COURT FILE NUMBER	1501-00955
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
	IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended
APPLICANTS	LUTHERAN CHURCH – CANADA, THE ALBERTA – BRITISH COLUMBIA DISTRICT, ENCHARIS COMMUNITY HOUSING AND SERVICES, ENCHARIS MANAGEMENT AND SUPPORT SERVICES, AND LUTHERAN CHURCH – CANADA, THE ALBERTA – BRITISH COLUMBIA DISTRICT INVESTMENTS LTD.
DOCUMENT	**RESPONSE BRIEF TO APPLICATION TO REMOVE THE MONITOR**
	July 15, 2016

Clerk's Stamp

CLERK OF THE COURT
FILED
JUL - 7 2016
CALGARY, ALBERTA

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. FACTS

1. On January 23, 2015, the Applicant made application for an initial order under the Companies' Creditors Arrangement Act, RSC 1985, c. C-36, as amended (the "CCAA").

2. As part of the application materials before Justice Yamauchi, the Monitor provided a Pre-Filing Report, dated January 22, 2016. That Pre-Filing Report disclosed the Monitor's pre-filing consulting services (the "Pre-Filing Engagements").

Pre-Filing Report of the Proposed Monitor Deloitte Restructuring Inc., dated January 22, 2016

3. Justice K. D. Yamauchi granted the Initial Order in this Action which, inter alia, appointed Deloitte Restructuring Inc. (the "Monitor") as Monitor of the Applicants. The Initial Order has not been appealed.

Initial Order of Justice K.D. Yamauchi filed January 23, 2016

4. Deloitte LLP was the auditor of the District between 1990 and 1999 (the "Prior Audit Work"). The Monitor's initial conflict search did not turn up this earlier engagement of the separate but related entity. The Monitor became aware of this engagement and reported it in the Monitor's Fourth Report, dated June 24, 2015.

Fourth Report of the Monitor, dated June 24, 2015, at para. 40

5. The Pre-Filing Engagements and the Prior Audit Work were again disclosed in the Monitor's Fifteenth and Sixteenth Reports. These reports also outlined the allegations contained in the Brief of the Respondents, represented by Ms. Poyner, in the application for a Sanction Order of the Lutheran Church – Canada, the Alberta – British Columbia District Investments Ltd. ("DIL") plan of compromise and arrangement (the "DIL Plan") regarding the potential that the Prior Audit Work (the "Unproven Allegations").

Fifteenth Report of the Monitor, dated February 25, 2016, at paras. 32 to 37

Sixteenth Report of the Monitor, dated March 14, 2016, at para. 17

6. The Monitor again disclosed the Prior Audit Work and the Unproven Allegations in the Monitor's First Report to the Creditors of the District, dated March 28, 2016 ("Report to Creditors").

First Report to the Creditors of the District, March 28, 2016, at paras. 65 and 66

7. The Report to Creditors contained extensive information regarding the District Plan, including full disclosure of potential risks. This disclosure expressly included the potential for NewCo shares to be negatively affected by a variety of known and unknown risks.

Report to Creditors, at paras. 42 and 43

8. The Report to Creditors was posted to the Monitor's website and was mailed to all Eligible Affected Creditors.

Nineteenth Report of the Monitor, dated May 27, 2016 ("19th Report"), at para. 18

9. The Monitor held five separate information meetings throughout Alberta and British Columbia to answer questions regarding the District Plan. At least one of the Respondents represented by Ms. Poyner was in attendance at two of these meetings. At those meetings, the Respondent had an opportunity to distribute a document to the attendees that outlined the Respondents' concerns with respect to the District Plan. The document disclosed the Prior Audit Work as well as the Unproven Allegations, acknowledging that the allegations against Deloitte LLP are unproven. The first page of the document suggests that the document was also emailed to all congregations in the District.

19th Report, at para. 23

Affidavit of Marilyn Huber, filed June 27, 2016, at paras. 2, 4, 5, 12, 13 and Exhibit "A".

10. In addition to the Report to Creditors, the Monitor prepared and mailed a number of supplementary documents. These documents were circulated as a result of discussions the Monitor had with District Creditors and included a document relating to future subdivision and development issues surrounding the Prince of Peace development (the "Additional Information").

19th Report, at para. 21.

11. The Additional Information was posted on the Monitor's website and was mailed to all Eligible Affected Creditors.

19th Report, at para. 22.

12. Ms. Poyner and Mr. Garber raised the Prior Audit Work and the Unproven Allegations during the District Creditors' Meeting on May 14, 2016.

19th Report, at Schedule 15, pp. 8 & 9

13. After a fulsome discussion of the District Plan, the District Creditors' Meeting was adjourned to permit congregations to have additional time to consult prior to voting on the District Plan.

19th Report, para. 28

14. The Monitor was proactive in communicating with congregations to ensure the adjournment was sufficient to allow them to fully consider the information provided to

them. The Monitor also offered to provide any additional information the Congregations needed upon their request. In four instances additional information was requested and was provided by the Monitor.

19th Report, para. 28

15. The notice of the reconvening date of the District Creditors' Meeting also included details on how Eligible Affected Creditors could change their vote and provided the contact information of the Monitor for Eligible Affected Creditors to contact them if had they any questions.

