COURT FILE NUMBER:	1501-0095
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c. C-36, as amended
APPLICANTS:	LUTHERAN CHURCH – CANDA, THE ALBERTA – BRITISH COLUMBIA DISTRICT, ENCHARIS COMMUNITY HOUSING AND SERVICES, ENCHARIS MANAGEMENT AND SUPPORT SERVICES, AND LUTHERAN CHURCH – CANADA, THE ALBERTA – BRITISH COLUMBIA DISTRICT INVESTMENTS LTD. ("DIL")
DOCUMENT:	**BRIEF OF THE RESPONDENTS ELVIRA KROEGER AND RANDALL KELLEN IN RESPONSE TO THE APPLICATION FOR JUDICIAL SANCTION OF THE PLAN OF COMPROMISE AND ARRANGEMENT OF THE LUTHERAN CHURCH – CANADA, ALBERTA-BRITISH COLUMBIA DISTRICT**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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

INDEX

I. INTRODUCTION AND BACKGROUND

1. District Depositors Elvira Kroeger and Randy Kellen oppose the judicial sanction of the Fifth Amended Plan of Compromise and Arrangement of Lutheran Church – Canada, the Alberta – British Columbia District ("ABC District"), filed on June 10, 2016 (the "District Plan") on the grounds that it:

    (a) fails to meet the requirements of the CCAA;
    (b) contravenes the provisions of the CCAA;
    (c) is not fair or reasonable to the District Depositors; and
    (d) is inappropriate, and not advanced in good faith or with due diligence.

2. Mrs. Kroeger and Mr. Kellen are depositors to both the CEF and the DIL.

    Respondents' Tab C3 - Affidavit of Elvira Kroeger sworn February 23, 2016
    Respondents' Tab C1 - Affidavit of Randy Kellen filed May 21, 2015, para. 13

3. 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 the following key provisions:

    (a) A "Convenience Payment" equal to the lesser of the amount of its creditors' Proven Claims, or the first $5,000.00 of their Proven Claims (Art. 4.2(a));

    (b) *Pro rata* distribution of the proceeds of liquidation of District's Non-Core Assets from the Payment Pool, less a Restructuring Holdback and a Representative Action Holdback (Art. 4.2(c));

    (c) *Pro rata* distribution of shares in a NewCo, to which will be transferred the Prince of Peace Assets, including the School and Church, the Harbour, the Manor and an undeveloped parcel of adjoining land (Art. 4.2(d));

    (d) a Representative Action provision similar to that contained in the DIL Plan of Arrangement, which would require that District Creditors assign all of their procedural and substantive rights to pursue any and all legal causes of action for that part of their claims not paid by the Plan (whether in their individual capacity, as part of a class under provincial class proceedings legislation, or in a derivative capacity in the name of District) against any person whatsoever, including third

parties, to a Subcommittee appointed by the District Creditors' Committee (Art. 5).

Respondents' Tab D2 - District Meeting Order dated March 22, 2016
Respondents' Tab A – the District Plan

4. The Plan contemplates that the ABC District will remain in operation, but will amend its bylaws and operating Handbook such that it will no longer be able to raise funds through any type of investment vehicle such as the CEF or DIL.

Respondents' Tab B3 - Monitor's First Report to District Creditors, para. 33.4
Respondents' Tab A - District Plan, Art. 4.3

5. In the event that the Plan is implemented, the District will retain very limited assets consisting of a small amount of office furniture and equipment, some prepaid expenses and cash held from mission remittances.

Respondents' Tab C13 – Affidavit of Courtney Clark sworn June 26, 2016, Ex. "G"

6. 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

7. 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 urged attendees to cast their votes in favour of the Plan 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

Respondents' Tab C12 - Affidavit of Marilyn Huber, sworn June 26, 2016, para. 9

8. 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, which presented a conceptual framework for the massive development of the 55-acre undeveloped portion of the Prince of Peace Properties, and which identified several costly and complex 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 C12 – Affidavit of Marilyn Huber sworn June 26, 2016, paras. 15 - 18

9. This information had not been previously disclosed to the District Depositors by the Monitor or the Chief Restructuring Officer, though both had been aware of that information since 2014 and 2015 respectively.

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

10. In response to the issues raised at the Red Deer Information Meeting, the Monitor made partial disclosure of the information in the MSDP, including the requirement of connecting to the municipal potable water supply (referred to as the "Conrich Tie-In") and the cost of meeting that requirement (estimated at $6 - $7.5 million), and the outstanding Appeals. However, the Monitor's memo did not provide the District Depositors with any means of accessing the MSDP, the Conrich ASP or the Appeals themselves.

Respondents' Tab B5 - Monitor's Memorandum regarding the future subdivision and development of properties within the Prince of Peace Development, dated April 29, 2016

11. Had the District Creditors been provided access to the MSDP, they would have learned additional facts about the development potential of the Prince of Peace Properties, including:

    a. Drinking water is currently trucked into the Prince of Peace Village at a cost of $24,921.00 per month;
    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;
    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

    Respondents' Tab C17 - Affidavit of Randy Kellen sworn June 28, 2016, para. 4, Ex. "A", p. 77-78, 80-81

12. Had the District Creditors been given access to the Conrich ASP, they would have learned the following:

    (a) All new development shall be required to connect to Rocky View County's potable water system (para. 23.9);
    (b) All new development shall be required to connect to Rocky View County's wastewater system (para. 23.16); and
    (c) Sump pumps and stormwater drainage systems shall not be connected to a development's wastewater system (para. 23.18).

    Respondents' Tab C17 – Affidavit of Randy Kellen sworn June 28, 2016, para.6, Ex. "B"

13. After becoming aware of the MSDP, the Conrich ASP and the Appeals, Mr. Randy Kellen telephoned Mr. Vince Biot of the Rocky View County Department of Engineering Services. They had a discussion about the potential development of the POP Properties. Mr. Biot confirmed that it would cost a developer approximately $20,000,000.00 to $30,000,000.00 to pay for the infrastructure upgrades and capital levies that are identified in the MSDP, and the developer would have to post a bond of approximately $30,000,000.00 to $50,000,000.00 before a development permit would be issued. That process alone could take up to two years.

    Respondents' Tab C17 – Affidavit of Randy Kellen sworn June 28, 2016, paras. 9 – 11

14. 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

15. The grounds for the motion were the Monitor's conflict of interest arising from the status of related accounting firm Deloitte LLP as 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

16. 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. A proxyholder for a congregational depositor stated that he had received his proxy prior to the disclosure of the MSDP information, and 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

17. 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 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 C13 - Affidavit of Courtney Clark sworn June 27, 2013, Ex. "E"

18. 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

II. ISSUES

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

(a) Does the District Plan conform to the statutory requirements, objectives and purposes of the CCAA?;

(b) Is the District Plan fair and reasonable to the District creditors, including the Depositors?; and

(c) Has the District Plan been advanced with due diligence and in good faith?

III. ARGUMENT

A. Applicable Legislation

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

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the

meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Respondents' Tab 25

B. Applicable Principles of Law re Judicial Sanction of a Plan of Compromise and Arrangement

21. The Court's power to sanction a plan or compromise or arrangement under s. 6 of the CCAA is discretionary, not mandatory. The Court is not required to sanction the compromise or arrangement even if it has been approved by the required double majority of creditors.

Respondents' Tab 1 -- *Re 229531 BC Ltd.* (1989), 73 CBR (N.S.) 310 at para. 21 (BCSC)

22. The debtor has the burden on an application for judicial sanction pursuant to s.6 of the CCAA. Before sanctioning the plan, the Court must be satisfied that:

> (a) all statutory requirements and previous court orders have been complied with;
> (b) nothing has been done or purported to be done which is not authorized by the CCAA; and
> (c) the plan is fair and reasonable.

Respondents' Tab 12 – *Re: Nortel Networks*, 2009 CanLii 31600 (Ont.S.C.) at para. 79

23. The Court does not have the jurisdiction or authority to sanction a Plan which contains terms that fall outside the purpose, objects and scheme of the CCAA.

