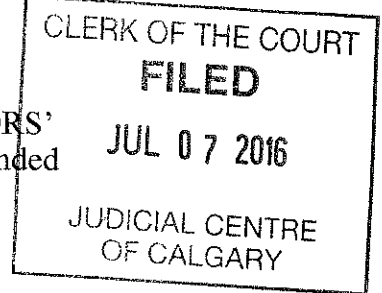


Action No.: 1501-00955
E-File No.: CVQ16LUTHERAN3
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

IN THE MATTER OF THE COMPANIES CREDITORS'
ARRANGEMENT ACT, R.S.C. 1985, c.C-36, as amended



AND IN THE MATTER OF A PLAN OF COMPROMISE
OR ARRANGEMENT OF 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.

PROCEEDINGS

Calgary, Alberta
March 21, 2016

Transcript Management Services, Calgary
Suite 1901-N, 601-5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392 Fax: (403) 297-7034

TABLE OF CONTENTS

Description		Page
March 21, 2016	Afternoon Session	1
Discussion		1
Submissions by Mr. Taman (Fiserve Claim)		4
Submissions by Mr. Oliver (Fiserve Claim)		5
Submissions by Mr. Simard (Fiserve Claim)		5
Order		5
Submissions by Mr. Taman (Other)		8
Submissions by Mr. Oliver (Other)		13
Submissions by Mr. Taman (Garber Brief)		16
Submissions by Mr. Garber (Garber Brief)		16
Submissions by Mr. Oliver (Garber Brief)		16
Submissions by Mr. Garber (Other)		17
Submissions by Ms. Poyner (Other)		22
Submissions by Mr. Simard (Other)		24
Submissions by Mr. Nishimura (Other)		27
Submissions by Ms. Nicholson (Other)		29
Submissions by Mr. Scott (Other)		32
Order		38
Certificate of Record		43
Certificate of Transcript		44

1 Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary,
2 Alberta

3

4 March 21, 2016

Afternoon Session

5

6 The Honourable Madam Justice Romaine

Court of Queen's Bench of Alberta

7

8 F. N. J. Taman

For the Applicant

9 M. Scott

For the Lutheran Church - Canada

10 J. Oliver

For the Monitor

11 D. S. Nishimura

For the DIL Creditors' Committee

12 C D. Simard

For the District Creditors' Committee

13 E. A. Poyner (by telephone)

For E. Kroeger and R. Kellan

14 S. H. Stephens (by telephone)

For Fiserve-Open Solutions and Open Solutions
DTS Inc.

15

16 A A. Garber

For M. Huber and S. Sherman

17 C. Nicholson

For F. Taman and Bishop & McKenzie LLP

18 G. Archibald

Court Clerk

19

20

21 **Discussion**

22

23 THE COURT CLERK:

Order in court, all rise.

24

25 THE COURT:

Good afternoon. Please be seated.

26

27 MR. TAMAN:

Good afternoon, My Lady. My Lady,

28 Mr. Garber had an initial application he'd like to make before we begin.

29

30 THE COURT:

Okay. But before we do that, Mr. Garber, I

31 understand there is -- that Ms. Poyner is on the line and also a Mr. Stephens; is that

32 correct?

33

34 MR. STEPHENS:

Yes, My Lady.

35

36 THE COURT:

Scott Stephens. I'm just not sure who

37 Mr. Stephens is so, Mr. Stephens, I'd ask you just to identify who you are and who you

38 act for.

39

40 MR. STEPHENS:

Yes, My Lady. I am counsel Fiserve-Open

41 Solutions Canada Inc. and Open Solutions DTS Inc. and I believe the only -- the -- well,

1 the only matter I'm -- reason I'm appearing before Your Ladyship today is because
2 (INDISCERNIBLE) entered into a settlement agreement with the petitioners that is now
3 subject only to your approval.
4

5 THE COURT: Okay. Thank you. Thank you, Mr. Stephens.
6 Okay. Mr. Garber?

7
8 MR. GARBER: My Lady, I provided to the Court this morning
9 affidavits of Marilyn Huber and Sharon Shuber that were sworn March the 19th seeking
10 leave of the Court to file those affidavits. I understand that there are no objections from
11 any of the counsel present so I seek leave of the Court to do so.
12

13 THE COURT: Okay. Any objection? Okay. No, that's fine.
14 Yes, go -- I'll give you that leave.
15

16 MR. GARBER: I have one of my sons with me, who is
17 studying math and physics at university but he has volunteered to do his first task as -- in
18 the legal business, which is to go downstairs and file them.
19

20 THE COURT: Okay. That's -- that's fine.
21

22 MR. GARBER: Thank you.
23

24 THE COURT: Thank you. Okay. Mr. Taman.
25

26 MR. TAMAN: My Lady, I guess we'll start with the
27 introductions, which probably would have been useful prior to Mr. Garber starting but, for
28 the record, the name's Taman, initial F., I'm on for all of the applicants. To my right is
29 Mr. Oliver, my friend who is counsel for the Monitor. A representative of the Monitor is
30 in the gallery. Behind me to my far right is Mr. Nishimura, who is counsel for the DIL
31 Creditors' Committee. Next to him is Mr. Simard, who is counsel for the District
32 Creditors' Committee. Behind me to my left is my friend Mr. Scott, who is counsel for
33 Lutheran Church - Canada, which is the national church body. Of course you have met
34 Mr. Garber, who is on for two plaintiffs in a proposed class action filed in Alberta. On
35 the phone, as mentioned, is Mr. Stephens, who is counsel for Fiserv, one of the trade
36 creditors, Ms. Poyner, who is counsel for two plaintiffs in the proposed class action filed
37 in BC. And then at the back, on my right, is Ms. Nicholson, who's counsel for myself
38 and Bishop McKenzie LLP. I will mention to Her Ladyship that Ms. Elmquist, who is
39 counsel for the public trustee, had indicated an intention to be here today a couple of
40 weeks ago. I haven't heard from her either way, however, it is 10 after, she's been served
41 with all the material so I would suggest proceeding and, if she's late, then we can --

1

2 THE COURT: Sure. What's the interest of the public trustee?

3

4 MR. TAMAN: A number of the individuals who will be
5 receiving payouts during the -- from this are going to be minors.

6

7 THE COURT: Okay.

8

9 MR. TAMAN: Or will still be minors when these payouts
10 happen, so.

11

12 THE COURT: Okay. I should also say, although it's probably
13 become apparent, that I am suffering from a very bad cold and cough so I may be
14 proceeding with -- with a lot of throat lozenges through today, so I -- I apologize to
15 everyone if you can't hear me or can't understand me. Thank you.

16

17 MR. TAMAN: My Lady, we can start perhaps with service.
18 As you're aware, the initial order allows posting as well as email and courier. There is a
19 service letter. The application for this particular matter was filed some time ago, February
20 16th, as was one of the affidavits. Those were, in fact, posted on February -- or, sorry, on
21 February 16th, rather. Posted and served on February 16th and 17th. The application was
22 originally before Justice Streckf, who adjourned this matter sine die. Notice was provided
23 to the service list on March 7th that the matter was going to return last week before
24 Madam Justice Horner, on the 15th. That was also posted as well as being served on
25 everyone and then this matter was adjourned in front of Her Ladyship so we are seeking
26 to have service endorsed on all of the affidavits.