19th Report, Schedule "17".

16. The vote was held at the reconvened District Creditors Meeting on June 10, 2016.

17. Following the vote, 83% of the Eligible Affected Creditors representing 76% of the voting claims in value voted to accept the District Plan.

Twentieth Report of the Monitor, dated June 20, 2016, at paras. 24, 26 and 27

II. ISSUE

18. Should the application for a replacement Monitor be granted?

III. THE LAW

19. Section 11.7 of the CCAA reads:

> **Court to appoint monitor**
>
> 11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the Bankruptcy and Insolvency Act.
>
> **Restrictions on who may be monitor**
>
> (2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company
>
> (a) if the trustee is or, at any time during the two preceding years, was
>
> (i) a director, an officer or an employee of the company,
>
> (ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the Civil Code of Quebec that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

Court may replace monitor

(3) On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the Bankruptcy and Insolvency Act, to monitor the business and financial affairs of the company.

20. The applicants agree that a monitor is an Officer of the Court and acts as the "eyes and ears" of the Court in CCAA proceeding. A monitor owes a fiduciary duty to all stakeholders, is required to act independently, and treat all parties reasonably and fairly.

United Used Auto & Truck Parts Ltd., [1999] BCJ No. 2754 (BCSC), ("*United Used Auto & Truck Parts Ltd.*")
Respondents' Application Brief, Tab 18, at paras 20

Re: Winalta Inc., 2011 ABQB 399, **Respondents' Application Brief, Tab 19,** at paras. 67 and 68

21. With respect to who can act as monitor, there are no absolute bars legislatively or at common law to the appointment of monitors who have had previous dealing with the applicant company prior to the initial order in CCAA proceedings. Rather, the Court balances the benefits of having a monitor with previous knowledge of the application company against the potential for the perception of conflict of interest.

22. In *Re Hickman Equipment (1985) Ltd.*, the Court had appointed the debtor company's auditors as monitor. Subsequently, it was argued that there was possible appearance of conflict of interest. The Court identified the benefits of appointing a monitor who had a previous knowledge of the applicant company as avoiding considerable additional delay in the application, which risked further adverse action taken against the applicant company, as well avoiding the duplication of work and associated expenses. The Court noted that there had been adequate disclosure of the potential conflict of interest by the monitor. In that case, the Court confirmed that it had been appropriate to appoint the former auditor, Deloitte & Touche, as the monitor.

TAB 1 - *Re Hickman Equipment (1985) Ltd.*, 2002 CarswellNfld 154 (Nfld SC TD), at paras. 8, 9 and 49

23. In reaching this conclusion, the Court stated at paragraphs 8 and 9:

> **Permitting the auditor of a company to act as its monitor under a reorganization plan under the CCAA is merely a recognition of the commercial realities at play when a company is forced to seek protection under the CCAA.** Under the CCAA, relief from one's creditors is not automatic. There is no automatic stay of proceedings against the applicant company by creditors merely because it has applied for such relief. The relief must be granted by the order of the Court after the application is filed and after the applicant company has declared and publically filed documents declaring that it is insolvent. Therefore, in order to prepare for a CCAA application, the applicant company will usually require the continuing assistance of its own accountants and auditors. These professionals would most likely be the accounting professionals most knowledgeable about the affairs and business of the applicant company and most competent to promptly assembly the requisite information and plans to support the initial application for relief under the CCAA. **A mandatory requirement that the auditor of an applicant company not be permitted to serve as monitor would, in most cases, result in considerable additional delay because the proposed monitor (not being familiar with the affairs of the company) would need to be brought up to speed. This extra work would obviously result in a duplication of expense for a company which is already cash strapped. Most importantly, it would delay a CCAA application being made on a timely basis, resulting in obvious risk of adverse moves being made against the applicant company by its creditors before it can obtain court protection.**
>
> **Cognizant of these commercial realities**... this Court was satisfied to confirm the appointment of Deloitte & Touche Inc. as Monitor.

TAB 1 - *Hickman Equipment (1985) Ltd.*, at paras. 8 and 9 as cited in *Can-Pacific Farms Ltd.*, 2012 BCSC 760, **Respondents' Application Brief, Tab 4,** at para. 23

24. This conclusion was endorsed and replicated in the case of *Can-Pacific Farms Inc.* In that case, the proposed monitor, Murphy & Associates, had never acted as auditor for the applicant company, but had provided financial consultant services and assisted in the preparation of financial records. In assessing the appointment of Murphy & Associates as monitor, the Court concluded that given its previous involvement with the company as advisor and in order to avoid delay and the duplication of costs already incurred by a different monitor, the appointment of Murphy & Associates as monitor was held to be appropriate.

Can-Pacific Farms Inc., 2012 BCSC 760, at **Respondents' Application Brief, Tab 4**, at paras. 24 to 26

25. An earlier case dealing with disclosure of conflict of interests as well as general disclosure is *United Auto & Truck Parts Ltd.* In that case, the Initial Order was challenged at the comeback hearing. The grounds were first, that full and frank disclosure of a number of facts had not been provided, and second, that the monitor had not disclosed that they had provided advice to the debtor companies. The Court held that the facts and the previous involvement of the monitor had both been sufficiently disclosed.