Respondents' Tab 11 - *Re Metcalfe & Mansfield Alternative Investments II Corp.*,

2008 240 OAC 245, 2008 ONCA 587 (CanLii); leave dismissed [2008] SCC No. 32765 ("Metcalfe & Mansfield") at para. 73

24. In *Re: Ted Leroy Trucking Ltd.* [2010] 3 SCR, 2010 SCC 60 ("*Century Services*"), the Supreme Court of Canada observed that the exercise of judicial discretion on an application for judicial sanction of a plan of compromise and arrangement must be guided by the "remedial purpose" of the CCAA (para. 59):

> Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
> >
> > (*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

Respondents' Tab 17

25. The Court in *Century Services*, *supra*, articulated the purpose of the *CCAA* in several ways:

(i) To permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets (at para. 15);

(ii) To provide a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made (at para. 59);

(iii) To avoid the social and economic losses resulting from liquidation of an insolvent company (at para. 70); and

(iv) To create conditions for preserving the status quo while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. (at para. 77)

Respondents' Tab 17

26. The Courts have recognized that, in addition to regulating the affairs of the debtor company and its creditors, the CCAA also serves the "wider public interest" by ameliorating the negative social and economic impacts of business failure. In *Metcalfe & Mansfield, supra* at para. 52, the Ontario Court of Appeal agreed with the following statement of Doherty J.A. (in dissent) in *Elan v. Comiskey*, (1990) 1 O.R. (3d) 289 p. 306-307:

> [T]he Act was designed to serve a "broad constituency of investors, creditors and employees". Because of that "broad constituency" the court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.

Respondents' Tab 11

27. Accordingly, the Courts have interpreted the term "arrangement" in ss. 4 and 6 of the CCAA as broad enough to include the compromise of third party claims, but only where those compromises are necessary to accomplish the purpose of the Act. Blair J.A. stated in *Metcalfe v. Mansfield, supra* at paras. 68 – 70:

> [68] Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.
>
> [69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).
>
> [70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. *In short, there must be a reasonable connection between the third-party claim being*

compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan. [italics added]

Respondents' Tab 11

28. The Court of Appeal went on to uphold the reasoning of the application judge, who approved the third party releases contained in the proposed plan of compromise and arrangement for the following reasons (at para. 71):

    (a) The parties released are necessary and essential to the restructuring of the debtor;
    (b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
    (c) The Plan cannot succeed without the releases;
    (d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and

    ....

Respondents' Tab 11

29. In *Pacific Coastal Airlines Ltd. v. Air Canada*, 2001 BCSC 1721, Tysoe J. observed that the regulating disputes between creditors and third parties is not a proper use of CCAA proceedings (at para. 24):

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

Respondents' Tab 14

30. Only if all of the statutory requirements in relation to a proposed plan of compromise and arrangement have been satisfied, the court must then determine if the plan is fair and reasonable.

Respondents' Tab 13 - *Northland Properties Ltd. et al v. Excelsior Life Assur. Co. of Can. And Guardian Ins. Co. of Can.* (1989) 73 CBR (NS) 195 at para. 35

31. The test that the court must apply in considering whether to sanction a plan or compromise or arrangement approved by creditors is:

> [Is the proposed plan of compromise or arrangement] such that an intelligent and honest man, a member of the class concerned and acting in respect of his interests, might reasonably approve?
>
> Respondents' Tab 5 - *Re Dorman Long & Co.*, [1934] 1 Ch. 635 (LexisNexis) at page 8

32. Given that CCAA proceedings provide an alternative to bankruptcy, the benefits offered by a proposed plan or compromise and arrangement must be measured against a forced liquidation. Accordingly, the Court in *Century Services*, *supra*, held (at para. 77):

> The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation.
>
> Respondents' Tab 17

33. In considering the fairness and reasonableness of a plan of compromise and arrangement, the Court is often reluctant to second-guess "business deals" struck between "businessmen".

> Respondents' Tab 13 - *Northland Properties Limited v. Excelsior Life Insurance Company of Canada, supra* at paras. 39, 43, 45

34. However, the Court has an obligation to ensure that the "deal" is fair and equitable, and that the majority vote fairly and accurately represents the majority's views. In *Re Gold Texas Resources*, [1989] B.C.J. No. 167 [Q.L.] (unreported), McLachlan J. (as she then was), stated (at p. 4-5):

> In reviewing the arrangement, the Court is placed under an obligation to see that there is not within the apparent majority some undisclosed or unwarranted coercion of the minority who may not have voted or who may have been opposed. It must be satisfied that the majority is acting bona fide and in good faith. It must also be satisfied that there is not a class within the larger majority class which does not represent a bona fide vote because, for example, the smaller class is in a conflict of interest: *In re Hellenic and General Trust Ltd.*, [1976] 1 W.L.R. 123.
>
> Respondents' Tab 7
>
> See also: Respondents' Tab 13 - *Re Northlands Properties Ltd.*, *supra* at para. 39

35. The Court has a dual supervisory role in a CCAA proceeding: to protect stakeholders and to uphold the administration of justice. In *Re San Francisco Gifts Ltd.*, 2005 ABQB 91, Topolniski J. wrote (at para. 29):

> Although the supervisory judge's main concern centres on actions affecting stakeholders in the proceeding, she is also responsible for protecting the institutional integrity of the CCAA courts, preserving their public esteem, and doing equity. She cannot turn a blind eye to corporate conduct that could affect the public's confidence in the CCAA process but must be alive to concerns of offensive business practices that are of such gravity that the interests of stakeholders in the proceeding must yield to those at large.

Respondents' Tab 15

36. The applicant has the burden of satisfying the court that the order sought is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence. In *Century Services*, *supra*, the Court held (at para. 70):

> However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company.

Respondents' Tab 17

37. Where a debtor company acts in bad faith, the Court may refuse to sanction a plan that emanates from the meeting of the creditors.

Respondents' Tab 6 - *Elan Corp. v. Comiskey*, *supra* at para. 82

C. Application of the Law to the Application for Judicial Sanction of the District Plan

(a) The District Plan is not Within the Scheme and Purpose of the CCAA

a. The Representative Action

i. The Representative Action Does not Advance the District's Restructuring Goals

38. As noted above, the purpose of the CCAA is to ameliorate the social and economic effects of a forced liquidation while efforts are made to reorganize the debtor's affairs so that it may carry on in business. The Representative Action provisions of the District Plan do not address that purpose, or any other legitimate purpose of the CCAA.

39. In its submissions on judicial sanction of the DIL Plan, the District advanced the position that the Representative Action provisions of the Plan are necessary to minimize the number of lawsuits advanced against it so that it will not be overrun by claims and its limited resources consumed and insurance coverage compromised in its efforts to defend itself. The District raised the spectre of litigation run amok, and argued that order could only reign with the Subcommittee at the helm.

40. There are a number of weaknesses in this submission. Firstly, the law already has ample tools for limiting the proliferation of litigation:

(a) Legislation and procedural rules such as the B.C. *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c. 28, s. 10 and Rules 11.25 and 11.31 of the Alberta Rules of Court limit Canadian courts' territorial competence in proceedings to those in which *inter alia* there is a "real and substantial connection" to the jurisdiction in which they were commenced. The application of that legislation and those rules will ensure that no claims commenced outside British Columbia and Alberta are likely to advance;

Respondents' Tabs 20, 26

(b) Procedural rules of joinder can be invoked to consolidate individual actions;

Respondents' Tab 21 - B.C. Rules of Court, Rule 22-5(8)
Respondents' Tab 20 - Alberta Rules of Court, Rule 3.70

(c) Where more than one class proceeding is brought within a jurisdiction, carriage motions are brought to determine which action shall proceed to certification. A carriage motion is a contest between opposing plaintiff's counsel, and does not impose upon the resources of the defendants;

Respondents' Tab 22 - *Class Proceedings Act*, RSBC 1996, c. 50 ("BCCPA"), s. 12
Respondents' Tab 23 - *Class Proceedings Act*, SA 2003 ("ACPA"), c. 16.5,

(d) The certification of a class proceeding has the effect of staying individual actions, subject to the right of individual class members to opt out of the class proceeding and pursue individual claims.