27

28 THE COURT: Okay. Any submissions on service? Okay.
29 I'll find service to be good and sufficient. Thank you.

30

31 MR. TAMAN: Thank you, My Lady. I'm also going to ask
32 the clerk to pass up a sort of burgundy folder that contains the orders for today.

33

34 THE COURT: Okay.

35

36 MR. TAMAN: What I've provided you with, My Lady, is a
37 new cover page for the Fiserv consent order which I believe you already have the body
38 of. I have provided you with the order we are seeking today, as well as a blackline of the
39 changes that have arisen which are largely, I think, date related on the -- on the -- from
40 the one that was filed with the application.

41

1 THE COURT:

Okay.

2

3 MR. TAMAN:

I'm also going to ask her to pass up a red folder. This morning Mr. Sherman swore an affidavit with a revised version of the district plan. I will go through those changes shortly, but essentially they are quite minor changes, largely just fine-tuning of the issues with regard to the articles and the bylaws of NewCo and so I think they're non-controversial. We'll undertake to file the original, which has been passed up to you.

9

10 THE COURT:

Okay.

11

12 **Submissions by Mr. Taman (Fiserve Claim)**

13

14 MR. TAMAN:

We propose to start today, My Lady, with the issue of the Fiserv claim because, if you've read that order, then Mr. Stephens is not going to be required to argue with regard to class so we can simply and shorten this particular application.

18

Fiserv is a trade creditor of the District. Their claim was disallowed in part by the Monitor and they have disputed that partial disallowance. Now, Fiserv was originally going to oppose the application for a plan order on the basis they believe that they should be in a separate class. After some negotiation, the District and Fiserv has come to a settlement of Fiserv's claim. The settlement is set out in the consent order that was provided to you. Their claim is to be allowed in full in the amount of \$268,200. They will not receive any shares, but they will receive the cash payments. We're estimating that's going to be somewhere around \$50,000, My Lady, and they will be provided a release.

28

With respect to the release, one of the arguments we raise as part of our settlement is that there is an argument with regard to some funds that were previously paid to Fiserv, perhaps being amounts that should be returned and so we are -- they're asking for release of those amounts. We're going to probably end up sawing it off roughly in about the middle between our best case and their best case.

34

All of this is contingent on the District plan actually being successful. If it's not, then obviously all bets are off. We believe it's a fair and reasonable settlement. It avoids what's likely to be an expensive court application to fight out this claim. It really is something of a midway point and, if the plan doesn't proceed, as I say, there's no prejudice to anyone in any event because the claim will then not be compromised and the releases won't go forward. Subject to any questions you have, My Lady, that's my submissions with regard to this aspect of this -- or this afternoon's relief, rather.

41

1
2 THE COURT: Okay. Thank you. Any submissions on the
3 Fiserv settlement? Mr. --

4
5 MR. STEPHENS: My Lady, I have nothing to add.

6
7 THE COURT: Okay. Thank you. Mr. Oliver?

8
9 **Submissions by Mr. Oliver (Fiserve Claim)**

10
11 MR. OLIVER: Thank you, My Lady. As the Monitor notes in
12 paragraph 21 of its 16th report, the Monitor is supportive of this settlement. The Monitor
13 also notes that the District Creditors' Committee is also supportive. Thank you.

14
15 THE COURT: Okay. Mr. Simard?

16
17 **Submissions by Mr. Simard (Fiserve Claim)**

18
19 MR. SIMARD: My Lady, on that last point, yes, the District
20 Creditors' Committee, whom I represent, is in favour of the settlement. You will see in
21 the consent order that my signature is not attached and that's just because I didn't get that
22 signature back to Mr. Taman's firm last week, but -- but we do --

23
24 THE COURT: Okay.

25
26 MR. SIMARD: -- support and consent to the order.

27
28 **Order**

29
30 THE COURT: Okay. Great. Thank you. Anyone else want
31 to make any submissions on the settlement? Okay. I find that the settlement is
32 reasonable, particularly given the positions of the Monitor and the District Committee and
33 I'm prepared to approve it.

34
35 I'm sorry, Mr. Taman, I don't -- I don't seem to have that order.

36
37 MR. TAMAN: I would pass up through madam clerk another
38 copy.

39
40 THE COURT: Have you got clean copy? Great. Thank you.

41

- 1 MR. TAMAN: I do, My Lady. This one's actually originally
2 signed by me. It is missing Mr. Simard's signature, as everyone else's.
3
- 4 THE COURT: Okay. There's a fair bit of --
5
- 6 MR. TAMAN: I haven't swapped off the front page on that
7 copy.
8
- 9 THE COURT: Okay. Okay. There were -- there's a flurry of
10 paper at the last minute so I may have missed it.
11
- 12 MR. TAMAN: Madam Justice Horner had had a copy so I just
13 assumed it had --
14
- 15 THE COURT: Okay.
16
- 17 MR. TAMAN: -- survived the transfer.
18
- 19 THE COURT: Okay. Thank you. And on that, Mr. Oliver, I
20 have your -- I have the stay order, which I've signed. Maybe this is an opportune time to
21 pass it down to you.
22
- 23 MR. TAMAN: And, My Lady, I have leave to swap off the
24 front page with the one that was provided to you this morning --
25
- 26 THE COURT: Okay. Yes.
27
- 28 MR. TAMAN: -- or this afternoon.
29
- 30 THE COURT: This afternoon. Okay. Thank you.
31
- 32 MR. TAMAN: Thank you.
33
- 34 THE COURT: Perhaps, as well, I should at this point tell you
35 that I have received today a letter from a Mr. Binhardt (phonetic) in Fairview, Alberta.
36 I've made copies for -- for the counsel who are here. I may not have made enough
37 copies, but I'll -- I'll pass them around. Basically, Mr. Binhardt, which is made to
38 terminate the CCAA proceedings, he's -- he's not happy at all with the proposed land or
39 the proceedings. And I note that this is not evidence, of course, it's just his letter, he's
40 asked me to respond to him, in fact to contact him, and just on the record I'm going to
41 say of course I'm not able to do that, but I have -- I will -- made his letter part of the

- 1 proceedings and also the sanction hearing if we get that far. Okay. Thank you.
2
- 3 MR. STEPHENS: My Lady, my apologies, if I may interrupt. My
4 client's interests, once the -- the settlement's approved, has come to an end, if I may
5 request your leave to depart for the -- for the balance of this application?
6
- 7 THE COURT: Yes, that's fine. Thank you, Mr. Stephens.
8
- 9 MR. STEPHENS: Thank you, My Lady.
10
- 11 THE COURT: I'm sorry that there aren't enough copies, but
12 I'm sure you'll be able to remedy that. And, Ms. Poyner, if -- I'm sure Mr. Garber will
13 give you a copy. Ms. Poyner, are you there? Oh, maybe we've lost her.
14
- 15 MS. NICHOLSON: Ms. Poyner?
16
- 17 THE COURT: I guess we have. Do you want to try again
18 before we proceed?
19
- 20 THE COURT CLERK: I can, for sure.
21
- 22 MR. GARBER: Those are perhaps the risks that you take when
23 you're vacationing in a foreign country - Mexico.
24
- 25 THE COURT: Yeah. Okay. Maybe it's time for lunch or
26 something.
27
- 28 MS. POYNER: Errin Poyner.
29
- 30 THE COURT: Ms. Poyner, it's Justice Romaine. I'm sorry, it
31 appears that we lost you for a few minutes there.
32
- 33 MS. POYNER: Thank you, My Lady.
34
- 35 THE COURT: Okay. You haven't missed much. We just
36 proceeded with the Fiserv claim and approved it and I passed --
37
- 38 MS. POYNER: Yes, I was -- I heard that.
39
- 40 THE COURT: Oh, okay. Okay. And I passed out a letter
41 from a depositor and I'll ask Mr. Garber if he'll send you a copy of it. Mr. Garber --

1
2 MR. GARBER:

I will do that.