26. The its holding, the Court stated:

> As was pointed out in *Mooney v. Orr* (1994), 100 B.C.L.R (2d) 335 (BCSC), the standard of disclosure must be realistic. In my view, the Petitioners met a realistic standard of disclosure and I decline to set aside the stay Order on the basis of non-disclosure.
>
> *United Used Auto & Truck Parts Ltd.*, **Respondent's Application Brief, Tab 18**, at paras. 11 to 14

IV. ANALYSIS OF THE LAW

27. When considering the case law, a distinction must be made in the type and timing of applications. There are applications not to approve a Monitor during the initial application. There are applications with respect to the passing of a monitor's accounts subsequent to their appointment, the performance of their duties, and their discharge. And finally, there are applications made subsequent to the initial appointment of the Monitor and the performance of their duties within CCAA proceedings, and specifically, in the case at bar, at the sanction stage.

28. At the initial application or comeback hearing, the majority of the work of the CCAA remains to be completed. The pre-initial application work done by the proposed monitor is preparatory and is *di minimus* in comparison to the hundreds or thousands of hours of work which remains to be done during the CCAA proceedings. However, even at this early stage, the Court heavily weighs the factors of delay as well as the duplication of costs and efforts already made by a proposed monitor, against the application to appoint a monitor other than the proposed monitor. This was demonstrated in *Can-Pacific Farms Inc.*

29. Put simply, even at initial application stage, the Court does not lightly appoint an alternative firm as monitor even if there is a potential conflict of interest with respect to the proposed monitor.

30. The Court is balancing the potential risk to the creditors and the debtor company arising from the potential conflict of interest against the prejudice to the creditors and the debtor company arising from the delay and duplication of costs and efforts associated with replacing the monitor. Clearly, the further along in the CCAA proceedings the application to replace the monitor is made, the more significant the potential conflict of interest needs to be in order to counterbalance the significantly increased prejudice of delay and the duplication of costs and efforts.

31. In this instance, we are dealing with an application to replace the monitor at the time of the Sanction Hearing. The potential risk to creditors and the debtor company must be weighed against the prejudice to them of appointing a replacement monitor.

32. The potential risk to the creditors and the debtor company of the Monitor's potential conflict of interest is minimal. If the sanction of the District Plan is granted, the involvement of the Monitor with respect to the Representative Action will be minimal. The Monitor will assist the District Creditors' Committee in forming the Subcommittee and will act as a conduit for passing information in consultation with the Subcommittee. The Monitor will work with the Subcommittee and their counsel to determine the amount of the Representative Action Holdback and to oversee distributions of funds relating to the Representative Action. Both the District Creditors' Committee and the Subcommittee will have counsel and access to the Court should they perceive any issues. In light of this, there is no actual or potential risk to the Monitor continuing to act in their capacity as monitor.

33. Conversely, the prejudice to the creditors of replacing the Monitor at this stage would be substantial.

34. With respect to costs, the proposed replacement monitor has indicated in order to give the opinion requested by Ms. Poyner, the cost will be $75,000 and the cost to complete the CCAA will be $100,000. These costs are not inclusive of legal fees. As the replacement monitor will be asked to render an opinion on a matter which is, in essence an expert legal opinion, regarding the Representative Action, it is anticipating that they will rely heavily on their legal counsel. Again, these costs are not included in the estimate. Further, the majority, if not all, of the proposed replacement monitors estimated costs would be required for the replacement to get up to speed, which would be a duplication of the work already performed by the Monitor.

35. With respect to time, there will be significant delay as the replacement monitor will need to review the materials regarding the CCAA as well as the proceedings to date in order to begin to contemplate the outstanding issues apart from the Representative Action. These issues included dealing with any disputed claims. Again, this would be a duplication of the work already performed by the Monitor.

36. When considering the risks and the prejudice, it must be noted that there is no justifiable reason for the delay in the Respondents' application to replace the Monitor. The disclosure of the Pre-Filing Engagements and the Prior Audit Work was made by the Monitor in June 2015. Despite the knowledge of these facts for one year, the Respondents did not bring an application to replace the Monitor.

37. If the Respondents had real and legitimate concerns regarding the structuring, development, and presentation of the District Plan with respect to this potential conflict of interst, they had ample opportunity to bring an application. However, no application was brought until

the eve of the sanction hearing. Rather, the Respondents participated in the CCAA proceedings and only subsequent to the District Plan being voted on with approval was this application brought.

38. Further, the issue of the potential conflict of interest was addressed by the Court at the March 3, 2016 application. On March 9, 2016, Justice Romaine ruled that the disclosure made by the Monitor was appropriate. This ruling has not been appealed.

39. The issue was again addressed at the March 21, 2016 application and ruled on by the Court. Again, the March 21, 2016 ruling has not been appealed.

40. This matter has been determined by the Court and the Respondents' application to replace the Monitor should be dismissed.

The Potential Risks Raised by the Respondents are Not Risks

41. The first potential risk raised by the Respondents is that the District depositors are unprotected. However, the Eligible Affected Creditors who are District depositors, are represented by the District Creditors' Committee. The District Creditors are fiduciaries of the District depositors and have a duty to consider the alleged conflicts. They are represented by experienced counsel who are aware of all of the arguments being raised. They have devoted months of their time immersing themselves in these CCAA proceedings. They have expressed no concerns nor brought an application to replace the Monitor. There is no risk that the interests of the District depositors are not protected.