Respondents' Tab 22 - BCCPA, ss. 13, 16
Respondents' Tab 23 - ACPA, s. 14

41. Accordingly, there is little likelihood that the District will be overwhelmed by litigation in the event that the Plan is not approved. Rather, there will be one class proceeding in each of British Columbia and Alberta, and potentially a number of independent claims advanced by those who choose to opt out of those actions or whose claims are of an individual nature not suited to determination in a class proceeding. It is open to the District to apply to have those individual claims consolidated if is appropriate to do so.

42. Secondly, the District's expectation that it will somehow benefit from placing the Subcommittee in control of post-CCAA litigation betrays a fundamental misapprehension of the fiduciary duties the Plan seeks to bestow upon it. If the Plan is sanctioned, the Subcommittee may only act in the best interests of the Representative Action Class. The Subcommittee may not base its decisions on the interests of the District in minimizing litigation in order to conserve its resources. To do so would constitute a breach of fiduciary duty.

Respondents' Tab A - District Plan, Art. 5.3(c)(iv)

43. The District has urged the Court to find that the Subcommittee will be entirely independent, but seems to anticipate that it will be the beneficiary of its goodwill. At best, this reveals the defect in the District's position on this application; at worst, it is a sign that the District has designed the Representative Action provisions of the Plan with improper motive to obtain a benefit from the Subcommittee to the prejudice of the Depositors.

44. Thirdly, the likelihood of District remaining in operation is likely to be rendered moot in the near future in any event. The Lutheran Church – Canada (the "LCC") is undergoing a program of restructuring. To that end, LCC has appointed a Commission on Constitution Matters and Structure ("CCMS"), which has conducted a survey of its members. According to the LCC, the results of that survey "support a major overhaul of [LCC] structure", including a "clear indication" that respondents to the survey favour "dissolving the Districts and restructuring the Synod to function with one Administrative structure, including the possibility of restructuring the circuits/regions geographically".

The LCC anticipates that restructuring will be implemented between November 2017 through 2018.

Respondents' Tab 13 - Affidavit of Courtney Clark sworn June 27, 2016, Ex. "J" and Exhibit "K", p. 2, 65

45. The District has virtually no remaining assets, and its lifespan appears to be limited to another 18 months at most. This is, for all practical purposes, a liquidating CCAA. Accordingly, District's operational requirements are not a significant factor to be taken into consideration in determining whether the Representative Action provisions of the Plan meet the purposes of the CCAA

ii. The Representative Action Provisions of the District Plan Compromise Third Party Claims

46. The Representative Action provisions of the District Plan represent a significant compromise of the District Depositors' rights to pursue claims against third parties. Under the Plan, the District Depositors must assign their procedural rights to pursue the Representative Action Claims (broadly defined as "any and all potential claims of District Depositors...to recover the amounts of their Claims not paid under this Plan...") against Representative Action Defendants (again, defined broadly and in circular fashion as "the Partially Released Parties and any other parties against whom Representative Action Claim(s) may be brought") to a Subcommittee of the District Creditors' Committee. The Subcommittee will have absolute discretion to commence and compromise third party claims (including derivative claims), to instruct counsel, and to determine the litigation budget to be shouldered by the Depositors.

Respondents' Tab A - District Plan, Art. 1 (definition of "Representative Action Claim" and "Representative Action Defendant"), 5.3

47. Even more troubling, the definition of Representative Action Claims includes as "any and all potential claims of District Depositors, whether such claims are pursued as part of the Representative Action or not". In other words, the Subcommittee has the authority to refuse to advance a Depositor's third party claim within the Representative Action, which represents the sole recourse of any Depositor with respect to a Representative Action Claim. Under the terms of the Plan, a Depositor whose third-party claim is denied by the Subcommittee has no right to proceed independently.

Respondents' Tab A - District Plan, Art. 5.5

48. Depositors who do not wish to participate in the Representative Action may opt out of it; however, once they have opted out, they have no right to commence an independent third party claim.

Respondents' Tab A - District Plan, Art. 5.5, 5.6

49. These provisions represent an unacceptable and unwarranted stripping of the Depositors' substantive and procedural legal rights in favour of third parties who have not contributed to the Plan, are not bound by its terms, and who have no right to the protection of the CCAA. The "sole recourse" provisions of the Plan will have a dampening effect on litigation, as those Depositors who for religious reasons do not wish to proceed against the District and its officers and directors will opt out of the Representative Action and in so doing will be forced to forgo their claims against lay third parties against whom they might otherwise be content to proceed. Those potential lay defendants include District counsel Mr. Taman and his law firm Bishop & Mackenzie LLP, the architects of the Plan.

50. The compromise of third party claims in the context of CCAA proceedings is extraordinary relief. As such, the District has the heavy burden of establishing that the Representative Action provisions of the District Plan fall within the legitimate purposes of the CCAA. It has not met that burden. Contrary to the principles in *Re Metcalfe & Mansfield, supra*, there is no "reasonable connection" between the compromise of the District Depositors' substantive and procedural rights to proceed against third parties and the objectives of the Plan, which is to achieve a liquidation of virtually all of District's assets for the benefit of its creditors while maintaining its operations until it is ultimately dissolved in 2018. Those objectives can be met with assistance of existing legal processes which are designed to limit, streamline, and consolidate claims. Accordingly, the Court is without jurisdiction to sanction the District Plan.

iii. The Representative Action Provides no Benefits to District Depositors within the Purposes of the CCAA

51. The Monitor has identified the "benefits" of the Representative Action as follows:

(a) It provides a "streamlined process" for the establishment of the Representative Action Class and the funding of the Representative Action;
(b) It prevents a situation where District Depositors are being contacted by multiple groups seeking to represent them in a class action or otherwise;
(c) Increased recoveries may be achieved by settling the Representative Action Claims on a group basis;

(d) It allows for ongoing involvement of members of the District Creditors' Committee; and
(e) "Selected depositors" have indicated that they view any involvement in litigation as inconsistent with their personal religious beliefs.

Respondents' Tab B3 - Monitor's First Report to District Creditors, para. 60

52. None of these purported procedural "benefits" are among the express purposes of the CCAA, as identified by the Supreme Court of Canada in *Century Services, supra.* They do not support the limited restructuring goals of the ABC District or assist to avoid the liquidation of its assets (which has already occurred). Accordingly, even if the Court finds that the Representative Action offers some "benefits" to the District Depositors as a group, the Court has no jurisdiction or authority under the CCAA to sanction the imposition of those "benefits" upon the District Depositors who have opposed the Plan.

(b) The District Plan Contravenes Section 5.1(2) of the CCAA

53. The definition of those "Representative Action Claims" which may only be advanced against Representative Action Defendants (including District's directors) by the Subcommittee includes certain claims against directors which are subject to a prohibition against compromise by s.5.1(2) of the CCAA, including:

(a) Claims related to a contractual right of one or more District Depositors entered into personally by a Representative Action Defendant (the definition of which includes District's directors); and

(b) Claims based on allegations of misrepresentations made by a Representative Action Defendant (the definition of which includes District's directors) or of wrongful or oppressive conduct by a Representative Action Defendant.

Respondents' Tab A - District Plan, Art. 1

54. Under the terms of the Plan, a District Depositor may not directly advance a claim against a District director in respect of any of the matters identified in s.5.1(2). Those claims may only be advanced by the Subcommittee. In the event that the Subcommittee declines to advance such a claim on behalf of a Depositor, that Depositor has no recourse and no right to commence an independent claim.

Respondents' Tab A - District Plan, Art 5.5

55. The Representative Action constitutes a significant compromise of the District Depositors' substantive and procedural rights to pursue claims against District directors outside of the Representative Action process, in violation of s. 5.1(2) of the CCAA. Accordingly, the Court has no jurisdiction to sanction the District Plan.

a. NewCo

56. The District Plan contemplates that the ABC District will divest itself of virtually all of its assets. The available cash, and the proceeds of the liquidation of the Non-Core Assets, will be distributed to the District creditors in accordance with Arts. 4.2(a) of the Plan (the "Convenience Payment") and 4.2(c) (the "Payment Pool").

Respondents' Tab B3 - Monitor's First Report to District Creditors, paras. 18, 19
Respondents' Tab C13 - Affidavit of Courtney Clark sworn June 27, 2016, Ex. "G"

57. The remaining District asset is the District – ECHS mortgage, which is valued at $82,095,703.00. The Plan proposes that in a tax-structured transaction, ECHS will purchase the NewCo Shares for $1.00, then transfer those shares to District in partial satisfaction of the mortgage. District will then distribute the NewCo Shares to its creditors on a *pro rata* basis. The NewCo Shares will be valued based upon the "forced liquidation value" of the Prince of Peace Properties and the estimated value of certain ECHS and EMSS chattels.