3
4 MS. POYNER:

Thank you, My Lady.

5
6 THE COURT:

Okay. Thank you. Okay. Mr. Taman?

7
8 **Submissions by Mr. Taman (Other)**

9
10 MR. TAMAN:

Thank you, My Lady. The second application today is seeking approval of the plan order for the District that's been provided to you. In -- just as a bit of background, the EMSS and ECHS plans have been sanctioned by Justice Yamauchi on January 20th, 2016. The DIL Creditors' meeting was held January 23rd, 2016. The plan was approved. We had the sanction hearing in front of you and that has been, essentially, adjourned in terms of a decision until this particular plan is sanctioned or that -- that whole process, I guess, comes to an end one way or another.

17
18 The four plans, as we noted when we were before you last time, are interactive to a greater or lesser extent depending on the entity involved. Each deals with their own unique aspects and certainly are all designed to stand alone if necessary, but they are designed to better work together and the District plan is essentially the last component.

22
23 We've worked with the Monitor, the counsel for the Creditors' Committee and the Creditors' Committee, as well as counsel for the Monitor finalized these plans. During the course of this, we received feedback from another -- a number of other counsels, including Ms. Elmquist from the Public Trustee, as well as Ms. Poyner. We've incorporated some of these changes. We have also incorporated other changes that have emerged during the plan process for the other three entities. There may well be further amendments to the plan and we've covered that possibility off in the plan order. However, we are seeking to have a meeting called on May -- May 14th, 2016 at the Telus Convention Centre.

32
33 Now, I'll mention we inadvertently filed an amended plan which we had -- we had intended to have an affidavit around and we did that. In any event, there's no harm. We've passed up to -- up to you today an affidavit containing a revised version. Essentially the -- there are minor versions and they're all around clause 7.1

37
38 THE COURT:

Okay. Okay.

39
40 MR. TAMAN:

So in 7.1 the main changes here are that we've noted that the bylaws are also attached, not simply the articles. There is a change to

1 7.1(d) to note that the bylaw is attached. To 7.1(d)(i) to note that NewCo is not able to
2 not able to incur -- occur -- incur, rather, indebtedness in excess of 10 percent of its net
3 asset value.

4
5 In 7.1(d)(ii), which notes the mechanism that will be used for shareholders to set up an
6 informal, I guess, market -- closed market, OTC market for exchanging shares amongst
7 one another and then there are also some minor changes to the bylaws and articles to
8 reflect those particular changes. Those are the most significant changes that have
9 emerged from this particular exercise. All of them are more just finetuning than anything
10 particularly material and obviously this is the version of the plan that will be forwarded to
11 the -- to the various creditors.

12
13 I will note that the Monitor has noted this is probably supposed to be an amended
14 amended plan now that we've filed -- inadvertently filed that other one so that is likely to
15 be a change you will see on the version that's circulated.

16
17 THE COURT: Okay.

18
19 MR. TAMAN: All right.

20
21 THE COURT: Okay.

22
23 MR. TAMAN: Now, as you mentioned, the plan has been
24 subject to extensive negotiation and comment by a variety of parties. The plan is
25 supported by the Monitor, by the majority of the District Creditors' Committee and the
26 Monitor has noted that they feel the plan is fair and reasonable. It appears to be in the
27 best interests of all the parties. We also believe the plan is reasonable and will be
28 supported by a majority of the creditors. Our view, it is neither unrealistic nor
29 unworkable and, as such, we believe it's appropriate to seek to put it before the creditors
30 for their approval. Subject to any questions that you may have and any response I might
31 have to any of the other comments, those are my initial submissions, My Lady.

32
33 THE COURT: Okay. Mr. Taman, I'm not sure whether my
34 questions -- my questions concern the plan.

35
36 MR. TAMAN: Yes.

37
38 THE COURT: They -- they kind of arise from the Monitor's
39 14th report so I could ask Mr. Oliver or I could ask you. Perhaps I should, since this is
40 your plan --

41

- 1 MR. TAMAN: Sure.
- 2
- 3 THE COURT: -- I should start by asking you.
- 4
- 5 MR. TAMAN: Absolutely, My Lady.
- 6
- 7 THE COURT: If you could just refer to the Monitor's 14th
8 report, that would be -- that would be useful, I think. And my first question is, the
9 summary of the book values of the assets held by the District excludes mission
10 remittances which are being held in trust and -- and my question is simply how much is
11 that? The Monitor, I think, is able to help us.
- 12
- 13 UNIDENTIFIED SPEAKER: Yeah. I don't think that's (INDISCERNIBLE)
14 to do with (INDISCERNIBLE). I believe there is (INDISCERNIBLE) --
- 15
- 16 THE COURT: I'm sorry, I can't hear you. My hearing is kind
17 of bad because of this, too, so.
- 18
- 19 UNIDENTIFIED SPEAKER: Oh, sorry. (INDISCERNIBLE) I believe as of
20 the date of this report there was about 100,000 in mission remittances --
- 21
- 22 THE COURT: Okay.
- 23
- 24 UNIDENTIFIED SPEAKER: -- (INDISCERNIBLE) 18,000
25 (INDISCERNIBLE) going out to (INDISCERNIBLE)
- 26
- 27 THE COURT: Okay. Thank you. And the Monitor says that
28 will be used in the District's ongoing operations. Can you -- can you just give me a little
29 bit more what --
- 30
- 31 MR. TAMAN: Sure (INDISCERNIBLE)
- 32
- 33 THE COURT: Are the mission funds earmarked for specific
34 purposes?
- 35
- 36 MR. TAMAN: Oh, mission funds, My Lady, are -- are
37 something that were approved for transfer. So this goes back to quite early on in the
38 process. The way that the -- the funding in the Lutheran Church - Canada has worked on
39 a global basis nationally now, each level is somewhat independent from the other. So,
40 although there is interconnections between the synod, represented by my friend Mr. Scott,
41 and the District, in fact three districts, they are still independent. They're -- they're

1 executive, if you will, in their leadership or actually elected from membership within that
2 geographic area.

3
4 In turn, there are a number of congregations and pastors who are members of each district
5 as well as being members of each synod. The way the cash normally flows, unless there
6 is a direct donation from a congregational member to the synod or to the district,
7 congregational members will make donations to their congregations. Those congregations
8 in turn determine an amount that they wish to send to the district as mission remittances.
9 Often that's around 10 percent, because that's the traditional Christian tithe, if you will,
10 but there's no requirement anywhere.