42. The second potential risk raised by the Respondents is the failure of the District to either begin an action against Deloitte or to assign such action to the Respondents. At the time this was raised in March 2016, there was a pending application to stay all actions, including the actions contemplated by the Respondents. To have commenced or assigned the action at that time would have been in the utmost bad faith of the District. To do so now, would be to breach a Court Order. There is no risk in the alleged failure to commence an action against Deloitte.

43. A third potential risk raised by the Respondents is that the failure of Deloitte to disclose the Master Site Development Plan (the "MSDP") and other development related risks. The Respondents allege that this has prejudiced the District depositors in some way; however, this is based upon the false premise that the shareholders of NewCo are required to develop the Prince of Peace Development. This is incorrect. As discussed more fully in our application Brief, filed June 30, 2016, the shareholders of NewCo will choose how to deal with the Prince of Peace Development at their first shareholders meeting with the benefit of the advice from their

Board. At that meeting, considerations such as the previous development plans, including MSDP and other site development options, may become relevant. At this point, however, the opinion of both the Monitor and CRO is simply that in the event that the shareholders decide to sell the Prince of Peace Development immediately, they will likely obtain a better return than selling the property though a Court based process. There is no risk with respect to the non-disclosure of the MSDP.

44. Further, as noted in *United Used Auto & Truck Parts Ltd.*, disclosure by the Monitor has to be reasonable, it does not have to be perfect. Given this threshold, it is not reasonable for the Monitor to predict what may be deemed relevant by each and every individual in making their personal decision. That is an impossible standard and to impose that standard on the Monitor would be not be reasonable.

45. In this instance, the Monitor put in place a process to identify and respond to as many individual questions as possible. Five information meetings were held. The Monitor provided email and phone numbers to enable individuals who were not able to attend the meetings to contact them directly. In several instances, when it was appropriate, additional written material was circulated. This is a more than reasonable process enabling individuals to ask questions and the Monitor to respond. It is also respectful of the fact that individuals may ask questions that aren't strictly relevant, but may still impact their decisions. This process and the level of information provided exceeds the standard of what is generally provided in usual CCAA proceedings and the threshold of reasonable.

46. The Respondents appear to raise the fourth risk that the Monitor has a different opinion regarding the conclusions that should be drawn in the CCAA proceedings. We respectfully submit that this is not a reason to replace the Monitor. The Monitor as an officer of the Court, is entitled and, indeed, required to form an opinion. The Respondents can and did provide their perspective. In the end, the Eligible Affected Creditors voted and the District Plan was approved.

47. The Respondents also raise the issue of scrutineers. We respectfully submit that this concern demonstrates a lack of understanding of the CCAA process. The reason for scrutineers in clubs and churches is that the ballots are destroyed following the count. In a CCAA, the ballots are kept following the count and not destroyed.

48. Finally, the Respondents seek to appoint a limited monitor to review the Representative Action. We submit that this appointment would be flawed. The issue of the Representative Action is a question of law, which is fully within the jurisdiction of the Court to determine without

the assistance of another monitor. The Court will consider the positions of the existing parties and their counsel, including the Monitor. As an officer of the Court, the Monitor has consulted with their legal counsel and has presented an opinion for the Courts consideration. The other participating parties have done the same. The matter of the Representative Action is not an issue where the Court needs the assistance of a further monitor or any other expert to determine facts. Rather, this is a question of legal interpretation of the laws of the Province of Alberta and of Canada which is what Justices are competent to do without assistance.

49. In conclusion, there are no actual or potential risks to creditors and the debtor company in having the Monitor continue to act. Conversely, there would be significant prejudice of delays and costs if a replacement monitor were to be appointed. Given the failure of the Respondents to bring this application during the preceding year and the timing of this application at the sanction stage, the appointment of the Monitor should be confirmed and the Respondents' application should be dismissed.

IV. CONCLUSION

50. The Applicants seek an order granting:

a. the dismissal of the Respondent's application, and

b. the costs of this application.

51. It is respectfully submitted that this is the only outcome that is just and appropriate in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Bishop & McKenzie LLP

Per: _____
FRANCIS TAMAN
Solicitors for the Respondents,
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.

Table of Authorities

Cases

2002 CarswellNfld 154
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2002 CarswellNfld 154, [2002] N.J. No. 158, 114 A.C.W.S. (3d) 795, 214 Nfld. & P.E.I.R. 126, 34 C.B.R. (4th) 203, 642 A.P.R. 126

In the Matter of the Companies' Creditors Arrangement Act, Chapter C-36 of the Revised Statutes of Canada, 1985 as amended; And In the Matter of the plan of compromise or arrangement of Hickman Equipment (1985) Limited; And In the Matter of Rule 25 of the Rules of the Supreme Court, 1986 under the Judicature Act, R.S.N. 1990, c. J-4, as amended; And In the Matter of the Bankruptcy and Insolvency Act, Chapter B-3 of the Revised Statutes of Canada, 1985, as amended

Hall J.