Respondents' Tab B3 - Monitor's First Report to District Creditors, paras. 20-23
Respondents' Tab A - District Plan, Art. 4.2(d)

58. There are legal restrictions on the transferability of NewCo Shares such that, according to the Monitor, "the potential liquidity of the NewCo Shares is...unknown and there may be situations where NewCo Shareholders cannot sell their NewCo Shares as desired or at all."

Respondents' Tab B3 - Monitor's First Report to District Creditors, p. 19

59. If the objective of the Plan is to provide partial satisfaction of the creditors' claims while allowing the District to remain in operation until it is dissolved in 2018, that objective is no better served by the issuance of NewCo Shares than it is by having a receiver appointed to foreclose upon the ECHS mortgage, sell the Prince of Peace Properties, and distribute the proceeds amongst District's creditors on a *pro rata* basis. The benefit to the creditors in receiving a *pro rata* distribution of the proceeds of the forced sale of the Properties is exactly equal to the benefit that they would receive from a *pro rata* distribution of NewCo shares valued at the forced sale value of the Properties.

60. To the extent that the NewCo provisions of the Plan are intended to allow for an opportunity to increase the value of the Prince of Peace Properties (either through liquidation under improved market conditions or through development) and in so doing provide creditors with a greater recovery, those expectations are based upon an assumption that the Prince of Peace Properties may be worth more in the future than they are today. That assumption may well fail to be borne out. Instead, according to the Monitor, market and business risks may instead materialize which will result in creditors losing all or part of their investments in NewCo.

Respondents' Tab B3 - Monitor's First Report to District Creditors, paras. 24, 42 – 43

61. District's divestment of the Prince of Peace Properties through the issuance of NewCo shares is not essential to its limited future operations, and provides no additional quantifiable benefit to creditors. The potential benefits to creditors of receiving NewCo Shares are dubious and speculative at best, and at worst are outweighed by risk of further loss. The only identifiable purpose in issuing NewCo Shares rather than to simply liquidate the Prince of Peace Properties is to allow (and, in the case of the Depositors who voted against the Plan, to force) creditors to speculate as to the future value of those assets. That is not a purpose sanctioned by the CCAA, and therefore the authority of the CCAA Court may not be utilized to impose that outcome upon the minority creditors who have opposed the Plan.

62. For these reasons, the NewCo provisions of the Plan fall outside of the scheme and purpose of the CCAA, and accordingly this Court lacks jurisdiction to approve them.

(c) The District Plan has not been Advanced with Good Faith, Due Diligence and Full Disclosure

a. NewCo

63. By virtue of exemptions in provincial securities legislation for shares issued in the context of legal proceedings (including CCAA proceedings), the District is not required to provide a prospectus disclosure statement in respect of the issuance of NewCo Shares. Instead, the District has an obligation of good faith which requires honesty to the court and to the stakeholders in these proceedings. Adherence to this duty should have resulted in the disclosure of all material information concerning NewCo and the Prince of Peace Properties.

Respondents' Tab 15 - *Re San Francisco Gifts Ltd, supra* at para. 17

Respondents' Tab 17 - *Century Services*, *supra* at para. 70

64. The District has failed in that duty. Having promoted the Plan on the basis of "potential upside opportunities that may be available such as through…a joint venture to further develop the Prince of Peace Properties", it had an obligation to disclose all information in its possession material to development. Instead, District knowingly and deliberately, and to the knowledge of the Monitor, failed to disclose the information concerning significant impediments to development of the Prince of Peace Properties contained in the MSDP, the Conrich ASP and the Appeals.

Respondents' Tab B3 - Monitor's First Report to District Creditors, para. 17

65. This information was not disclosed until many votes had already been cast. Election letters were enclosed in the First Report to Creditors which was sent to District Depositors on March 28, 2016, allowing Depositors to mail in their votes immediately. At subsequent "Information Meetings" held between April 19 and 28, 2016, the Monitor urged attendees to submit their votes on the spot, rather than waiting to vote at the District Creditors' Meeting on May 14, 2016. It was not until April 29, 2016 (the day after the last "Information Meeting") that the Monitor disclosed limited information on its website about the MSDP and the impediments to development of the Prince of Peace Properties.

Respondents' Tab B5 - Monitor's memo to District Creditors re: MSDP dated April 29, 2016

Respondents' Tab C12 – Affidavit of Marilyn Huber sworn June 26, 2012, para. 9

66. Subsequent directions concerning how a Depositor might change his or her vote were ineffective. On May 20, 2016, the Monitor posted on its website a notice advising that Depositors might change their votes in advance of the Creditors' Meeting that was to be reconvened on June 10, 2016. However, Depositors were not provided with the necessary blank forms of Election Letter with which to do so. Had individual Depositors been given access to new Election Letters, more "yes" votes may have become "no" votes. In the absence of access to new Election Letters, Depositors who may have wanted to change their votes following disclosure of the MSDP had no practical way of doing so.

Respondents' Tab B7 - Monitor's Notice to District Creditors re: Adjournment of District Creditors Meeting, dated May 20, 2016

Respondents' Tab C13 – Affidavit of Courtney Clark sworn June 26, 2016, Ex. "E"

67. In these circumstances, the Court may reasonably draw the conclusion that the District's non-disclosure of the MSDP, the Conrich ASP and the Appeals was an effort to promote the "upside benefits" of developing the Prince of Peace Properties without disclosing the "downside" costs and risks, in order secure the Depositors' approval of the Plan. As such the District has conducted itself in bad faith in presenting its Plan to the Depositors, and for that reason its application should be rejected.

b. The Representative Action

68. The Representative Action provisions of the Plan also have not been advanced in good faith. They have the purpose and effect of shielding from future liability the very parties who have been the architects of their terms.

69. Mr. Taman and Bishop & McKenzie LLP, the law firm in which he is a partner, are counsel for all four Applicants in these proceedings. Mr. Taman and Bishop & McKenzie LLP also provided legal advice and services to District, and to its borrowers ECHS and Shepherd's Village Ministries Ltd., with respect to the matters giving rise to these insolvencies, including the POP Village transactions.

Respondents' Tab C4 - Clark Affidavit sworn February 23, 2016, Exs. "F" to "H", "V"

70. In their Notice of Civil Claim, the Respondents allege (*inter alia*) that Mr. Taman and Bishop & McKenzie LLP rendered knowing assistance to breaches of trust and breaches of fiduciary duty by the ABC District in relation to the POP Village and related transactions, and that they are jointly and severally liable with defendant Shepherd's Village Ministries Ltd. for knowing receipt of District CEF trust funds obtained through breach of trust.

Respondents' Tab C4 - Clark Affidavit sworn February 23, 2016, Ex. "K", paras. 148 - 156

71. The Respondents further allege that by acting for the Applicants in this matter and by advancing the District and DIL Plans which contain the Representative Action provisions purporting to circumscribe the procedural rights of the DIL and District Depositors to advance third party claims (including claims against himself and Bishop & McKenzie LLP), Mr. Taman has intentionally sought to misuse the CCAA proceedings to shield himself and his law firm from liability. The Respondents have sought an order for punitive damages in relation to this conduct.

Respondents' Tab C4 - Clark Affidavit sworn February 23, 2016, Ex. "K", paras. 100 – 101, 175

72. Finally, the Respondents allege that Mr. Taman and Bishop McKenzie LLP have been unjustly enriched as a result of the legal fees that they have been paid at the cost of the DIL and District Depositors in these proceedings.

