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, 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 DISTRICT CREDITORS ELVIRA KROEGER AND RANDALL KELLEN REGARDING THE APPLICATION TO REMOVE THE MONITOR**

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 10:00 AM ON FRIDAY, JULY 15, 2016

I. INTRODUCTION

1. District Depositors Elvira Kroeger and Randy Kellen bring this application for the following orders:

    (a) Removing Deloitte Restructuring LLP as Monitor in these proceedings and replacing it with Ernst & Young LLP ("EY") in its place; or alternatively

    (b) Appointing EY as a Limited Purpose Monitor for the purpose of reviewing the Representative Action provisions of the Fifth Amended Plan of Compromise and Arrangement of Lutheran Church-Canada, the Alberta-British Columbia District (the "ABC District" and the "District Plan") dated June 10, 2016 and rendering its opinion to the Court upon any application for judicial sanction of that Plan pursuant to s.6 of the CCAA with respect to whether the District Plan ("Representative Action") is fair and reasonable to the District Depositors;

    (c) Authorizing EY to retain legal counsel to assist it in rendering its opinion to the Court if it considers it reasonable and necessary to do so; and

    (d) That EY's fees and those of its counsel, to a maximum amount of $150,000.00 plus applicable taxes, shall be paid by the Applicants and be secured under the current Administration Charge or under a second Administration Charge to rank *pari passu* with the current Administration Charge.

2. This application is brought on the following grounds:

    (a) That the Monitor is unable by reason of conflict of interest to provide the Court with a neutral and objective opinion concerning the Representative Action provisions of the Fifth Amended Plan of Compromise and Arrangement of the Lutheran Church - Canada Alberta – British Columbia District (ABC District), dated June 10, 2016 (the "District Plan");

    (b) That the Monitor breached its fiduciary duty to the Court and to the District Creditors by failing to disclose municipal planning documents, including a Master Site Development Plan, Conrich Area Structure Plan, and related inter-governmental appeals, in relation to the Prince of Peace Properties.

Affidavit of Elvira Kroeger sworn February 23, 2016
Affidavit of Randy Kellen filed May 21, 2015, para. 13

II. FACTUAL BACKGROUND

(a) The Appointment of the Monitor

3. Pursuant to the Initial Order of Mr. Justice Yamauchi filed on January 23, 2015, Deloitte Restructuring Ltd. ("DRL") was appointed Monitor in these proceedings.

Respondents' Tab D1 - Initial Order dated January 23, 2015, para. 29

4. Pursuant to the Initial Order, the Monitor had a duty to "report to the Court at such times and intervals as the Monitor may deem appropriate with respect to the Property, the Business, and other matters as may be relevant to the proceedings herein".

Respondents' Tab D1 – Initial Order, para. 30(b)

5. Pursuant to the Initial Order, the Applicants must pay the reasonable fees and disbursements of the Monitor and its counsel, secured by an Administrative Charge of $300,000.00 against the Applicants' Property, which has priority over other such charges and claims.

Respondents' Tab D1 – paras. 34, 36, 40, 42

(b) Monitor's Pre-Appointment Relationship with ABC District

6. In its Pre-Filing Reports, the Monitor disclosed that it had provided consulting services to the ABC District between February 6, 2014 and the date of the Initial Order, including:

   (a) February 6, 2014: to provide an independent evaluation of the potential options relating to the Prince of Peace development and to create a plan for executing the option that was ultimately chosen;

   (b) June 30, 2014: To provide an evaluation of the debt structure of the Church Extension Fund as it related to the District, the members of the District, ECHS, EMSS and the POP Development; and

   (c) July 25, 2014: To act as a consultant regarding the informal or formal restructuring of the Applicants.

Respondents' Tab B1 - Monitor's Pre-Filing Report, dated January 22, 2015

7. On November 28, 2014, and while the Monitor was advising the ABC District in relation to its restructuring efforts, the District sent a letter to CEF Depositors stating that it had "accumulated excess funds with very few ministry projects to fund" which resulted in a lower rate of return for CEF depositors. Accordingly, the District advised depositors that it would no longer be accepting deposits to the CEF.

