that the interests of the DIL Depositors are protected and that the recoveries available under the Representative Action are maximized.

75. A group of DIL Depositors (the "**Opposed Depositors**") retained counsel in order to pursue a potential class action. The Opposed Depositors previously sought the leave of this Court to lift the Stay in order to permit them to pursue their class action claim, however, the Court refused to do so. The primary opposition to the Representative Action provisions in the Plan have been advanced by the Opposed Depositors.

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

76. From the perspective of the Monitor, the substantive rights of the Opposed Depositors are protected, if not enhanced, through the Representative Action Process contained in the Plan. While the Representative Action provisions in the Plan may impact the Opposed Depositors' ability to pursue the Representative Action Claims using their previously retained counsel without approval from the DIL Subcommittee, such litigation remains capable of being pursued through the

Representative Action process. Further, the DIL Subcommittee is required to meet with a least three law firms prior to selecting counsel to represent the DIL Depositors in the Representative Action. It is possible, should she wish to be considered for this role, that the Opposed Depositors' previously retained counsel will be retained by the DIL Subcommittee to purse the Representative Action on behalf of those DIL Depositors that elect to participate in the Representative Action.

Plan at Article 5.3.

77. The Representative Action Process was put to the DIL Depositors for consideration, debated and ultimately approved by the more than the required majority of DIL Depositors in numbers and in value.

78. The Representative Action Process is fair and reasonable because:

(a) it equitably balances the various competing interests of DIL Depositors and other parties;

(b) encourages the timely and fair compensation of the DIL Depositors with Representative Claims by streamlining the Representative Action Process;

(c) the DIL Depositors would not receive a better distribution in the event of a forced sale liquidation of all of the assets of DIL; and

(d) the Monitor and the DIL Creditors Committee are in support of the Plan in general, including the Representative Action.

V. RELIEF REQUESTED

79. It is respectfully requested that this Honourable Court sanction the Plan as voted on by the DIL Depositors and the DIL Meeting.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23 day of February, 2016.

Gowling WLG (Canada) LLP

Per: _____

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

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