Respondents' Tab C4 - Clark Affidavit sworn February 23, 2016, Ex."K", para. 157

73. Against those allegations, Mr. Taman's defence of the Representative Action provisions of the Plan that he himself drafted are disingenuous. In a letter to Respondents' counsel dated December 21, 2015, Mr. Taman stated:

> We appreciate your comments [concerning the determination of the opt-in deadline], but they fail to take into account religious beliefs of the individuals involved in this particular CCAA Proceeding. There are a material number of individuals who, based on their religious beliefs, including their understanding of 1 Corinthians 6, do not believe in pursuing law suits against the Church. It is a desire to be responsive to these people's desires to not in any way be involved in the organization or pursuit of such a law suit that we have set an early date for the initial election as to whether or not they wish to participate in the law suit. While from a purely secular perspective this would seem early, the initial opt out respects the individual's desire not to be in any way involved in the law suit. When combined with the ability to opt out later on, we believe that it provides an ability for people who have a differing interpretation of scripture to be able to pursue the action if they believe that it is in their best interests.

Respondents' Tab C4 - Clark Affidavit sworn February 23, 2016, Ex. "C"

74. Mr. Taman and Bishop & McKenzie LLP are not "the Church". However, by characterizing the Representative Action as an action against "the Church", Mr. Taman has sought to take advantage of some Depositors' disinclination to sue "the Church" to ensure that related claims are also not advanced against himself and his law firm.

75. It would be inappropriate for this Court to base its decision in this matter on the District's (or any other party's) interpretation of scripture, or its views as to any Depositors' religious beliefs. However, it is appropriate for this Court to find that third parties should not benefit from certain Depositors' desire to opt out legal proceedings against "the Church" by sheltering beneath the "sole recourse" provision of the Plan.

Respondents' Tab A, District Plan Art. 5.5, para. 18

76. The Monitor's vehement support of the Representative Action process also bears scrutiny. The definition of "Representative Action Claims" includes derivative claims that could be brought in the name of the Applicant. Deloitte & Touche (a company related to the Monitor, Deloitte Restructuring Inc.) was the auditor of ABC District from at least 1990 to 1998 or 1999, during which time the POP Village development was commenced, financed and brought to market by ABC District. Mrs. Kroeger and Mr. Kellen have made demand upon ABC District to commence an action in negligence against Deloitte & Touche's successor, Deloitte LLP.

Respondents' Tab C4 - Clark Affidavit sworn February 23, 2016, Exs. "L" – "U"
Respondents' Tab C7 - Affidavit of Courtney Clark sworn March 4, 2016, Ex. "A"

77. Deloitte LLP is therefore a potential defendant to a derivative claim brought in the name of ABC District. However, under the Plan the Monitor is tasked with ongoing communications with District Depositors concerning the Representative Action, including (pursuant to Art. 5.4), providing Depositors who have not opted out of the Action with an estimate of the Representative Action Holdback, information about opting out of the Representative Action, the name of the Representative Counsel, the deadline for opting out of the Representative Action, and the names of the Subcommittee members. This clearly puts the Monitor in a conflict between its own interests and its duty to fairly and accurately advise and inform the District Depositors concerning the Representative Action. Accordingly, the Representative Action provisions of the Plan must not receive the sanction of the Court in these proceedings.

Respondents' Tab A – District Plan, p. 17

(d) The District Plan is not Fair and Reasonable

a. The Majority Vote was Obtained Through Religious Influence

78. As noted above, the District Plan has been approved by the requisite majority in number and two-thirds in value of voting creditors. However, this outcome is not binding upon the Court. The Court retains a supervisory jurisdiction to refuse to sanction the District Plan if the plan is not fair and reasonable, despite the voting requirements of CCAA s. 6 having been met.

79. As noted above, the Court is often slow to second-guess "business deals" arrived at by "businessmen" in negotiating plans of compromise and arrangement under the CCAA.

However, it must be borne in mind that the District Depositors are not "businessmen"; rather, 60% of them are by and large, senior citizens over 70 years of age.

Respondents' Tab C2 - Affidavit of Kurtis Robinson sworn January 22, 2015, para. 22

80. Further, the relationship between the District and the Depositors is not a business relationship; rather, it is a relationship of religious leaders to their followers. That relationship provides ample opportunity for undue influence. This is the case even though there has been input by a Creditors' Committee (itself comprised of Lutheran Church – Canada, ABC District members) that has been independently advised. The power of religious leaders to persuade their followers to adopt a course of action which is not in their own financial best interests cannot and should not be underestimated.

81. Indeed, there is evidence of efforts by Church officials to influence the outcome of the District Creditors' vote in favour of the Plan. Pastors across Alberta and British Columbia have made their churches available for "Information Meetings" hosted by the Monitor to promote the Plan, and have urged their congregations to place their trust in the "accuracy" of the information imparted by the Monitor and Chief Restructuring Officer.

Respondents' Tab B4 - Monitor's Notice to District Creditors re: Location of Information Meetings, dated April 7, 2016

Respondents' Tab C13 - Affidavit of Courtney Clark sworn June 27, 2016, Ex. "H"

82. In contrast, some Church pastors have sought to marginalize, discredit, intimidate and silence those Church members who have opposed the Plan. Some specific examples of such conduct include:

(a) On May 8, 2016 Pastor Darren Siegle of the Grace Lutheran Church in Osoyoos, B.C. refused to acknowledge the presence of Plan opponent Donald Specht during Sunday services, and refused to allow him to speak against the District Plan at a Church Council meeting;

Respondents' Tab C14 - Affidavit of Donald Specht, sworn June 23, 2016

(b) On May 25, 2015, Pastor Mark Ruf of Grace Lutheran Church in Calgary AB (a District Board member from 2000 to 2012) wrote a letter to his congregation wherein he characterized the information circulated by the Monitor and CRO as "accurate and current", and the views of those opposed to the Plan as "misinformation circulated by various people for varied reasons";

Respondents' Tab C13 - Affidavit of Courtney Clark sworn June 27, 2016, Ex. "H"

(c) On April 24, 2016, Shane Duthie of the Board of Lay Ministry of the Grace Lutheran Church in Calgary advised the congregation in writing that meetings convened by members opposed to the Plan were "not sanctioned by Grace Lutheran and not in the spirit of our Constitution", and therefore could not be held under the name of the "Grace Lutheran", as a matter of "Church discipline";

Respondents' Tab C13 - Affidavit of Courtney Clark sworn June 27, 2016, Ex. "I"

(d) On April 26, 2016, the pastor of the Lutheran Church in Red Deer refused to allow Marilyn Huber to distribute anti-District Plan written material inside the church prior to an Information Meeting hosted by the Monitor;

Respondents' Tab C12 – Affidavit of Marilyn Huber sworn June 26, 2016, paras. 11 – 13

(e) On May 13, 2016, Pastor David Dressler of Good Shepherd Lutheran Church in Calgary (a District Board member from 2009 to 2015) told Keith Odegard, a member of his congregation and an Elder of the Church, that he was "very disappointed" in him for associating with Mr. Specht, and that his opposition to the Plan put him in a "conflict of interest" with the congregation.

Respondents' Tab C11 - Affidavit of Keith Odegard sworn June 22, 2016

83. The message sent by these pastors and other church officials is clear: the Pastors support the District Plan and those who oppose the Plan risk rejection by and exclusion from their Church and spiritual family. It is a deplorable exercise of religious coercion even the most effective independent legal advice cannot hope to overcome.

84. In these unusual circumstances, therefore, the Court must be unusually vigilant in the exercise of its supervisory jurisdiction. It must take care to not only protect District Creditors from religious coercion and intimidation, but also to uphold the integrity of the CCAA Court and public confidence in the CCAA process. The Court must not defer to the results of a creditor vote that has been influenced to an unknown degree by the exercise of religious coercion or influence. At the very least, the Court must review the District Plan objectively, without regard to the outcome of the vote, to determine whether

its terms are fair and reasonable. At most, it may refuse to sanction a Plan which does not have the *bona fide* support of the majority.

b. The Majority is in a Conflict of Interest

85. The Court must also consider the effect of the inclusion of the Convenience Payment provisions of the Plan on the voting outcome. The proposed Convenience Payment of the lesser of $5,000.00 or the full amount of their claim will have the effect of paying in full the claims of 1,640 out of 2,631 District Depositors (approximately 62%) and 10 of the 12 Trades (approximately 77%).

Respondents' Tab A - District Plan, Art. 4.2(a)
Respondents' Tab B3 - Monitor's First Report to Creditors, para. 16

86. It was a foregone conclusion that these creditors, who represent a significant majority in number in proven claims, and who by receiving payment in full are unaffected by the balance of the provisions of the Plan, would vote in its favour. Absent the Convenience Payment, the requisite double majority may well not have been achieved.