Respondents' Tab C6 - Affidavit of Lorraine Giese sworn June 17, 2016

8. This was untrue. At the time that the District wrote its November 28, 2014 letter, it was insolvent and unable to meet its obligations to the CEF depositors.

9. On December 1, 2014, the District wrote to CEF Depositor Marilyn Huber and encouraged her to renew her term investment. It also invited Ms. Huber to "remember the Church Extension ministry in your prayers, with your invested dollars and by encouraging others to do the same."

Respondents' Tab C5 - Affidavit of Marilyn Huber, sworn February 24, 2016

10. The Initial Order in these proceedings was filed less than two months later, on January 23, 2015.

Respondents' Tab D1 - Initial Order of Yamauchi J., dated January 23, 2016

11. In its Fourth Report dated June 24, 2015, the Monitor disclosed a "Potential Conflict of Interest". The Monitor advised that it had recently determined that a related professional accounting firm, Deloitte & Touche (now Deloitte LLP) had acted as auditor for the District from 1990 to 1998 or 1999. The Monitor further stated that while its former role as auditor to District did not preclude it from acting as Monitor in these proceedings, it might preclude it from conducting a preliminary review of the District's expenditures in relation to the Prince of Peace development (the "Review") for the period during which it had acted as auditor.

Respondents' Tab B2 - Monitor's Fourth Report, p. 14

12. However, given that the District had failed to produce documentation to support the monies expended on the Prince of Peace development prior to 2006 (the "Advances"), the Monitor took the position that "it was not conflicted from completing the Review to the extent that they can for the period for which documentation is available."

Respondents' Tab B2 - Monitor's Fourth Report, p. 14

(c) The Representative Action

13. The District Plan contains Article 5 ("Representative Action") which, *inter alia*, governs and regulates claims against third parties, including derivative claims brought in the name of District against parties whose acts and omissions have caused or contributed to its insolvency and the resulting claims of its depositors. The Plan contemplates that conduct of the Representative Action (including derivative claims) will be carried by a Subcommittee of the District Creditors' Committee, and that the Representative Action will be the "sole recourse" of the depositors for their claims not otherwise paid or released under the Plan.

Respondents' Tab A - District Plan, Arts. 5.1, 5.5

14. Mrs. Kroeger and Mr. Kellen have, through counsel, have made demand upon District to commence proceedings in negligence against Deloitte & Touche (now Deloitte LLP), in relation to acts and omissions arising in the course of its engagement as auditor to District during the period 1990 to 1998/9, or alternatively to assign to them the District's right of action.

Respondents' Tab C5 - Affidavit of Courtney Clark sworn March 4, 2016, Ex. "A"

15. The District has done neither.

16. In the event that the District Plan is approved by the depositors and sanctioned by the Court, the prosecution of District's claim against Deloitte LLP will be governed by the Representative Action provisions of the Plan.

17. The District Plan contemplates that the Monitor will have an ongoing role in communicating to the depositors about the Representative Action, as follows:

    (a) Receiving Notices of Opting-Out from District Depositors (Art. 5.4, 5.6);
    (b) Providing District Depositors who have not opted out with an estimate of the Representative Action Holdback together with any further information regarding opting out of the Representative Action, the name of Representative Counsel, the deadline for opting out of the Representative Action, and the names of the Subcommittee members (Art. 5.4);
    (c) Changing the status of those District Depositors who have opted out of the Representative Action from participating in the Representative Action to not participating in the Representative Action (Art. 5.6);

(d) Calculating and returning a Depositor's Proportionate Share of Costs after they opt out (Art. 5.6);
(e) In the event that costs will be incurred prior to the commencement of the Representative Action, advising Depositors that this is the case and advising them of the deadline before which they must opt out of the Representative Action if they do not wish to have any amounts withheld pursuant to a Representative Action Holdback (Art. 5.6)

Respondents' Tab A

18. Accordingly, in the event that the District Plan is sanctioned by the Court and a derivative claim is advanced against Deloitte LLP within the context of the Representative Action, the Monitor will be in the position of advising the District Depositors as to the cost of participation and the manner of opting out.