11
12 THE COURT: Yes.

13
14 MR. TAMAN: Of that amount, the district often will then
15 send -- well, does in fact send a portion of the amounts they receive from congregations
16 to the synod which has been around 30 percent, if memory serves. I'm working a bit
17 without a net here so my apologies if the percentages are off.

18
19 THE COURT: That's okay. I understand that but, yeah.

20
21 MR. TAMAN: But they send a percentage to the national body,
22 the synod, and they use that for their operations. So that is normally the main source of
23 operational funds at each level. One of the issues that --

24
25 THE COURT: Yeah. And I'm just --

26
27 MR. TAMAN: Oh --

28
29 THE COURT: -- my question is what about the rest of the
30 funds? What --

31
32 MR. TAMAN: Yeah. So the rest of the funds that don't go to
33 the synod are actually operational funds that are used by the district in its day to day
34 operations.

35
36 THE COURT: Okay. Okay. Thank you. My next question is,
37 paragraph 18, the treatment of eligible affected creditors. I understand it, but there is a --
38 it's -- the -- the convenience -- convenience payment would take place either following
39 the appeal of the sanction order or another date that may be agreed in writing by the
40 District and the Monitor, the effective date. Is this supposed to be the later of the expiry
41 of the --

1
2 MR. TAMAN: That's correct, My Lady.
3
4 THE COURT: Oh, okay. It isn't -- it isn't drafted that way, at
5 least in your report, Mr. Oliver. Maybe it's more clear in the -- in the plan. I just wanted
6 to make sure. You're not thinking of delaying the inconvenience payment for any reason
7 other than the appeal period?
8
9 MR. OLIVER: That's correct. And we'll -- we'll ensure that
10 that's --
11
12 THE COURT: Okay.
13
14 MR. OLIVER: -- adequately . . .
15
16 THE COURT: Okay.
17
18 MR. TAMAN: I think the only reason we would consider
19 delaying it is if for some reason there wasn't sufficient funds in order to make the
20 payment. I think that was the reason for the wording as -- as it is set there. That's -- that
21 doesn't appear to be the case at this point.
22
23 THE COURT: Okay. Okay. Now, the transfer -- the transfer
24 of -- of properties for NewCo shares will be in partial satisfaction of the District ECHS
25 mortgage, which I understand to be about 82 million now --
26
27 MR. TAMAN: That's correct, My Lady.
28
29 THE COURT: -- what happens to the rest of the -- of the
30 mortgage?
31
32 MR. TAMAN: That remains an outstanding debt, My Lady, at
33 that point.
34
35 THE COURT: To the District?
36
37 MR. TAMAN: To -- yeah, in favour of the District from
38 ECHS.
39
40 THE COURT: Yeah. Okay.
41

1 MR. TAMAN: ECHS may receive additional funds through the
2 course of sale of some assets that -- which is unlikely since most -- most things are being
3 rolled over and I think everyone -- thing's been dealt with, but it remains in place, My
4 Lady.

5
6 THE COURT: Okay. I think that that -- those were my only
7 questions. Yeah, that's it. Thank you.

8
9 MR. TAMAN: Thank you, My Lady.

10
11 THE COURT: Okay. Mr. Oliver?

12
13 **Submissions by Mr. Oliver (Other)**

14
15 MR. OLIVER: My Lady, for the record, Jeffrey Oliver for the
16 Monitor, Deloitte Restructuring. To begin with, I'll just quickly review service if I may.
17 The 14th report of the Monitor was served on the service list on the 18th of February. It
18 was posted on the website on that same date. The 16th report of the Monitor, which is
19 also before Your Ladyship, was served on the service list on the 14th of March, and there
20 is an affidavit of service on file in that regard. And as Your Ladyship is well aware, the
21 17th report was only finalized on Friday. It was served on the service list on that date
22 and was also posted on the website of the Monitor on the same date so I do undertake to
23 file an affidavit of service with respect to that report shortly.

24
25 THE COURT: Okay. And I understand from his brief that
26 Mr. Garber has seen the confidential portion of that report.

27
28 MR. GARBER: That's correct, My Lady.

29
30 THE COURT: And has Ms. Poyner as well?

31
32 MR. OLIVER: Yes, she has, My Lady.

33
34 THE COURT: Okay.

35
36 MS. POYNER: Yes, I have, My Lady.

37
38 THE COURT: Thank you. Thank you. Okay. Go ahead.

39
40 MR. OLIVER: My Lady, for the reasons that are enumerated
41 by the Monitor in its various reports, it is supportive of the District's application for a

1 meeting order. How I propose to proceed, if I may, is to simply address one of the issues
2 that was actually discussed about a monitor in the 17th report which has to do with some
3 valuation matters --

4

5 THE COURT: Right.

6

7 MR. OLIVER: -- and the sealing order application as well.

8 And then the balance of the Monitor's submissions are contained in the Monitor's report,
9 but I do anticipate we will have some comments in response to any submissions of
10 Mr. Garber or Ms. Poyner so, if it's okay with Your Ladyship, I suggest that that aspect
11 be deferred until we have an opportunity to hear from them.

12

13 THE COURT: Sure.

14

15 MR. OLIVER: Okay. Thank you. One of the matters that
16 Your Ladyship will have noted is addressed in the 17th report of the Monitor is the fact
17 that the Monitor has, in consultation with the District Creditor's Committee, agreed to a
18 revised process in relation to the valuation of the NewCo shares and the purpose of doing
19 so is to ensure that any valuation exercise which is performed by the Monitor is reviewed
20 by a third party firm that is retained by counsel to the District Creditor's Committee --

21

22 THE COURT: Right.

23

24 MR. OLIVER: -- and that that firm feels it is -- well, and to
25 frankly present an alternate valuation at which point there exists a mechanism to either
26 bring them both before this court or for there to be agreement. So the relevance to this,
27 as is noted in the report, is the value of the shares will impact the shortfall of District --
28 District depositor claims which will in turn influence the potential amounts that can be
29 advanced on the representative action. So I just wanted to ensure that Your Ladyship was
30 aware of that.

31

32 THE COURT: M-hm.

33

34 MR. OLIVER: Thank you. In respect to the sealing order, My
35 Lady, I appreciate it's somewhat unusual for you to see a draft report of the Monitor to
36 creditors. Typically those are documents that the Monitor simply prepares and sends out.
37 In this instance, however, because of the fact that there were disclosure concerns raised
38 upfront by . . .

39

40 THE COURT: Sorry, Mr. Oliver.

41

1 MR. OLIVER: Yeah. Yes. No worries, My Lady. By
2 Ms. Poyner and Mr. Garber, the Monitor wanted this issue before Your Ladyship now so
3 we can hopefully avoid issues down the road. The Monitor's concern, however, was to
4 have a draft report floating around that actually presupposed the outcome of the
5 application. It was necessary for the structure of the report, but as a court officer we were
6 not comfortable with it so we have presented it to you. We request that it be sealed. At
7 this point the timing that we request is until the Monitor's discharge. The report has been
8 provided to Ms. Poyner and Mr. Garber upon assurances of confidentiality and I also
9 believe that Mr. Tamin and Mr. Simard have seen the report as well, so. And in our
10 respectful submission, the request meets the test of the -- of *Sierra Club* and that the
11 prejudice to the process is not outweighed -- or, sorry, is not outweighed by the prejudice
12 to any third party.