87. The inclusion of the Convenience Payment provisions in the Plan results in a conflict of interest within the voting majority. The 62% of District creditors whose claims of $5,000.00 or less will be paid in full by the claims will not be burdened with the NewCo and Representative Action provisions of the Plan. Therefore, a significant number of those creditors who voted in favour of the Plan can fairly be said to have been voting only in favour of the Convenience Payment; the NewCo and Representative Action provisions of the Plan are of no significance to them. As such, they are in a conflict with those creditors for whom the $5,000.00 Convenience Payment represents a very small percentage of their claims, and whose interests stand to be significantly affected by the NewCo and Representative Action provisions of the Plan.

Re Texas Gold Resources, *supra* at p. 4-5

c. The Convenience Payment is not Fair or Reasonable

88. Further, the Convenience Payment is neither fair to the District Depositor with claims of more than $5,000.00, nor it is reasonable.

89. The Convenience Payment results in 100% satisfaction of the claims of 1,640 smaller creditors at the expense of those creditors with claims in excess of $5,000.00. The total cost of the Convenience Payment is $6,300,000.00 (the "Fund"), which is 0.065% of the

total Proven Claims of $96,700,000.00, or $0.065/dollar. The payment of the Convenience Payment has the following effect on the distribution made to creditors with larger claims:

Value of Creditor's Proven Claim	*Pro rata* share of the Fund without Convenience Payment	*Pro rata* share of the Fund *with* Convenience Payment	Net Reduction in Creditor's Distribution under the Plan
$2,000,000.00	$130,000.00	$5,000.00	$125,000.00
$1,500,000.00	$ 97,500.00	$5,000.00	$ 92,500.00
$ 500,000.00	$ 65,000.00	$5,000.00	$ 60,000.00
$ 250,000.00	$ 16,500.00	$5,000.00	$ 11,500.00
$ 125,000.00	$ 8,125.00	$5,000.00	$ 3,125.00
$ 76,750.00	$ 5,000.00	$5,000.00	$0

90. The prejudice suffered by the District Depositors with larger claims as a result of the Convenience Payment constitutes a marked departure from the principle that a plan of arrangement advanced pursuant to the CCAA must provide for distribution on a *pro rata* basis. In *Re Second Standard Royalties Ltd.*, (1930) 66 O.L. R. 288 at para. 33, the Court held:

> I think it must be a fundamental factor for consideration in all such schemes or arrangements that the proposed sacrifice or other modification of charter rights must be borne proportionately by all those members of the class affected, so that a minority, while opposed, may at least feel that the majority are all giving up as much proportionately as they are. If the scheme may have the effect of enabling the majority…to benefit some members of the class at the expense of others, then the scheme must be scrutinized with great care, and ought in most cases to be rejected.
>
> Respondents' Tab 16

91. The Monitor has sought to justify the Convenience Payment on the grounds that it eliminates smaller creditors and concentrates NewCo Share ownership in the hands of Depositors with more substantial financial interests. The Convenience Payment could just as easily be seen as preferentially and unfairly saving the creditors with smaller claims from the risk of NewCo Share ownership: the risk that they could lose all or part of their investment.

92. No intelligent and honest District Depositor with a claim greater than $5,000.00, acting in his or her own best financial interests and having a full understanding of the financial

impact of the Convenience Payment provisions of the Plan – which is to subsidize the 100% compensation of creditors with claims of $5,000.00 while also releasing them from the risks of NewCo Share ownership and the substantive and procedural burdens of the Representative Action -- would approve of them. Accordingly, the Court must not sanction them in these proceedings.

d. The NewCo Provisions of the Plan are not Fair or Reasonable

93. The NewCo provisions of the Plan require the District Depositors to compromise their debt claims in exchange for a *pro rata* distribution of shares in NewCo valued at the forced liquidation value of the Prince of Peace Properties. The mandate of NewCo (potentially ranging from short-term liquidation of the Properties to long-term development) will not be decided until the first meeting of the NewCo shareholders, to be held six months after the Effective Date of the Plan.

Respondents' Tab B3 - Monitor's First Report to District Creditors, paras. 35, 40

94. In the absence of a clear mandate for NewCo, the District Plan is nothing more than "a plan to make a plan". Neither the Depositors nor the Court know at this time how or whether NewCo will ultimately realize the value of the Prince of Peace Properties. The "plan" will ultimately be made by a majority of the NewCo shareholders at their first meeting, long after these proceedings are over. As such, the District Plan deprives the Court of its power pursuant to s. 6 of the CCAA to ensure that the "plan" is fair and reasonable and therefore appropriate to impose upon the minority.

95. Rather than offering the Depositors options for the realization of the value of the Prince of Peace Properties, the District Plan represents the imposition of an unacceptable level of risk. While the Monitor has identified a benefit to Depositors flowing from the "ability to liquidate the Prince of Peace Properties at a time when [Alberta real estate] market conditions are more favourable", there is no guarantee that the market will improve in the near to mid term. The market is just as likely to decline further, thereby devaluing the NewCo Shares over time.

Respondents' Tab B3 – Monitor's First Report to District Creditors, para. 40.4
Respondents' Tab C15 - Affidavit of Vera Kroeger sworn June 23, 2016

96. Similarly, the likelihood that NewCo will be able to profitably develop the Prince of Peace Properties by way of a joint venture in the mid to long term is entirely speculative. ABC District has to date been unable to find a partner willing to joint venture with it, despite preparing and filing a comprehensive Master Site Development Plan. The Court

might reasonably draw the conclusion that the costly infrastructure requirements of developing the Properties (estimated at $6,000,000.00 to $7,500,000.00 for the cost of connecting to the municipal water supply alone) may have discouraged interest in the project.

Respondents' Tab B5 - Monitor's memorandum to Creditors re MSDP, p. 2

97. Given the cost of the infrastructure requirements of the development of the Prince of Peace Properties, both in time and money, the likelihood of NewCo realizing any profits in the mid- to long-term, if at all, is questionable at best. Certainly, the District has tried over the last 20 years to turn the Prince of Peace development into a profitable venture, and has failed miserably. In essence, the NewCo provisions of the Plan transfer the problem of formulating a viable business plan for the ill-conceived Prince of Peace development from the District to its elderly creditors. This Court should not allow the District to burden the Depositors with the responsibility of trying to succeed where it has failed.

98. Furthermore, NewCo Shares are simply not a suitable investment for the District Depositors over the age of 70 years who make up more than 60% of the total number of creditors. Mrs. Kroeger, a widow of 87 years of age living on a small teacher's pension, has sought advice from Investment Advisor Doug McConnell of Raymond James Ltd. Mr. Jones has prepared an expert opinion in this matter. In his report dated July 5, 2016, Mr. McConnell opines that NewCo Shares are an unsuitable investment for Mrs. Kroeger (and seniors like her), because they do not meet her requirements for a low risk, easily liquidated investment which can be relied upon to meet her cash needs.

Respondents' Tab E 1 - Expert report of Doug McConnell dated July 5, 2016

99. Mrs. Kroeger does not wish to own NewCo Shares. She would prefer to receive her *pro rata* share of the value of the Prince of Peace Properties now, and invest those funds in an investment with which she feels comfortable and confident.

Respondents' Tab C15 – Affidavit of Elvira Kroeger sworn June 23, 2016, para. 3(c)

100. Depositor Fredrick Voight, who is 91 years of age and resides in a retirement home in White Rock, B.C., has received the same advice from his investment advisor Grant Wilson of Hollis Wealth. Mr. Voight needs money now to pay his basic monthly rent of $2,100.00, plus additional monthly costs for extra personal care services.

Respondents' Tab C16 – Affidavit of Fredrick Voight sworn June 23, 2016, paras. 5 – 6, Ex. "B"

101. Mrs. Kroeger, Mr. Voight and the more than 1,600 Depositors like them who are more than 70 years old and retired from employment need investments that are easily liquidated and can produce cash flow to pay their living expenses. NewCo Shares do not meet those criteria.