(d) NewCo

19. The District Meeting Order was granted on March 18, 2016. Pursuant to that Order, and with the support of the Monitor, the ABC District has advanced the Plan, which contains a provision whereby District Creditors will receive a *pro rata* distribution of shares in a NewCo, to which will be transferred the Prince of Peace Properties, including the School and Church, the Harbour, the Manor and an undeveloped parcel of adjoining land (Art. 4.2(d));

Respondents' Tab D2 - District Meeting Order dated March 22, 2016
Respondents' Tab A - District Plan, Art. 4

20. The Monitor has endorsed the Plan. In its First Report to Creditors, the Monitor advised the CEF Depositors that accepting NewCo shares would allow them to "benefit from potential upside opportunities that may be available such as through the further expansion of the Harbour and Manor senior's care facilities, through a joint venture to further develop the Prince of Peace Properties or through other options" (underlining added).

Respondents' Tab B3 - Monitor's First Report to District Creditors, para. 40.4

21. Following the issuance of the Meeting Order, the Monitor convened a series of "Information Meetings" in Lutheran Churches across British Columbia and Alberta, which District Depositors were invited to attend. Those meetings took place between April 19 and April 28, 2016. The Monitor invited attendees to cast their votes immediately, and without waiting for the District Creditors' Meeting to be convened on May 14, 2016 in Calgary.

Respondents' Tab B4 - Monitor's memorandum to creditors

re: location of information meetings, dated April 7, 2016

Affidavit of Marilyn Huber, sworn June 26, 2016, para. 8

22. One such Information Meeting took place in Red Deer, Alberta on April 26, 2016. At that meeting, an attendee raised the following matters for discussion:

    (a) That a Master Site Development Plan ("MSDP") had been filed by the ABC District with the municipal government of Rocky View County in December 2012, which presented a framework for the development of the 55-acre undeveloped portion of the Prince of Peace Properties, and which identified several costly infrastructure projects that would have to be completed before development could proceed;

    (b) That Rocky View County had adopted an Area Structure Plan in respect of the Hamlet of Conrich (the "Conrich ASP"), in which the Prince of Peace Properties are located, which stipulates that no development may occur within the Hamlet of Conrich until the specific kinds infrastructure requirements identified in the MSDP are met; and

    (c) That the implementation of the Conrich ASP had been delayed pending appeals raised by the neighbouring cities of Calgary and Chestermere, and that those appeals would not be heard and decided until September 2016.

Respondents' Tab C8 - Huber Affidavit sworn June 26, 2016, paras. 15 – 18

23. The infrastructure projects that the MSDP identifies as prerequisites to development of the Prince of Peace Properties include:

    a. The Prince of Peace Village is not currently connected to the municipal potable water supply, and accordingly potable water is currently trucked into the Prince of Peace Village at a cost of $24,921.00 per month. The MSDP estimates the cost of connecting to the municipal water supply at $4,000,000.00, plus off-site levies for water supply at $3,200,000.00 (Appendix 9, pages 2-3, 5);
    b. The sanitary sewer lift station currently servicing the Prince of Peace Village is operating at capacity, and will have to be upgraded before development or expansion of the remaining Prince of Peace Properties can occur; (App. 9)
    c. There is no dedicated stormwater management infrastructure present on the Prince of Peace site. Instead, sump pumps are used to divert stormwater into the existing sanitary sewer lift station (App. 9).

Respondents' Tab C13 - Affidavit of Randall Scott Kellen, sworn June 28, 2016, para.4, Ex. "A" – "C"

24. In response to the issues raised at the Red Deer Information Meeting, the Monitor made partial disclosure of information concerning the MSDP and the impediments to development identified therein to its website on April 29, 2016. Significantly, the Monitor did not in its memo refer the District creditors to the Rocky View County website, where the creditors could read the MSDP, the Conrich ASP and the Appeals for themselves.