Heard: May 6, 15, 2002
Judgment: May 31, 2002
Docket: 2002 01 T 0352

Counsel: *Aubrey L. Bonnell, Q.C., Brian Winsor, Terence M. Dolan, John Salmas*, for ABM Amro Bank Canada, ABN Amro Leasing and Tramac Equipment Ltd.
J. Vernon French, Q.C., for Culease Financial Services and Bombardier Capital Ltd.
Gregory W. Dickie, for Tyco Capital (Canada) Inc., CIBC Equipment Finance Ltd. and CIT Financial Ltd.
Philip Buckingham, Peter O'Flaherty, Elaine Gray, for Daimler Chrysler Financial Services, Daimler Chrysler Capital Services and Mercedes-Benz of Canada Inc.
Em Spurrell, Linc A. Rodgers, Rhodie E. Mercer, Q.C., for Eastern Demolition and Fabtek Corp.
Edward J. Shortall, Q.C., for Gillis Truckways Inc.
Thomas R. Kendell, Q.C., for General Motors Acceptance Corporation
Griffith D. Roberts, for Group Holdings Ltd., Hickman Equipment and Hickman Holdings Ltd.
R. Barry Learmonth, Q.C., Jonathan Wigley, for Ingersoll-Rand Canada Inc.
Neil L. Jacobs, Maureen Ryan, for John Deere Ltd. and John Deere Credit Inc.
Jamie Smith, Q.C., for Deloitte & Touche Inc.
R. Paul Burgess, for MTC Leasing Inc. and National Leasing Group Inc.
Carl Holm, Q.C., for Merrick Holm
Thomas O. Boyne, Q.C., for Royal Bank of Canada
D. Bradford L. Wicks, for TD Asset Finance Corp.
Richard Jones, for Wells Fargo Equipment Finance Co.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.g Monitor

Debtors and creditors

VII Receivers
VII.3 Appointment
VII.3.d Monitors and consultants

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Corporation brought application for relief under Companies' Creditors Arrangement Act — Monitor was appointed — Monitor had previously been auditor for corporation — Corporation terminated Act proceedings — Monitor's appointment was terminated and receiver appointed — Monitor brought application for passage of accounts and for final discharge — Creditors objected to passage of accounts, claiming monitor breached its fiduciary duty by failing to disclose extended relationship with corporation — Application granted — Creditors did not make formal application to remove monitor — Time spent by monitor's professions on duties related to Act proceedings was not excessive — Nature of services performed by monitor was not inappropriate — Rates of $375 and $450 per hour charged by monitor were appropriate given professionals' high level of restructuring experience — Monitor did not engage in inappropriate activity once it realized reorganization or liquidation was impossible — Monitor was not involved in misrepresentations of source deductions — Discrepancy in source deductions would not have prevented granting of relief under Act — Monitor's approval of payment of previously overlooked source deductions was not improper — Creditors were not prejudiced by late payments of source deductions — Practical reasons existed for appointment of auditor as monitor — Prior relationship was adequately disclosed and court was aware of relationship before appointment — Evidence did not reveal actual conflict existed or that monitor failed to perform duties properly — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Receivers --- Appointment — Monitors and consultants

Corporation brought application for relief under Companies' Creditors Arrangement Act — Monitor was appointed — Monitor had previously been auditor for corporation — Corporation terminated Act proceedings — Monitor's appointment was terminated and receiver appointed — Monitor brought application for passage of accounts and for final discharge — Creditors objected to passage of accounts, claiming monitor breached its fiduciary duty by failing to disclose extended relationship with corporation — Application granted — Creditors did not make formal application to remove monitor — Time spent by monitor's professions on duties related to Act proceedings was not excessive — Nature of services performed by monitor was not inappropriate — Rates of $375 and $450 per hour charged by monitor were appropriate given professionals' high level of restructuring experience — Monitor did not engage in inappropriate activity once it realized reorganization or liquidation was impossible — Monitor was not involved in misrepresentations of source deductions — Discrepancy in source deductions would not have prevented granting of relief under Act — Monitor's approval of payment of previously overlooked source deductions was not improper — Creditors were not prejudiced by late payments of source deductions — Practical reasons existed for appointment of auditor as monitor — Prior relationship was adequately disclosed and court was aware of relationship before appointment — Evidence did not reveal actual conflict existed or that monitor failed to perform duties properly — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Hall J.*:

Canadian Co-operative Leasing Services v. Price Waterhouse Ltd., (sub nom. *Canadian Cooperative Leasing Services*

v. Price Waterhouse Ltd. (No. 2)) 128 N.B.R. (2d) 1, (sub nom. *Canadian Cooperative Leasing Services v. Price Waterhouse Ltd. (No. 2))* 322 A.P.R. 1, 1992 CarswellNB 28 (N.B. Q.B.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11.7(3) [en. 1997, c. 12, s. 124] — referred to

APPLICATION by monitor for passage of accounts and for final discharge.