13
14 THE COURT: Okay. Thank you. Is there any objection to
15 the application for a sealing order of the proposed confidential portion of the 17th report?
16 Mr. Garber?

17
18 MR. GARBER: My Lady, the issue is -- I'm not sure whether I
19 should address these issues now or leave them for my main submissions, but -- and I can
20 go back to the broader principles at stake here. Firstly, as was stated by Ms. Poyner in
21 her previous submission, the applicant itself, the District, has duties to act in good faith
22 and, as I submitted to the Court in my brief this morning, the Monitor also has duties to
23 the court in its capacity as an officer of the court. As stated in my brief --

24
25 THE COURT: Mr. Garber, I'm -- I'm sensing that you're
26 going to go into your main --

27
28 MR. GARBER: Well --

29
30 THE COURT: -- argument and -- and maybe I will leave the
31 sealing order issue until -- until the end.

32
33 MR. GARBER: Okay.

34
35 THE COURT: Okay? Thank you. I'm sorry. So, Mr. -- since
36 I'm leaving the decision on that until the end, I'll allow Mr. Garber and Ms. Poyner to --
37 to make submissions on that, as well as -- as on the merits of -- of the application. So,
38 Mr. Oliver, is there anything else you wanted to say?

39
40 MR. OLIVER: No, My Lady, simply in response to any issues
41 that are -- that are raised by my friends.

1

2 THE COURT: Okay. Thank you.

3

4 **Submissions by Mr. Taman (Garber Brief)**

5

6 MR. TAMAN: Sorry. A point of clarification, My Lady.
7 There's been briefs filed by Mr. Garber?

8

9 THE COURT: Oh, have you not seen the brief --

10

11 MR. TAMAN: No, My Lady. I'm not --

12

13 THE COURT: -- or argument?

14

15 MR. TAMAN: -- been provided with a copy of it, My Lady.

16

17 THE COURT: Mr. Garber?

18

19 **Submissions by Mr. Garber (Garber Brief)**

20

21 MR. GARBER: My Lady, I provided a copy to the Court and to
22 Mr. Oliver this morning. I indicated a willingness to, of course, provide my brief to all
23 concerned. I was not privy to any confidentiality agreements that were reached. I was
24 aware of an agreement between myself and Mr. Oliver. I was aware of a similar
25 agreement between Ms. Poyner and Mr. Oliver. I requested Mr. Oliver that my brief be
26 provided to all counsel and he ask that I not do so.

27

28 THE COURT: Mr. Oliver?

29

30 **Submissions by Mr. Oliver (Garber Brief)**

31

32 MR. OLIVER: My Lady, the circumstances are as follows.
33 Mr. Garber's brief references the aspects of the 17th confidential supplement that are to
34 be sealed.

35

36 THE COURT: Right.

37

38 MR. OLIVER: Mr. Garber indicated an intention to send it to
39 all counsel. I advised him that in my view that was a breach of our agreement in relation
40 to confidentiality. I was aware, however, that Mr. Taman and Mr. Simard were under
41 similar confidentiality obligations, as was Ms. Poyner, but my friend took the position that

1 the brief should not be shared selectively and I take it did not take my word for it,
2 frankly, that my friends were under those confidentiality submissions.

3
4 THE COURT: Okay. Well, obviously, Mr. Taman,
5 Mr. Simard -- Ms. Poyner, have you received a copy of Mr. Garber's brief?

6
7 MS. POYNER: Yes, My Lady.

8
9 THE COURT: Okay. Okay. I'm going to --

10
11 MR. GARBER: I have extra copies, My Lady.

12
13 THE COURT: Do you? Would you give one to Mr. Taman
14 and Mr. Simard, please? And why don't we take, you know, 10 minutes to give them an
15 opportunity to take a look at it. Thank you.

16
17 THE COURT CLERK: Order in court, all rise.

18
19 (ADJOURNMENT)

20
21 THE COURT CLERK: Order in court, all rise.

22
23 THE COURT: Thank you. Please be seated. Okay.
24 Mr. Garber.

25
26 **Submissions by Mr. Garber (Other)**

27
28 MR. GARBER: Well, My Lady, I'm a little bit uncertain as to
29 what I can say and cannot say. I assume that I can discuss freely the contents of the
30 supplement which I agreed not to disclose when I received a copy of that document from
31 Mr. Oliver I believe was early Friday -- Saturday morning. I know that there are counsel
32 here who do not have a copy of my written argument and I feel uncomfortable now
33 discussing something which I undertook to keep confidential. I was asked not to give a
34 copy of my brief to certain counsel here and I just want to make sure I'm on safe grounds
35 by speaking to the Court candidly and openly.

36
37 THE COURT: I -- Mr. Oliver, Mr. Taman, Mr. Simard, I don't
38 think that there's very much that Mr. Garber cannot talk about from the draft. Do you --
39 I'm just -- I'm just quickly going through -- Mr. -- Mr. Garber, you talk about specific
40 disclosure, and I would suggest you don't repeat that specific disclosure, but I think the
41 points that you make about the specific disclosure are not new points or anything

1 surprising and I'll -- so go ahead and, if anybody objects as you go on, we'll -- we'll deal
2 with it then. Okay.

3
4 MR. GARBER: Thank you. As I stated earlier, My Lady, I
5 begin with the broad principles, firstly, that the applicant itself owe the duty of good faith.
6 The Monitor itself also owes duties in their capacity as the officers of the court. As I
7 stated in my brief, and I submit that these comments are equally applicable to a Monitor,
8 where it said, "A trustee in bankruptcy", My Lady, I'm at paragraph 9 of page 2 of my
9 brief: (as read)

10
11 A trustee in bankruptcy must represent impartially the interest of
12 all creditors, must act evenhandedly and must avoid any real or
13 perceived conflict of interest toward all parties to a bankruptcy.
14

15 And at paragraph 10: (as read)

16
17 The appointment of a trustee is not a franchise to make money,
18 nor is it to favour one party or one side. The trustee must be an
19 impartial officer of the court.
20

21 And I'm quoting there, My Lady, the *Confederation Treasury Services Ltd.* where those
22 principles are discussed in detail by the court.

23
24 Now, the issue here is not whether a meeting order should be held. Of course it needs to
25 be held, a meeting of the creditors. (as read)

26
27 The role of Monitor . . .

28
29 As stated in paragraph 15 - I hope I'm at liberty to quote this: (as read)

30
31 . . . is to provide sufficient information to consider the District
32 plan and reporting to eligible affected creditors on the Monitor's
33 view of the reasonableness and fairness of the District plan.
34

35 That's at page 8 of what I understand to be the supplement.

36
37 THE COURT: Page 8 of what, I'm sorry, Mr. Garber?

38
39 MR. GARBER: Of this draft supplement.

40
41 THE COURT: Okay.