Respondents' Tab B6 - Monitor's memorandum re: Future subdivision and development of properties within the Prince of Peace Development, dated April 29, 2016 ("Monitor's MSDP Memo")

25. After becoming aware of and reading the MSDP, the Conrich ASP and the Appeals for himself, Mr. Kellen telephoned Mr. Vince Biot of the Pocky View County Engineering Department. Mr. Biot advised Mr. Kellen the cost of constructing the potable water, sanitary sewer and stormwater projects identified in the MSDP would cost $20,000,000.00 to $30,000,000.00, and that before Rocky View County would issue a permit for the development of the Prince of Peace Properties, a developer would have to submit a Community Plan and post a construction bond in the amount of $30,000,000.00 to $50,000,000.00 to cover the costs of the infrastructure upgrades. The permitting process alone could take up to two years, and was subject to review and approval by not just Rocky View MD but also the neighbouring municipalities of Calgary and Chestermere.

Respondents' Tab C13 - Affidavit of Randy Kellen sworn June 28, 2016, paras. 9 - 11

(e) The District Creditors' Meeting

26. The District Creditors' Meeting was held on May 14, 2016 in Calgary. At the outset of the Meeting, Mrs. Kroeger's proxy, Mr. Don Specht, brought a motion for the appointment of Mr. Keith Odegard, Chartered Accountant, to be appointed as an independent scrutineer to oversee the counting of the votes.

Respondents' Tab B6 - District Creditors' Meeting Minutes, p. 8

27. The grounds for the motion were the Monitor's conflict of interest arising from related accounting firm Deloitte LLP being a potential defendant to the Representative Action.

The Monitor, acting as Chair of the Meeting, ruled the motion out of order on the grounds that para. 28 of the Meeting Order gave the authority to appoint scrutineers to the Monitor, the Monitor had appointed its own scrutineer, and it did not consider it necessary to appoint any additional scrutineers. The Monitor did not permit the assembled District Creditors to vote on the motion.

Respondents' Tab B6 - District Creditors' Meeting Minutes, p. 8

28. During the course of the Meeting discussion arose concerning the MSDP, the Conrich ASP, the related Appeals and their significance to the development potential of the Prince of Peace Assets.

29. In response to questions by an attendee, the Monitor disclosed that it had been aware of the MSDP since 2014. The Chief Restructuring Officer disclosed that he had been aware of the MSDP since shortly after he was retained in 2015. Ms. Sandra Jory of the District Creditors Committee stated that she had not become aware of the MSDP until after she read the Monitor's memorandum of April 29, 2016 that it posted on its website. She also stated that the District Creditors Committee had not reconvened to consider the information contained in the MSDP since it had been disclosed by the Monitor.

Respondents' Tab B6 - Minutes of District Creditors' Meeting, p. 11

30. One attendee stated that he had received his congregation's proxy prior to the disclosure of the MSDP information. He stated that he required additional time to confer with his congregation concerning this new information before exercising his proxy. A motion for adjournment of the Meeting was made, seconded and passed. The Meeting was adjourned.

Respondents' Tab B6 - District Creditors' Meeting Minutes, p. 20-21

31. On May 20, 2016, the Monitor posted a notice on its website that the Meeting would be reconvened on June 10, 2016 for the purpose of concluding the vote upon the Plan. The notice indicated that Depositors who had already cast their votes could change them. The Monitor did not, however (despite the urging of counsel) provide Depositors with access to new Election Letters to be used for that purpose.