Respondents' Tab E 1 - Expert Report of Doug McConnell, p. 4

102. Again, the issuance of NewCo Shares is not essential to the limited restructuring aims of District, and offers no quantifiable benefit to its Depositors over and above an immediate liquidation of the Prince of Peace Properties and *pro rata* distribution of the proceeds. It does, however, bind all of the Depositors (regardless of age, circumstance and wealth or lack thereof) together in a single business venture ruled by the majority shareholders in NewCo. It would be infinitely more fair and reasonable to liquidate the Prince of Peace Properties now, distribute the proceeds to the Depositors on a *pro rata* basis, and allow them to invest their funds in a way that satisfies their personal financial objectives, risk tolerances, and cash flow needs.

103. The Plan has been promoted on the premise that it is only through the issuance of NewCo Shares that Depositors can hope to increase their recovery. In addition to being based on numerous assumptions concerning future events and property values that may well not be borne out, that premise is false. Again, Depositors can also increase their recovery by taking their *pro rata* share of the proceeds from the liquidation of the Prince of Peace Properties and putting it to work in one or more of the wide variety of investment vehicles available in the financial marketplace, without exposing themselves to the risks associated with the historically disastrously money-losing Prince of Peace development.

Respondents' Tab B3 - Monitor's First Report to District Creditors, para. 24

e. The Representative Action is not Fair or Reasonable

104. The Monitor has endorsed the Representative Action provisions of the District Plan for the following reasons:

(a) It provides for a streamlined process for the establishment of the Representative class and the funding of the Representative Action;

(b) It prevents a situation where District Depositors are being contacted by multiple groups seeking to represent them in a class action or otherwise;

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

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

Respondents' Tab B3 – Monitor's First Report to District Creditors, para. 60

i. The Purported "Benefits" of the Representative Action Provisions of the Plan are Illusory

105. Mrs. Kroeger and Mr. Kellen take issue with these purported "benefits" to Depositors.

106. Firstly, as noted above, applicable provincial jurisdictional legislation and procedural rules limit the number of jurisdictions in which claims can be advanced. Further, class proceeding legislation provides for the "streamlining" of class claims. Upon certification, all persons meeting the class description are automatically members of the class unless they fill out an opt-out form which is provided to them along with the notice of certification. Any individual actions previously commenced by members of the class are stayed. Multiple class proceedings filed in the same jurisdiction are reduced to a single proceeding through the application of carriage provisions. Accordingly, there is no need for these claims to be "streamlined" through the Representative Action process.

Infra, para. 40
Respondents' Tab 22 -- BC CPA, s. 8, 12, 13, 16
Respondents' Tab 26 - *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c. 28, s. 10

107. Secondly, there is no evidence that District Depositors have been overrun with solicitations by lawyers seeking retainers. It is not necessary to the success of a class proceeding that all potential class members be "signed up". Persons fitting the class definition will become class members immediately upon certification, subject to their right to opt out of the proceedings.

108. Thirdly, it is pure speculation to assume that one Representative Counsel could negotiate a better settlement on behalf of District Depositors than a number of counsel acting together.

109. Fourthly, it is preferential and disproportionate to cater to some Depositors' disinclination to engage in the litigation by circumscribing others Depositors' ability to participate, and by removing all options for those who wish to advance claims outside of the Representative Action process. As noted above, provincial class proceedings legislation provides a process whereby Depositors who do not wish to participate in litigation may opt out of class proceedings immediately after certification. This is a reasonable way of ensuring that only those Depositors who wish to participate in the litigation are part of the class.

Respondents' Tab 22 - BC CPA, s. 16
Respondents' Tab 23 – ACPA, s. 17

110. Even if the Court agrees with the Monitor that the Representative Action provisions of the Plan provides these "benefits" to the District Depositors, that alone does not provide the Court with the necessary jurisdiction to sanction the Plan. The "benefits" identified by the Monitor are not within the legitimate purposes of the CCAA, which are to support the debtor's restructuring goals and avoid the economic and social outcomes of business failure and liquidation. Accordingly, the Court has no jurisdiction to sanction the Plan.

ii. The "Sole Recourse" Provisions of the Plan are Unfair and Unreasonable

111. Pursuant to Art. 5.5 of the Plan, if a Depositor opts out of the Representative Action, he or she will have no recourse whatsoever to pursue the residual portion of his or her claim which is not paid by way of a distribution under the Plan.

Respondents' Tab A - District Plan, Art. 5.5

112. Further, a Depositor who elects to participate in the Representative Action but whose individual claim is rejected by the Subcommittee has no right to pursue that individual claim on his or her own accord.

Respondents' Tab A - District Plan Art. 1, definition of "Representative Action Claim"

113. In contrast, in class proceedings commenced pursuant to provincial class proceedings legislation, a litigant who wishes to opt out of a class proceeding retains the right to commence and pursue an independent claim.

Respondents' Tab 22 -- BC CPA, s. 16
Respondents' Tab 23 – ACPA, s. 17

114. The "opt out" provisions of provincial class proceedings legislation balance the need for access to justice and conservation of judicial resources with the individual litigant's right to retain counsel and advance his or her claim in the manner of his or her own choosing.

115. In submissions before the Court on judicial sanction of the DIL Plan, the Monitor suggests that this defect in the Representative Action provisions may be repaired by permitting a Depositor whose claim has been rejected by the Subcommittee to apply to the Court for "directions". This is not an adequate solution to the problem. Access to the courts is not a matter of judicial discretion. It is a constitutional right and a fundamental pillar of the rule of law. In *Re British Columbia Government Employees Union*, (1985) 20 D.L.R. (4th) 399, [1985] B.C.J. No. 1939 (C.A.) [Q.L.], Nemetz CJBC held:

> [9]...in order for the courts to effectively discharge the duties imposed by its independent status it is imperative that a citizen have full and unfettered access to the courts. Otherwise the citizen's constitutional right to resort to this independent branch of government would be threatened. The ability to invoke the protection of the courts underpins the rule of law upon which Canada was created, as recognized in the Preamble to Part I of the Constitution Act, 1982 which reads:
>
> > Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:
>
> [10] Manifestly to maintain that rule of law a person must have unimpeded access to the courts.
>
> ...
>
> [26] We have no doubt that the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens.

Respondents' Tab 2

116. The "sole recourse" provisions of the District Plan strip the Depositors' substantive and procedural rights from them in a way that violates their right of

unimpeded access to the courts and dampens third party claims, but does not in any way advance the District's restructuring objectives. No honest and intelligent District Depositor acting in their own best interests would give up these fundamental rights of citizenship where the law already provides perfectly satisfactory processes for advancing legal claims against third parties on a class basis. These provisions are neither fair nor reasonable, and accordingly must not receive the sanction of this Court.

iii. The Representative Action definitions are circular

117. The definition of "Representative Action Claim(s)" and "Representative Action Defendants" are circular, leading to confusion and misunderstanding as to what types of claims are included in the Representative Action and who the potential defendants might be.

118. Art. 1 of the District Plan defines the term "Representative Action" as follows:

> **"Representative Action"**: means that legal action or actions undertaken in respect of the Representative Action Claims, which action may be advanced as a class proceeding for the benefit of the Representative Action Class pursuant to the terms of the Plan....

Respondents' Tab A, p. 9

119. The definition of the term "Representative Action Claim(s)" in Art. 1 of the Plan is broad enough to encompass any and every claim that a District Depositor may bring against any defendant, whether in an individual, representative or derivative capacity. It even encompasses those claims which a District Depositor may wish to advance, but the Subcommittee chooses not to pursue:

> **"Representative Action Claims"**: means Any and all potential claims of District Depositors, whether such claims are pursued as part of the Representative Action or not, that seek or could seek, directly or indirectly, to recover the amounts of their Claims under this Plan and are not released by this Plan under Articles 8.1 and 8.3. For greater certainty, such potential claims include those claims or potential claims specifically mentioned in Articles 8.2 and 8.4, and also includes the following claims:
>
> (a) Claim(s) related to a contractual right of one or more of the District Depositors entered into personally by a Representative Action Defendant;

(b) Claim(s) based on allegations of misrepresentations made by a Representative Action Defendant to District Depositors or of wrongful or oppressive conduct by a Representative Action Defendant;

(c) Claim(s) of the District against a Representative Action Defendant, including but not limited to claims for breach of any legal, equitable, contractual or other duty;

(d) Claims that are a D & O Claim, including a D & O Insured Claim; and

(e) Any claim(s) which one or more of the District Depositors could have pursued in the name of District, including without limitation, any derivative action (whether statutory or otherwise) or any Claim(s) which could be assigned to a creditor pursuant to s. 38 of the BIA, if such legislation were available.