1

2 MR. GARBER: And we've stated all along, My Lady, two
3 principles: (1) that the applicant in breach of its duties of good faith has failed to disclose
4 fairly and fully important information to the creditors. For example, in the previous
5 affidavits of Marilyn Huber and Sharon Sherman, they deposed that when they went to
6 renew their deposits they were not told that the District, in fact, was insolvent. And so
7 deposits were being solicited and encouraged from CEF depositors at a time when the
8 District knew they were insolvent but failed to disclose it. And why does that matter?
9 Because there's an element of trust involved. The District is coming to the creditors and
10 saying, Please trust us, this is a plan which we think is fair and reasonable. There are
11 other things that were not disclosed. We've talked about, earlier, the involvement of
12 Mr. Taman and Bishop & McKenzie in some of the transactions giving rise to the issue
13 that brought us here today, the forgiveness of loans as indicated in the affidavit of Sharon
14 Sherman filed today, the ABC District gave a \$6 million loan in exchange for the right to
15 receive proceeds from the future sale of property owned by the Prince of Peace
16 congregation, of which Mr. Taman was a member. The ABC District forgave a \$12.5
17 million loan to Shepherd's Village. The allegations in our statement of claim are much
18 more detailed than that.

19

20 So the issue is, My Lady, firstly, what should be disclosed to the people who will be
21 voting on this plan and, secondly, can we question the Monitor's view of the
22 reasonableness and fairness of this plan? We have stated in previous court proceedings
23 that the depositors must be given full and complete disclosure, not only of the facts which
24 gave rise to the insolvency proceedings, but also to options available to them. And in the
25 case of the District plan, it's extremely important because depositors who have
26 investments greater than \$5,000 will be asked to accept shares of dubious value in a new
27 company which shares may not even be capable of being sold. And so, as Mrs. Sherman
28 deposed in her affidavit, her 94 year old mother has a deposit of just under \$300,000 in
29 this fund, what possible value is it to her to have shares which she may not even be able
30 to sell. And so --

31

32 THE COURT: Mr. Garber --

33

34 MR. GARBER: Yes?

35

36 THE COURT: -- isn't this a matter of the -- isn't this a matter
37 for the creditors to consider at the time of the meeting?

38

39 MR. GARBER: It is. I'm speaking to the issue of what they
40 need to be told.

41

1 THE COURT: Yeah.

2
3 MR. GARBER: And I'm submitting, My Lady, that they have
4 not been given sufficient information to consider and that the Monitor's views of the
5 reasonableness and fairness of the plan should be discounted. For example, as I said, at
6 paragraph 15 the Monitor indicates that sufficient information should be given to consider
7 the plan. I do note at paragraph 62, My Lady, that there is a reference to the claim being
8 brought by Ms. Poyner in British Columbia on behalf of her clients and also being
9 advanced in Alberta by Sharon Sherman and Marilyn Huber. But if you look at that
10 paragraph, My Lady, paragraph 62 . . .

11
12 THE COURT: Yeah. Go ahead.

13
14 MR. GARBER: The defendants are listed. There is no
15 indication at all as to why any of these particular defendants have been named as
16 defendants, nothing at all.

17
18 THE COURT: There -- well, there -- there's nothing with
19 respect to the allegations in the statement of claim --

20
21 MR. GARBER: That's correct.

22
23 THE COURT: -- which, of course, are just allegations.

24
25 MR. GARBER: That's correct. And there's not even an
26 indication that a class proceeding, in fact the class proceedings that -- that have been
27 commenced could be and, in fact, are an option to the plan whereby the depositors are
28 being asked to accept shares of dubious value and questionable liquidity in this new
29 company. And so I ask myself, given the obligations of good faith, given the
30 requirements -- the obligations of the trustee to act as an impartial officer of the court,
31 why has the Monitor failed to disclose the reasons for these entities being sued and,
32 furthermore, why has the Monitor not indicated that the class proceeding is a full and
33 complete option to the depositors voting on a plan which would give them, as I said,
34 shares in this new company. And it's my submission, My Lady, that given the
35 obligations of impartiality, given the obligations on the part of the (INDISCERNIBLE)
36 itself to act in good faith, why have these things not been disclosed?

37
38 If it had been disclosed, for example, that the -- that the applicant had in fact solicited and
39 encouraged deposits from people like Mrs. Sherman, knowing that they were insolvent
40 and not saying so, that might go to the element of trust to be reposed or not to be reposed
41 in what the applicant is recommending.

1
2 THE COURT: Again, that's an allegation, Mr. Garber.

3
4 MR. GARBER: The evidence, My Lady, of Ms. Sherman and
5 Ms. Huber in their previous affidavits was, in fact, that this is what happened. The point
6 I'm simply making, My Lady, is that the element of trust which is so important to
7 consider in these proceedings starts to erode when, in fact, the facts come out. I -- I
8 mention in my brief a number of things that concern the smaller claims, \$5,000 and less,
9 would be paid in full and in cash. Now, of course, I can't see a reason why someone
10 who falls in that category would not quickly vote in favour of the plan. It goes to why is
11 this being advanced. And, My Lady, I submit that when the Monitor states that the
12 general business risks associated with NewCo must be considered against the increase of
13 litigation risk as a result of larger claims being pursued, the reality is this, and perhaps
14 people don't want to talk about it but I'm obliged to do so. The reality is that, if the
15 NewCo plan is not accepted, a sister company of the Monitor and the applicant's counsel
16 may be, in fact, targets of those larger claims. And it goes to, again, My Lady, the
17 absolute importance for there to be openness and transparency about what we're doing
18 here. I can understand why the Monitor may not be happy about a larger plane.

19
20 So what we're -- and there's another comment in my brief that, My Lady, I'm not sure if
21 I necessarily need to go through. We take issue with the description of the CEF fund as a
22 fund in which people would invest their money and earn interest on faith-based
23 developments, that certainly is an issue. Mrs. Sherman's letters that she received explain
24 that the church, extension ministry, would help the church by providing loans to churches
25 and schools where people could hear the gospel and so how you characterize all of this,
26 My Lady, is very important.

27
28 In -- in simple terms, given the overriding obligations of good faith on the part of the
29 applicant and given the Monitor's duties to act impartially and to avoid even the
30 appearance or perceived conflict of interest that the only way we can overcome those
31 concerns is for the Court to ensure that when the creditors are asked to vote on this plan
32 that they are given full factual disclosure of underlying facts giving rise to the proceedings
33 so that the element of trust can be taken care of and, secondly, they must know that there
34 is an alternative to a plan which would subject them to receiving shares of dubious value
35 and questionable liquidity in this new company.

36
37 And I think it's important, My Lady, for that message to be given to the depositors so
38 that they have a choice. And if after being presented with all the facts and they're
39 satisfied with one way or the other, then, of course, we rest our case.

40
41 But that, My Lady, is -- is my submissions. The issue is we strongly object to the

1 wording of this report as it now stands.

2

3 THE COURT:

Okay. Thank you, Mr. Garber.

4

5 Ms. Pointer -- Poyner, I'm sorry.

6

7 **Submissions by Ms. Poyner (Other)**

8

9 MS. POYNER:

Thank you. Yes. Thank you, My Lady. I

10 adopt Mr. Garber's submissions. I have a few additional submissions of my own. Before

11 I make my submissions, My Lady, I will just to make sure that my voice is coming

12 through clearly on the telephone. I'm calling from out of the country, so I want to make

13 sure that I'm -- I'm heard.