Respondents' Tab B7 - Monitor's memorandum to District Creditors re: Notice of Adjournment of the Meeting of District Creditors, dated May 20, 2016 ("Monitor's Adjournment Memo")

Respondents' Tab C9 - Affidavit of Courtney Clark sworn June 27, Exhibit "E"

32. The District Creditors' Meeting was reconvened on June 10, 2016. The vote was concluded. 83% of voting creditors (1076) representing 76% of dollar value of claims ($65,000,000.00) voted in favour of the Plan, while 17% of voting creditors (218) representing 24% of dollar value of claims ($20,100,000.00) voted against the Plan.

Respondents' Tab B8 - Monitor's 20th Report, p. 8

III. ISSUES

33. Mrs. Kroeger and Mr. Kellen submit that there are three issues on this application:

(a) Did the Monitor breach its fiduciary obligations to the Court and to the District Depositors by failing to disclose the MSDP?

(b) Is the Monitor in breach of its fiduciary obligations to the Court and to the District Creditors as a result of its conflict of interest in relation to the Representative Action provisions of the District Plan?;

(c) Should Deloitte Restructuring LLP be removed from its role as Monitor in these proceedings;

(d) Should Ernst & Young LLP be appointed as Monitor in place of DRL in these proceedings, and if so on what terms?

IV. ARGUMENT

A. Applicable Legislation

34. The *Companies Creditors' Arrangement Act*, RSC 1985, c-36 ("CCAA") provides:

s.23 The Monitor shall:

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

...

s.25 In exercising any of his or her powers or in performing any of his or her duties and functions, the monitor must act honestly and in good faith and

comply with the Code of Ethics referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

Respondents' Tab 25

35. The *Code of Ethics for Trustees*, C.R.C. c. 368 provides as follows:

> **34** Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in the administration of the Act.
>
> ...
>
> **36** Trustees shall perform their duties in a timely manner and carry out their functions with competence, honesty, integrity and due care.
>
> ...
>
> **38** Trustees shall not assist, advise or encourage any person to engage in any conduct that the trustees know, or ought to know, is illegal or dishonest, in respect of the bankruptcy and insolvency process.
>
> **39** Trustees shall be honest and impartial and shall provide to interested parties full and accurate information as required by the Act with respect to the professional engagements of the trustees.
>
> ...
>
> **44** Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the opinion of an informed person to impair, their professional judgment.
>
> ...
>
> **50** Trustees shall not obtain, solicit or conduct any engagement that would discredit their profession or jeopardize the integrity of the bankruptcy and insolvency process.

Respondents' Tab 24

B. Applicable Principles of Law re the Duty of a Monitor in CCAA Proceedings

36. In *Re Winalta Inc.*, 2011 ABQB 399, this Court considered an application by Deloitte & Touche Inc. for approval of its fees as monitor under the CCAA. Deloitte had been appointed by HSBC as its "private monitor". The debtor company alleged that Deloitte

had breached its fiduciary duty and had entered into a conflict of interest by disclosing certain financial information to HSBC without its knowledge or consent. The Court applied the following principals:

> [67] A monitor appointed under the *CCAA* is an officer of the court who is required to perform the obligations mandated by the court and under the common law. A monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders.
>
> [68] Kevin P. McElcheran describes the monitor's role in the following terms in *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005) at p. 236 :
>
> > The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

Respondents' Tab 19

37. In *Canadian Cooperative Leasing Services v. Price Waterhouse Ltd.*, (1992) 128 N.B.R. (2d) 1, [1992] N.B.J. No. 399 (Q.B.) [Q.L.], the Court adopted the following passage from Ellis: *Fiduciary Duties in Canada*, p. 104, para. 4(2)(a) concerning conflict of interest by a court-appointed receiver (at page 27):