***Hall J.*:**

Background of CCAA Application and Initial Order

1 By an originating application (*ex parte*) Hickman Equipment (1985) Limited (hereinafter "Hickman") made application for relief under the **Companies' Creditors Arrangement Act**, RSC, 1985, c.-C-36 (the "**CCAA**"). Hickman advised the Court that it intended to propose a plan of arrangement or compromise between it and its creditors pursuant to the **CCAA** and it applied, *inter alia*, for an order appointing Deloitte & Touche Inc. as Monitor of Hickman pursuant to the proposed order. While the originating application was officially made *ex parte*, a small select group of secured creditors of Hickman were advised of the making of the application and appeared and spoke thereto. These were:

(1) John Deere Limited

(2) John Deere Credit Inc.

(3) Canadian Imperial Bank of Commerce; and

(4) General Motors Acceptance Corporation.

2 In support of the originating application for relief under the **CCAA**, Hickman filed the affidavit of Albert E. Hickman, one of the Directors of Hickman. Paragraph 71 of that affidavit stated:

"Deloitte & Touche Inc. and Deloitte & Touche LLP are knowledgeable as to the specifics of the business and operations of Hickman Equipment and therefore will be able to perform the functions of monitor more efficiently, more effectively and at less cost than could other entities."

3 Deloitte & Touche LLP were the auditors of Hickman. This fact was not directly stated in the affidavit of Albert Hickman. However, attached as Exhibit 1 to his affidavit, was a copy of the audited financial statements of Hickman for the year ended December 31, 2000 which audited statements were clearly prepared by and contained an auditor's report from Deloitte & Touche LLP.

4 At the hearing of the originating application (*ex parte*) for relief under the **CCAA** on February 7, 2002, no further mention was made nor was any further documentation filed which disclosed that Deloitte & Touche LLP were also the auditors for a large group of corporations related to Hickman, as well as being the personal auditors and tax advisors to Albert Hickman and Howard Hickman , both of whom were directors of Hickman. As the hearing Judge, I was aware of this extended relationship between Deloitte & Touche LLP and the Hickman Group of Companies, and Albert and Howard Hickman. This information had come to me during my years in the practice of law. In addition, Robert Stack, counsel for Hickman, had, prior to the issuance of the originating application (*ex parte*) provided a draft copy of it to me and had advised me of the relationship which existed between Deloitte & Touche LLP and the extended Hickman Group of Companies, and Albert and Howard Hickman.

5 At the initial hearing of the originating application (*ex parte*) no further mention was made by any of the counsel present of any concerns about Deloitte & Touche Inc. acting as Monitor of Hickman because of the relationship between Deloitte & Touche LLP with the Hickman Group of Companies, and Albert and Howard Hickman as set out above.

6 In **Houlden and Morawetz: Bankruptcy and Insolvency Law of Canada** (Third Edition) N§16.3, the learned authors state:

> "... the auditor of the debtor company may be appointed. The duties of the monitor are set out in s. 11.7(3)."

7 The reference to s. 11.7(3) is of course a reference to the **CCAA**. The authors continue:

> "A monitor is an agent of the court. The monitor owes a fiduciary duty to all parties and an obligation to ensure that one creditor is not given an advantage over other creditors. ...
>
> The monitor has an obligation to act independently and to consider the interests of the debtor and the creditors. If a monitor is not acting in this manner, the court will appoint a replacement: *Re United Used Auto & Truck Parts Ltd.* (1999), 12 C.B.R. (4th) 144 (B.C.S.C.).

8 Permitting the auditor of a company to act as its monitor under a reorganization plan under the **CCAA** is merely a recognition of the commercial realities at play when a company is forced to seek protection under the **CCAA**. Under the **CCAA**, relief from one's creditors is not automatic. There is no automatic stay of proceedings against the applicant company by creditors merely because it has applied for such relief. The relief must be granted by the order of the Court after the application is filed and after the applicant company has declared and publically filed documents declaring that it is insolvent. Therefore, in order to prepare for a **CCAA** application, the applicant company will usually require the continuing assistance of its own accountants and auditors. These professionals would most likely be the accounting professionals most knowledgeable about the affairs and business of the applicant company and most competent to promptly assembly the requisite information and plans to support the initial application for relief under the **CCAA**. A mandatory requirement that the auditor of an applicant company not be permitted to serve as monitor would, in most cases, result in considerable additional delay because the proposed monitor (not being familiar with the affairs of the company) would need to be brought up to speed. This extra work would obviously result in a duplication of expense for a company which is already cash strapped. Most importantly, it would delay a **CCAA** application being made on a timely basis, resulting in obvious risk of adverse moves being made against the applicant company by its creditors before it can obtain court protection.

9 Cognizant of these commercial realities and the fact that creditors were cancelling dealership agreements and commencing legal action against Hickman, this Court was satisfied to confirm the appointment of Deloitte & Touche Inc. as Monitor.

Select creditor opposition to continuation of Deloitte & Touche Inc. as Monitor

10 The initial objective of Hickman under the **CCAA** was to restructure itself as a going concern but as a reduced operation. About a week before the filing of the originating application (*ex parte*), John Deere Limited had terminated its

dealership agreement with Hickman. John Deere Limited was the principal equipment supplier to Hickman and the cancellation of this dealership agreement was a major blow to Hickman in that Hickman, no longer being a John Deere dealer, could no longer avail of warranty and financing facilities made available by John Deere Limited to its dealers. Nonetheless at the time of the originating application (*ex parte*), Hickman represented to the Court that it harboured a reasonable belief that John Deere Limited could be brought back on side and might reinstate its dealership agreement with Hickman. Failing this, Hickman envisioned an orderly wind down of the company pursuant to the **CCAA**.