14

15 THE COURT:

We can hear you. Thank you.

16

17 MS. POYNER:

Okay. Thank you. My Lady, the -- the

18 primary issue from my client's perspective on this application is the role that the Monitor

19 is playing here in disseminating information to the District creditors given the Monitor's

20 clear and acknowledged conflict of interest. On the hearing of the sanction application in

21 respect of the DIL plan, there were a number of submissions made concerning the

22 information that had been provided to the District creditors concerning the -- or the -- to

23 the bill creditors concerning the DIL plan and how that level of information then

24 legitimized the vote that was ultimately cast on the District plan. The argument was made

25 that the DIL creditors were fully informed and, therefore, their votes ought to be

26 respected.

27

28 Now, in this case, the -- the report that the Monitor intends to send out to the District

29 creditors does not meet the test of full disclosure, as my friend, Mr. Garber, has already

30 submitted, in that it prevents the representative action process contained in the plan in a

31 positive light while failing to address the alternative process, which is the BC and Alberta

32 proceedings as they've been made in these -- in these proceedings, in the same objective

33 light. There -- there is no neutral and objective treatment of these two alternative options.

34

35 And, My Lady, I would simply submit that the reason that we find ourselves in this

36 position, the reason that there is no neutral and objective treatment of the two options, is

37 because the Monitor is in a conflict. The Monitor is a potential defendant in both the

38 representative action and in the BC and Alberta proceedings and, because of -- because

39 the Monitor is in that position, it has, presumably, for reasons of its own, come to the

40 conclusion that the representative action process is advantageous for its sister company,

41 Deloitte LLP, and I qualify that statement, My Lady. I don't necessarily say that the

1 Monitor has come to that conclusion, I -- I simply say that it is a reasonable -- a
2 reasonable conclusion that one might draw in -- in someone who has the -- someone who
3 has an understanding of the background facts could draw that conclusion. And when you
4 will see the Monitor's report, I would simply observe that, at paragraph 58, the Monitor
5 reviews the reasons why it is of the view that the representative action process and the
6 District plan is beneficial to District depositors and it goes -- the Monitor goes through
7 four reasons why it has drawn that conclusion. The Monitor states that it provides a
8 streamlined process for the establishment of the representative class and the funding of the
9 representative action. It prevents a situation where District depositors are being contacted
10 by multiple groups seeking to represent them in a class action or otherwise. It provides
11 for increased recoveries and that it provides an opt out option for those who don't wish to
12 be involved.

13
14 Now, the Monitor does not go into any similar analysis of the potential benefits of the
15 Alberta and British Columbia proceedings. There is no balance neutral and objective
16 analysis of the two options. And I'm just going to -- as an example, My Lady, there --
17 and there should be if the -- if the Monitor's going to engage in this process. For
18 example, at paragraph 58.4, the Monitor states: (as read)

19
20 Selective District depositors have indicated that they'd be
21 (INDISCERNIBLE) if the litigation is inconsistent with their
22 personal religious beliefs. The representative action process allows
23 District depositors to opt out of the representative action before
24 litigation is ever commenced should that be their preference.

25
26 First of all, that is not correct. The plan, as it has been presented to the Court, provides
27 for an opt out option -- My Lady, I'm -- I'm going to withdraw that comment. I believe
28 that -- that actually is correct and it was my misunderstanding, which I've just corrected
29 myself on as I'm speaking here. But the -- the point that I really wish to make here is
30 the -- the *Class Proceedings Act* pursuant to which the Alberta and British Columbia
31 proceedings have been commenced also provides for an opt out option, but, in fact, not
32 made explicit in this report. Again, it's a very one-sided report. You know, it talks about
33 there being a streamlined process for the -- for the representative action. Well, as we've
34 already discussed before you, My Lady, the *Class Proceedings Act* also provides for
35 streamlining of -- of these processes. It's a one-sided analysis and, as I say, the -- a
36 reasonable conclusion that one might draw is that it is a one-sided analysis because the
37 Monitor is in a conflict and has decided that the representative action process is to its
38 benefit.

39
40 Now, I would like to just give a further demonstration as to how this conflict of interest
41 that the Monitor is in affects this plan and renders it unworkable and -- and for that

1 reason should not be -- there should be no meeting order. The plan calls for the
2 Monitor's ongoing involvement in the representative action. Articles 5.4 and 5.6 of the
3 plan contemplate that the Monitor will be the recipient of the opt out notices that are
4 completed by -- by the District creditors who don't wish to participate. Pursuant to article
5 5.6, the Monitor then calculates the creditors' proportional share of costs and ensures that
6 it's returned to them. And then in article 5.6, again, the Monitor also is contemplated to
7 be communicating with depositors regarding the opt out deadline. Now, those
8 communications go out prior to the commencement of the representative actions, so the
9 subcommittee will have to tell the Monitor when the representative action is going to be
10 commenced, give the Monitor sufficient information to -- to communicate with the
11 depositors so that the depositors will know who the potential defendants are. Now, when
12 the potential defendants include Deloitte LLP, that puts the subcommittee, who has a
13 fiduciary duty to the creditors, in -- in this position of having to disclose to the Monitor --
14 having to disclose to the Monitor that their sister company is a defendant in this action,
15 the Monitor must then communicate that information to the creditors. So the Monitor will
16 be learning confidential and possibly privileged information that is of -- that constitutes a
17 threat to its sister company, Deloitte LLP, and then is in the position of communicating
18 with the creditors about that information and -- and, in particular, communicating with
19 creditors about the ability -- about their ability to opt out of that proceeding and thereby
20 reduce the liability exposure of Deloitte LLP.

21
22 My Lady, that is absolutely unacceptable. It is absolutely unacceptable to -- to -- for this
23 plan to contemplate the Monitor being involved in that process where the Monitor's
24 interests are directly in conflict with those of the creditors, the Monitor being a -- an
25 officer of the Court. It is simply unacceptable, inappropriate, unreasonable to ask any of
26 the creditors to -- to contemplate and accept being in that position, vis a vis the Monitor,
27 and for that reason this -- this meeting order application should be rejected.

28
29 My Lady, subject to any questions, those are my submissions.

30
31 THE COURT: Okay. Thank you.

32
33 Okay. Responses? I'm sorry, Mr. Simard, I missed you. You probably should have had
34 the opportunity to speak before Mr. Garber, but please go ahead now.

35
36 **Submissions by Mr. Simard (Other)**

37
38 MR. SIMARD: That's fine, My Lady. Thank you. As you
39 know, I represent the District Creditors' Committee, a majority of whom approve the plan,
40 not a unanimous approval, but a majority, and so, as a whole, the committee supports the
41 plan and supports the application of District to nail this plan and move towards a meeting.

1
2 My Lady, with respect to -- I know I saw an email from Mr. Taman to the service list
3 saying that he may rely on a *Fracmaster* case today.

4
5 THE COURT:

Right.