> It is important to review the practical manifestations of a concept as ephemeral as "utmost good faith" and heightened loyalty. In essence, the law require [sic] the individual subject to the duty to scrupulously avoid placing himself in a possible or potential conflict of interest. Therefore, the fact that a conflict could have arisen, but did not, does not exculpate the fiduciary from wrongdoing. It is evidenced throughout the case law that judicial departure from the prohibition against the possibility of potential conflict of interest (in other words, any judicial relaxation of the concept, whereby actual conflict must be proved) has caused certain of the judiciary to evaluate the very creation of a fiduciary relationship upon whether or not there has been an operative conflict of interest. This clearly cannot be supported and, in reality, is akin to the proverbial "tail wagging the dog". Entering into a potential conflict of interest is a breach whether or not the conflict is operative; once such a conflict becomes operative to jeopardize the beneficiary or his property, the fiduciary breach would then give rise to the remedies available in law. The point is important: to wait until damage or prejudice actually occurs is to prejudice the beneficiary's right to utmost loyalty and avoidance of conflict. If such a schism in theory is allowed, the law would be encouraging a finding that the duty "piggy-backs" the damage caused rather than premising damage on the basis of duty.

38. A monitor must avoid engagements which could lead to a conflict of interest, including those where it may be required to review the advice given to the debtor company prior to the commencement of CCAA proceedings. It is essential that the Monitor be seen to be completely independent.

Respondents' Tab 8 - *GuestLogix Inc. (Re)*, 2016 ONSC 1047 at para. 33
Respondents' Tab 4 - *Can-Pacific Farms Inc. (Re)*, 2012 BCSC 760 at para. 27

39. As a fiduciary, a monitor has a duty to make the creditors aware of all matters of relevance in the CCAA proceeding.

Respondents' Tab 27 - Ellis, M.V., *Fiduciary Duties in Canada*, v. 1 (Toronto: Thomson Reuter, 2016)
at para. 1-7(d)

40. The monitor has an obligation to act independently and to consider the interests of the debtor and the creditors. If a monitor is not acting in this manner, the court will appoint a replacement.

Respondents' Tab 18 - *Re United Used Auto & Truck Parts Ltd.*,
(1999) 12 C.B.R. (4th) 144: [1999] BCJ No. 2754 (S.C.) at para. 20 [Q.L.]

B. Application of the Law to the Application to Remove The Monitor

(a) The Monitor's Conflict of Interest: Representative Action

41. The Monitor is clearly in a conflict of interest arising from its status as a potential defendant to the Representative Action provisions of the District Plan. It cannot with any degree of neutrality or objectivity advise the Court on the reasonableness and fairness of those terms.

42. The fact that the Monitor is not released from liability for any damages arising from its pre-CCAA conduct as auditor to District does not solve its conflict of interest. The Representative Action provisions of the District Plan contain a number of substantive and procedural benefits for defendants of which the Monitor might take advantage as a defendant. For example, the Plan vests in the Subcommittee the authority to decide which claims to advance in the Representative Action, and which claims to reject. Mrs. Kroeger and Mr. Kellen have made demand upon the District to commence proceedings

against Deloitte LLP, or to assign its right of action over to them. District has done neither. In the event that the Plan is sanctioned and the Subcommittee does not obtain leave to commence a derivative action, Mrs. Kroeger and Mr. Kellen will be barred from doing so themselves. The Monitor therefore potentially benefits from the "sole recourse" provisions of the Plan.

Respondents' Tab C5 - Affidavit of Courtney Clark, sworn March 4, 2016, Ex. "A"

43. Further, the Plan contemplates that the Monitor will have ongoing communications with the District Depositors regarding the cost of participating in the Representative Action, and the means of opting out. It would be entirely improper to have the Monitor fulfilling these duties if it is also a defendant in the Representative Action. For example, in the event that Representative Counsel requires a retainer to prepare an application for leave to commence a derivative claim against Deloitte LLP, the Monitor will be responsible for communicating with the District Depositors as to the amount of the Holdback that will be required to fund that retainer, and advising them that they can opt out of the Representative Action if they don't wish to pay it.