11 Ultimately however Hickman was unable to convince John Deere Limited to reinstate the dealership agreement which had previously existed between them or to establish any new dealership agreement. This became apparent to Hickman very shortly after the granting of the initial **CCAA** order (hereinafter "Initial Order") with the result that Hickman entered into negotiations with and concluded an agreement with Ontrac Equipment Services Inc. ("Ontrac") whereby Ontrac agreed to purchase certain assets of Hickman in accordance with a letter agreement negotiated between them. By an interlocutory application filed February 15th, Hickman sought approval of that letter agreement. Hickman argued that approval of this letter agreement would greatly facilitate an orderly liquidation of the assets of the company, allowing it to maximize realization of the equity Hickman claimed existed in these assets. The interlocutory application was heard on February 18th and February 21st. These hearings were the first dates on which creditors had the opportunity to express to the Court concerns they had about the continuation of Deloitte & Touche Inc. as monitor for Hickman under the **CCAA** reorganization plan. At the February 18th hearing counsel for two creditors indicated, in the presence of other counsel, that they were aware of the extended relationship between Deloitte & Touche LLP and the Hickman Group of Companies, and Howard and Albert Hickman. Both counsel indicated they wished to have the opportunity to examine the Monitor on several issues, the details of which they did not disclose, related to the causes for the financial collapse of Hickman. Counsel for one of these two creditors indicated that it wanted an opportunity to consider an application to replace the Monitor due to the close relationship of the Monitor with the related Hickman Group of Companies and the principals of Hickman. However no formal application was filed by either of these creditors to have the Monitor removed and a replacement monitor appointed. The hearing of the application to approve the letter agreement between Hickman and Ontrac was adjourned to February 21st. On that date counsel for Wells Fargo Equipment Finance Company (hereinafter "Wells Fargo") indicated that his client would be bringing an application to have the Monitor removed and a receiver appointed by the Court. However, the bulk of the hearing on February 21st dealt with the terms of the letter agreement between Hickman and Ontrac, and ultimately an order was issued on February 22nd approving a modified letter agreement between these parties.

12 Part of the ongoing obligations of Hickman as a result of the approval of the Ontrac letter agreement, was an obligation to obtain appraisals of the value of the equipment still held by Hickman. The appraisal was to be provided by an independent auditioning company by the name of Ritchie Brothers. Ultimately that appraisal was provided and there was a very considerable difference between the company's expected realizations upon its equipment and the market prices indicated by Ritchie Brothers. While the company had expected to realize approximately $40,000,000 on its equipment, Ritchie Brothers provided Hickman with a guaranteed auction value for its equipment of only approximately $16,000,000. Another auction company, LVG Auctioneers, provided Hickman with an estimate of auction values of $20,000,000. This large discrepancy caused Hickman to reconsider its ability to achieve the original projected results under the **CCAA** proceedings. Hickman decided to terminate the **CCAA** proceedings and to apply for the appointment of a receiver to manage the affairs of the company and to liquidate its assets. This plan of action was supported by the Monitor in its report to the Court of March 8, 2002. As a result, at a hearing on March 13, 2002, Hickman consented to the issuance of a Receiving Order against it under the **Bankruptcy and Insolvency Act** and consented to an application that a receiver be appointed of the assets of Hickman. As a result of the Receivership Order, the appointment of the Monitor under the **CCAA** was terminated and the Monitor was directed on or before March 30, 2002 to report to the Court on its activities subsequent to the date of its appointment, to pass its accounts, to apply for its final discharge and to have the accounts of Monitor's counsel passed and approved. This present application deals with the Monitor's application for the passage of the accounts and its final discharge and the objections of two creditors thereto, namely, Ingersoll-Rand Canada Inc. ("Ingersoll-Rand") and Wells Fargo.

Substance of objections to Monitor's accounts

13 At the initial hearing into the passage of the Monitor's accounts, Ingersoll-Rand and Wells Fargo objected to a lack of detailed information with respect to the Monitor's accounts. Additionally they requested information from the Monitor on the following matters:

(1) How source deductions escalated to $400,000 when the affidavit of Albert Hickman at the time of the originating application (*ex parte*) for relief under the CCAA indicated that the only remittance arrears to the Canadian Customs and Revenue Agency was approximately $65,000.

(2) How the payroll requirements for the five weeks from February 7th to March 13th shown in the cashflow projections initially provided by the Monitor grew from $58,000 to $205,000 plus source deductions, and when did the Monitor become aware of this and that the staff had not been laid off.

(3) Why actual equipment sales only totalled $27,503 when projected sales for the relevant period were supposed to be $3,000,000. Additionally, these creditors sought information as to why projected sales for 33 pieces of equipment which were indicated as possible at the time of the approval of the Ontrac letter agreement, were not in fact made; and

(4) The creditors questioned where one sale of $27,503 was made how HST payable could have amounted to $49,266.

14 At the initial hearing with respect to the passage of the Monitor's accounts, the Monitor was ordered to provide detailed time billings for its services and to provide, in affidavit form, answers to the above request for information by Wells Fargo and Ingersoll-Rand. In addition, Mr. Alan MacKinnon, CA, an officer of the Monitor, was directed to be available on cross-examination on his affidavit.