6
7 MR. SIMARD:

And -- and the *Fracmaster* case, I've often
8 cited in these applications, including in the *Lone Pine* application before you in December
9 of 2013. The other case that is often cited is *Nova Metal Products*, the 1990 case of the
10 Ontario Court of Appeal. And the theme that emerges from those cases is -- is that, at
11 this stage, the Court should not prejudge the possible success or approval or disapproval
12 of the -- of the plan. Issues of fairness and reasonableness are to be considered only at
13 the sanction order application after there's been a vote of creditors, which results in -- in
14 the bar at this stage being fairly low. I think the terminology used in the *Fracmaster* case
15 is that a Court would -- would refuse to put a plan to a meeting only if the Court could
16 discern at this stage that the plan was doomed to fail, so a very high bar. And, of course,
17 the Act itself authorizes the company to formulate a plan and to put it to a meeting of
18 creditors. The Act does not itself require an order at this stage, it's just become a practice
19 that -- that an order is sought in advance of going to a meeting.

20
21 The -- and, of course, the other -- the other custom at this stage and what we see before
22 the Court is -- is the package that is sought to be sent out to the creditors and it contains
23 the customary things, the company's materials, the plan, the meeting notice, the proxy
24 materials, et cetera, for creditors. There are additional elements here like the opt in and
25 opt out notice, and then the Monitor's report. Usually, the Monitor's report is the only
26 piece that is editorial or opinion in nature, and that is the case here. And, of course, the
27 Monitor is your court officer and, in -- in its role as your court officer, it's -- it's
28 exercising its professional and independent judgment. I would submit, My Lady, that no
29 one should be able to tell the Monitor what to put in a report. No one should be able to
30 tell the Monitor that, as court officer exercising your independent judgment, you must say
31 this or you must not say that. Certainly, parties can say to the Monitor, and Mr. Garber
32 and Ms. Poyner's clients are doing that through their affidavits and through the brief,
33 they're asking the Monitor -- well, they're making the -- the point forcefully, of course,
34 that the Monitor should be considering saying things or not saying other things, but I
35 submit that construct is not appropriate. What is appropriate is that these issues get raised
36 and the Monitor, of course, as the court officer, will consider what it thinks it should put
37 in its report in exercising its judgment, but it shouldn't be told at this stage.

38
39 The -- the issue of what should go in the report of the Monitor that would go to the
40 creditors, I submit, is itself an issue of fairness. It's -- it's also a sanction application type
41 issue. And the question that -- that the company, if -- if the plan goes to creditors and if

1 the vote is approved, the company will have to stand before you at the sanction
2 application. Ms. Poyner and Mr. Garber will be here and -- and the company will have to
3 satisfy you that -- that the vote was meaningful in the sense that creditors were given
4 sufficient information and were given appropriate information to form a reasoned opinion
5 and to be able to vote in a reasoned and intelligent way on the plan and, if not, there's a
6 risk that the plan may not be sanctioned, but I would submit that that is part and parcel
7 of -- of the usual practice and the way the Act is set up in that you go to a vote and then
8 you have a sanction hearing at which these issues of fairness are considered. So the same
9 test, I believe, that applies to the entire meeting order application now applies to the
10 materials that are sought to be put before the creditors such that the fairness or the
11 appropriateness of those materials is to be judged at the sanction application stage and --
12 and not now. The same -- the same low bar of doomed to fail is what should apply not --
13 not only to the entire application, but to the materials.

14
15 The -- the complaints made by Mr. Garber's clients and Ms. Poyner's clients I could -- I
16 would characterize generally as falling under a number of categories. The first is that
17 allegations set out in -- in their clients' statements of claim and -- and in Mr. Garber's
18 clients' recent affidavits are not repeated or are not reported on in the Monitor's report.
19 And so, as -- as you point out, My Lady, those are allegations that will be advanced in a
20 representative action or, if there's no plan, in -- in class actions, they generally speak to
21 the misconduct or conflict of interest of Mr. Taman and his firm of District itself and of
22 Deloitte. But they are allegations, they are allegations that would proceed in -- in
23 litigation that would follow.

24
25 They also complain, in my submission, about the Monitor's opinion about the plan and
26 the Monitor's statements of opinion about the effect of the plan going ahead, NewCo or
27 no NewCo representative action or no representative action. And, to summarize, I think
28 what they're saying, effectively, is they don't like how the Monitor's expressing its
29 opinion. They don't like the content of the opinion and they also don't like how the
30 Monitor's expressing its opinion in the report but, again, I think we're -- we're in territory
31 there that is a no go. No one, myself included, and no party here can tell the Monitor
32 how to express its opinion, nor should they.

33
34 The third complaint I heard in Mr. Garber's submissions was with respect to the
35 convenience class, which, of course, is -- is a well recognized mechanism approved in
36 many CCAAs to ensure that small -- small stakeholders are taken out -- taken care of
37 entirely and don't bear -- don't bear the same proportion of loss as -- as large
38 stakeholders. So there -- there certainly is a body of case law that supports the
39 convenience class mechanism but, again, that -- that is an issue for fairness. If they have
40 a compelling argument that the convenience class was unfair in this case, that -- that
41 argument could be advanced at the sanction order application.

1
2 So, in summary, My Lady, I would submit that the case law governing this application
3 dictates that the Court should not prejudge the fairness of the plan at this stage. It should
4 not also prejudge the fairness of the materials and the Court should trust its court officer
5 to exercise its independent judgment professionally, independently, faithfully. The
6 Monitor obviously has heard these complaints loud and clear and the Monitor will -- will
7 exercise its independent judgement as it sees fit, but I -- I personally don't have any doubt
8 that the Monitor can do that professionally. As we've seen, the Monitor has disclosed
9 the -- the potential conflict of interest, not of itself, but of a related Deloitte entity. We,
10 as professionals, are subject to allegations from time to time. We have liability insurance.
11 I don't -- I don't doubt that the Monitor can exercise its judgment professionally and
12 properly.
13

14 And we should also -- there is a -- there is a running theme in this case and you, the
15 Court, hear it and the parties hear it from a number of different quarters, not just from
16 Ms. Poyner's clients or Mr. Garber's clients, and it is that -- that depositors will vote a
17 certain way or -- or will not vote a certain way. I think -- I think the way the plan and
18 the CCAA is set up is -- is that we are all compelled to trust depositors' intelligence.
19 They will get the Monitor's report, they will get the plan. If they do not understand, they
20 can -- they can contact advisors, they can contact the Monitor, they can contact the CRO,
21 they can contact various people to -- to make sure they understand and -- and exercise
22 their judgment properly when they vote. That's just part of the democratic process under
23 the Act. And also I submit, My Lady, that we have to trust the Monitor's mindfulness of
24 its duties as a court officer in this circumstance.
25

26 Unless you had questions, those were my submissions.
27

28 THE COURT:

Thank you, Mr. Simard.

29
30 Sorry, Mr. Nishimura.
31

32 **Submissions by Mr. Nishimura (Other)**
33

34 MR. NISHIMURA:

I won't -- I won't take long, Ma'am, because

35 I -- my comments run roughly the same as -- as Mr. Simard's.
36

37 A couple of things. Mr. Garber had referenced the duty of a trustee and -- and compared
38 it to the duty of a Monitor and, of course, they're -- they're slightly different. The -- the
39 trustee is acting in the shoes of the company, whereas the Monitor is advising creditors
40 and it's advising them on what the company is proposing. As Mr. Simard alluded to,
41 back in the old -- olden days that I remember, we didn't seek orders, we -- a meeting was