See para. 17, *infra*
Respondents' Tab A - District Plan, Art 5.6

44. The Monitor has, in the past, suggested that if it was named as a defendant to the Representative Action it would simply step down and a new monitor could be appointed. Again, this does not resolve the conflict. Much of the communications between the Monitor and the District Depositors concerning the Representative Action is contemplated to occur before the Representative Action commences. Any direction to the Monitor given prior to the commencement of the Representative Action that it must step down would have the effect of putting the Monitor on notice of an impending claim. That is confidential and privileged information to which the Monitor would not otherwise be entitled.

45. The Monitor's fiduciary duty to the District Depositors and to this Court goes beyond simply stepping down when a conflict of interest becomes operative and prejudice begins to accrue. The Monitor has a duty to avoid potential or possible conflicts of interest. Deloitte LLP's status as a defendant in the Representative Action is foreseeable. To allow the Monitor to continue in its position until prejudice accrues to the District Depositors is, in the words of Mr. Ellis, in *Fiduciary Duties in Canada*, "the tail wagging the dog".

See para. 34, *infra*

(b) The Monitor's Breach of Fiduciary Duty: Material Non-Disclosure

46. In the course of its pre-appointment engagement, the Monitor advised the District in respect of its CEF dilemma, and potential options relating to the Prince of Peace development. In the course of that engagement, the Monitor became aware of the MSDP, the Conrich ASP and the related Appeals. This knowledge undoubtedly influenced the advice that the Monitor provided to the District concerning its plan for the disposition of the Prince of Peace Properties -- a plan that ultimately involved seeking creditor protection pursuant to the CCAA, rather than development.

47. The Monitor proceeded to endorse the District Plan on the basis that it gives District Depositors an opportunity "to benefit from potential upside opportunities that may be available such as through...a joint venture to further develop the Prince of Peace Properties". Having done so, it was obliged to honesty and faithfully disclose to the Depositors everything that it knew about the development potential of the Properties, including that information contained in the MSDP, the Conrich ASP and the Appeals. It did not do so.

Respondents' Tab B2 - Monitor's First Report to Creditors, para. 40.4

48. The Monitor has sought to justify its conduct on the basis that "a vote in favour of the District Plan did not constitute a vote in favour of any particular mandate for NewCo and that further development was only one of the possible mandates available for NewCo."

Respondents' Tab B7 - Minutes of District Creditors' Meeting, p. 11

49. That response is unacceptable. To suggest that information concerning the development potential of the Prince of Peace Properties would not become material unless and until the NewCo shareholders choose a development mandate ignores the Depositors' right to make a fully informed assessment of the "potential upside opportunities" of development before deciding whether to become NewCo shareholders in the first place.

Respondents' Tab B2 - Monitor's First Report to Creditors, para. 40.4

50. Proper and timely disclosure of the MSDP, the Conrich ASP and the Appeals in these proceedings would have required the Monitor to revisit and perhaps comment upon the advice that it gave to the District concerning its "options" for the Prince of Peace Properties and the "plan" for executing that option during its pre-appointment consulting engagement. That would have clearly put the Monitor in a conflict of interest, and required it to step down. Instead, the Monitor concealed the information.

Respondents' Tab 8 - *GuestLogix Inc. (Re)*, 2016 ONSC 1047 at para. 33
Respondents' Tab 4 - *Can-Pacific Farms Inc. (Re)*, 2012 BCSC 760 at para. 27

51. The manner in which the voting process was conducted ensured that the MSDP, the Conrich ASP and the related Appeals did not come to the attention of many voters before their votes were cast. Depositors were able to submit their votes by mail immediately upon receiving the Monitor's First Report to District Creditors, and were invited by the Monitor to vote at the Information Meetings held in advance of the District Creditors' Meeting.

Respondents' Tab C8 - Huber Affidavit, para. 9-10, 22-23

52. Having been confronted with the MSDP, the Conrich ASP and the Appeals during the April 28, 2016 Information Meeting in Red Deer, the Monitor had a duty to ensure that the information came to the attention of each and every District Depositor, and that they were given a meaningful opportunity to read that information and reconsider any votes that had already been cast in favour of the Plan. Instead:

    (a) The MSDP Memo posted to the Monitor's website failed to provide Depositors with information which would have allowed them to access the MSDP, the Conrich ASP and the Appeals and make their own assessment of that information; and

    (b) The Monitor's Adjournment Memo failed to provide Depositors with new election letters and forms of proxy with which those who had already voted could change their vote.