[underlining added]

Respondents' Tab A, District Plan, Art. 1, p. 9

120. Given that the definition of "Representative Action Claim" includes claims against "Representative Action Defendants", it is essential to understand who a "Representative Action Defendant" is in order to understand what claims are included in the definition of "Representative Action Claims".

121. Under Art. 1 of the Plan, the definition of "Representative Action Defendant" against whom a Representative Claim may only be brought within the confines of a Representative Action is broad enough to encompass (with certain exclusions and limitations) any person whatsoever:

"Representative Action Defendant:: means the Partially Released Parties and any other parties against whom Representative Action Claim(s) may be brought, but excludes the Released Representatives except to the extent permitted pursuant to Art. 8.2. [underlining added]

Respondents' Tab A, District Plan, Art. 1, p. 10

122. These definitions are circular. A Representative Action Claim is a claim brought against a Representative Action Defendant; a Representative Action Defendant is a person against whom a Representative Action Claim is brought. The definitions offer no useful guidance to the reader as to what or whom a Representative Action Claim or a Representative Action Defendant is. This will have a dampening effect on litigation, as

Depositors may be disinclined to participate in legal proceedings the scope and ambit of which are unclear to them. This is unfair and unreasonable.

iv. The Representative Action Provisions do not Provide for Information about the Representative Action to be Provided to the District Depositors Prior to the Opt-out Deadline

123. The provisions of Art. 5 render it impossible for a Depositor to know and understand exactly what causes of action the Subcommittee intends to advance, and against whom, before making an election whether to participate in the Representative Action and incur the Representative Action Holdback, or to opt out entirely.

124. Pursuant to Art. 5.4 and 5.6 of the District Plan ("Deemed Election to Participate in Representative Action") a District Depositor is deemed to have elected to participate in the Representative Action unless and until the Depositor delivers a signed Notice of Opting Out to the Representative Counsel or the Monitor "on or before 5:00 pm (Calgary time) on the last Business Day preceding the date of commencement of the Representative Action". Depositors who fail to return the Letter are deemed to have opted in to the Representative Action.

Respondents' Tab A, District Plan, p. 17 - 18

125. Art. 5.4 contemplates that following selection of the Representative Counsel by the Subcommitee, the Monitor will provide to all Depositors who have not yet 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.

Respondents' Tab A, District Plan, p. 17

126. This is the full extent of the information that District Depositors can expect to receive from the Monitor in advance of the opt-out deadline. The Plan does not contemplate that the Subcommittee, the Monitor or the Representative Counsel will advise the Depositors as to the nature of the claims to be commenced, or the defendants named, at any time prior to the opt-out deadline.

127. Mr. Taman, counsel for District, has suggested that some Depositors "do not believe in pursuing lawsuits against the Church." If that is the case, then their willingness to participate in the Representative Action will depend on whether the named defendants are religious entities. However, the Plan does not contemplate that the information will be provided prior to the opt-out deadline. In the absence of substantive information about the Representative Action, it is reasonable to expect that many District Depositors will elect to opt out of it. This is a benefit not only to the District, but also to the third parties against whom claims may be advanced in the Representative Action, including Mr. Taman and Bishop & McKenzie LLP, the architects of the Plan.

Respondents' Tab C4 - Clark Affidavit sworn February 23, 2016, Ex. "C", p. 10

128. In contrast, under class proceedings legislation, the opt-out deadline is typically set by way of the certification order for a reasonable period of time (30 to 90 days) after the date of certification. This is to allow class members to learn about the class proceeding, to read the pleadings, and to contact class counsel to ask questions about the case before making a determination about whether to participate. The District Plan does not provide the District Depositors with the same opportunity to make an informed decision about the Representative Action prior to the opt-out deadline.

Respondents' Tab 22 - BC CPA, s.16
Respondents' Tab 22, ACPA, s. 17

v. The Representative Action Provisions do not Provide for Adequate and Reliable Financial Disclosure to the District Depositors regarding the Cost of the Representative Action

129. Art. 5.4 of the Plan provides that after the Representative Counsel has been appointed the Monitor will advise the District Depositors who have not opted out as to the amount of the Representative Holdback. However, participating Depositors will not know their own proportionate share of the Representative Action Holdback (the "Proportionate Share of Costs", as defined in Art. 1) until after the opt-out deadline has passed and the size of the Representative Action Class is known.

Respondents' Tab A, District Plan, p. 17

130. This leaves the District Depositors in the position of having to make an irrevocable decision as to whether or not to participate in the Representative Action prior to the opt-out deadline without knowing what their *pro rata* share of the Representative

Holdback will be. If the Depositor finds that he or she has insufficient financial information upon which to make an informed decision and therefore elects to opt out of the Representative Action, he or she will have no recourse to pursue their claims independently of the Representative Action process.

131. Further, the Plan does not provide for (as it should) the replenishment of the Representative Action Holdback in the event that the sum is depleted. That the District Depositors have not been informed that they will be required to replenish the Holdback in the event that it is depleted or risk forfeiting the litigation underway is a significant factor militating against the Plan.

132. In the absence of reliable information about the extent of their financial commitment to the Representative Action, it can reasonably be expected that many District Depositors will be content to receive their distribution under the Plan and forgo the balance of their claims by electing to opt out of the Representative Action. Again, this is a benefit to the District and the third parties against whom claims may be advanced in the Representative Action, including the Lutheran Church of Canada and District counsel Mr. Taman and Bishop & McKenzie LLP, the architects of the Plan.

133. In contrast, a class proceeding commenced pursuant to provincial class proceedings legislation is typically pursued by class counsel on a contingency fee basis, in recognition of the fact that the named plaintiff is acting in a representative capacity and cannot (and should not) be required to carry the financial burden of the litigation for the rest of the class. Fees and disbursements are charged only in the event of success, and must be approved by the Court. The imposition of the District Plan and the provision made therein for a Representative Action Holdback changes this dynamic, and puts the Depositors at risk of a demand for substantial retainers to advance the Representative Action.

vi. The Subcommittee is in an Actual or Potential Conflict of Interest with the Representative Plaintiff and/or the DIL Depositors

134. There is an irreconcilable conflict of interest between the Subcommittee and the Representative Plaintiff that can be expected to mar the Representative Action. Unlike the Subcommittee tasked with instructing counsel, the Representative Plaintiff bears the sole financial responsibility for paying an adverse costs award. If the Representative Action Holdback is (or is likely to be) insufficient to fully indemnify the Representative Plaintiff as contemplated by Art. 5.7 ("Indemnity for Representative Plaintiff"), it is reasonable to expect that there may be a divergence of views between the Subcommittee

and the Representative Plaintiff as to the conduct of the Representative Action. This puts the prosecution of the Representative Action and the interests of the participating District Depositors at risk.

135. In contrast, in class proceedings commenced under provincial legislation, the representative plaintiff instructs class counsel. When the interests of the representative plaintiff come into conflict with the interests of the class, counsel must seek direction from the Court. Adding another instructing party, the Subcommittee, to this already complex and delicate fiduciary relationship is an unwarranted and unwise decision.

IV. CONCLUSION

136. The future of the ABC District is uncertain. It has elected to carry on operations in much reduced fashion, and following the restructuring plans of the LCC its lifespan may be limited to 18 months. In any event, the Representative Action and NewCo provisions of the Plan do nothing to support or enhance the ongoing operations of ABC District, either in the short or the long term. Instead, they burden the District Depositors with business and market risks in relation to the disposition of the Prince of Peace Properties, and they strip the District Depositors of their fundamental legal right of access to the courts to pursue third party claims. To the extent that this Court may find that the Plan provides "benefits" to the District Depositors, they are not "benefits" which this Court has the jurisdiction to impose upon the minority creditors pursuant to the CCAA. Accordingly, the District Plan must not receive judicial sanction. The ABC District's application must be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED: July 6, 2016.

Errin A. Poyner
Counsel for Elvira Kroeger and Randall Kellen