Respondents' Tabs B6, B8

53. There is no doubt that the information contained in the MSDP, the Conrich ASP and the Appeals was material to District Depositors' voting decisions. At least one congregational depositor changed its vote after the Creditors' Meeting was adjourned to allow Depositors to consider the MSDP, Conrich ASP, and the Appeals.

Respondents' Tab C9 - Affidavit of Courtney Clark sworn 27, 2016, Ex. "F"

54. When viewed against the backdrop of the District's false and misleading communications with CEF Depositors in November and December 2014, which were written while DRL was advising the District on its CEF dilemma and on restructuring, the Monitor's non-

disclosure of the MSDP, Conrich ASP and related Appeals might to a reasonable and informed person appear as if the Monitor is prepared to condone and facilitate the District's dishonest conduct.

Respondents' Tab C6 - Affidavit of Lorraine Giese, Ex. "A"
Respondents' Tab C5 – Affidavit of Marilyn Huber sworn February 24, 2016, Ex. "B"

Respondents' Tab 24 - Code of Ethics for Trustees, s. 44

55. The Monitor's material non-disclosure of the MSDP, the Conrich ASP and the Appeals constitute a breach of its fiduciary duty to the District Depositors and to this Court. In order for this Court to have confidence in the opinion of its monitor in coming to a determination as to the fairness and reasonableness of the District Plan, and for the District Depositors and public at large to have confidence in the integrity of these proceedings, DRL must be removed and replaced with a new monitor.

(c) Appointment of Ernst & Young LLP as Replacement Monitor

56. Mr. Neil Narfason of Ernst & Young LLP ("EY") is prepared to assume the role of Monitor, either on a limited or unlimited basis, in place of DRL.

57. Mr. Narfason has provided the following estimate of fees for the engagement:

(a) $75,000.00 to act as a Limited Purpose Monitor for the purpose of reviewing the Representative Action provisions of the District Plan and providing his opinion to the Court;

(b) $125,000.00 to $150,000.00 to assume the role of Monitor in its entirety, provide an opinion to the Court as to the fairness and reasonableness of the Plan as a whole, and to execute the duties of Monitor pursuant to the Plan in the event that the Plan receives judicial sanction.

Respondents' Tab C9 - Affidavit of Courtney Clark sworn June 26, 2016, Ex. "A" – "D"

58. As the Court did upon the appointment of DRL, EY's reasonable fees and disbursements and those of its counsel should be payable by the Applicants and secured by the Administrative Charge. If it is the case that the current Administrative Charge of $300,000.00 is insufficient to secure EY's estimated fees (having regard to accounts already passed by DRL), then a second Administrative Charge should be granted for that

purpose, without prejudice to the District Creditors' right to challenge DRL's fees and disbursements upon the conclusion of these proceedings.

V. SUMMARY

59. The Monitor is an officer of the Court and its role is one of ultimate trust, good faith, and due diligence. The Monitor's duty of neutrality and objectivity allow the Court to place confidence in its advice, and allows the stakeholders and the public at large to place confidence in the CCAA process.

60. In this case, however, the Monitor is neither neutral nor objective. Its independence appears to have been impaired by its prior consulting engagement with the District. Further, it is a third party stakeholder in relation to the Representative Action provisions of the District Plan.

61. The Monitor has not acted with due diligence. It has failed to disclose material information in its possession concerning the Prince of Peace Properties to the Court and to the District Depositors.

62. The Monitor's conduct in this matter threatens to undermine public confidence in these proceedings. In all of the circumstances, the Court may and must replace the Monitor with EY.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED: June 29, 2016

Erin A. Poyner
Counsel for Elvira Kroeger and Randall Kellen