15 On May 15, 2002 a hearing was held with respect to the passage of the Monitor's accounts.

16 No formal application had ever made by any of the creditors for the removal of the Monitor and replacement of it by another accounting firm. At the Court hearings of February 18th and 21st revolving generally around the approval of the Ontrac letter agreement, some creditors did express dissatisfaction with the Monitor continuing in that role. However, none of them made formal application to have the Monitor removed and the material adverse change which resulted from the low appraisal values obtained from Ritchie Brothers and LVG Auctions rendered replacement of the Monitor moot due to the issuance of the Receiving Order and the Receivership Order. Nonetheless it was apparent at the hearings into the passage of the Monitor's account that these two creditors regarded Deloitte & Touche Inc. as being in breach of their fiduciary duty as Monitor to reveal to the creditors the extensive professional relationships by Deloitte & Touche LLP with other members of the Hickman Group of Companies and Howard and Albert Hickman. This general dissatisfaction coloured the nature of the objections made to the passage of the Monitor's accounts.

17 In addition to the generalized objection to the passage of the Monitor's accounts based upon an alleged breach of fiduciary duty, Ingersoll-Rand and Wells Fargo raised the following specific objections to these accounts.

First billing

18 Paragraph 27 of the Initial Order granting relief to Hickman under the CCAA had ordered that the Monitor and counsel to the Monitor would be paid their reasonable fees and disbursements (including the reasonable solicitor and client fees and disbursements of counsel to the Monitor) by Hickman as part of the restructuring costs. These fees and disbursements were "... subject to any final assessment or taxation by this Court." The first billing of the Monitor to Hickman covered the period from January 21, 2002 to February 9, 2002, the latter date being two days after the issuance of the Initial Order. This account broke down as follows:

Professional time	-	$107,593.00
Out-of-pocket costs	-	3,187.00
Subtotal	-	110,780.00
HST at 15%	-	16,617.00
Total	-	$127,397.00

19 $54,600 of the total of $107,593 of professional time on this invoice related to work performed by a Karen M. Cramm and a John Whitehead, being a partner and a senior manager in the Toronto office of Deloitte & Touche Inc. Mr. Alan MacKinnon, the local partner in charge of this file for Deloitte & Touche Inc., indicated that Ms. Cramm and Mr. Whitehead were restructuring specialists with Deloitte & Touche Inc. The hourly rates assigned to them for this account were $450 and

$375 respectively, whereas the rate charged to the file by Mr. MacKinnon was $250 per hour. The objection of counsel for Ingersoll-Rand and Wells Fargo to this portion of the account were basically:

(1) Why did it take $107,000 worth of professional time to prepare for the CCAA application?

(2) Why should the insolvent estate be expected to bear high professional rates from Toronto when Mr. MacKinnon's rate was so markedly lower than the rates of Ms. Cramm and Mr. Whitehead?

(3) Why shouldn't the rates of Cramm and Whitehead be reduced to Mr. MacKinnon's hourly rate?

20 There was no detailed cross-examination of Mr. MacKinnon with respect to the individual components of professional service included in this billing. The computer generated detailed time slips of Deloitte & Touche Inc. were presented in evidence. Like most reports of this nature the description of the service provided is singularly laconic, rarely consisting of more than seven or eight words. Taken together the individual entries give a picture of the services provided by the various professionals at Deloitte & Touche Inc. leading up the preparation of the CCAA originating application and supporting materials. The total time for Ms. Cramm is some 65.5 hours from the 28th of January to the 6th of February, inclusive. A very considerable period of time was employed by Ms. Cramm in working on a "report" which appears to be a report on the "financial position", presumably of Hickman. In addition, she was involved in preparation of the CCAA application and in various meetings with representatives of Hickman and Canadian Imperial Bank of Commerce, as well as with counsel for Hickman. In the absence of any specific challenge to anything other than the hourly rate assigned to Ms. Cramm, my review of the account satisfies me that the amount of time involvement on her part in this matter during the time frame in question is not excessive.

21 With respect to the services of John Whitehead, his portion of this initial billing spreads over the period from January 29th to February 8th and totals some 64 hours. Forty-one of these 64 hours are involved with services the narrative of which describes them as "review and analysis of restructuring information, report preparation". The other time entries for Mr. Whitehead involve preparation for various meetings with the bankers for Hickman and analysis of auction prices for various pieces of equipment as well as preparation and finalization of cashflow reports, preparation of press releases and hotline information, attendance at Court hearings and debriefing meetings thereafter and meeting with employees in preparation of master lists for reporting to Court and creditors on heavy equipment. Additionally, he was involved in a review of schedules for potential double security claims. My comments with respect to Mr. Whitehead's involvement in this matter and the amount of time applied on his part during this time frame are the same as those I have made with respect to Ms. Cramm. In both of their cases I am satisfied that the amount of professional time involved is not excessive.

22 Counsel for Ingersoll-Rand and Wells Fargo did not cross-examine to any significant extent to the remainder of the billing for this particular phrase of their work. There was no challenge to the involvement of local representatives of Deloitte & Touche Inc. in this matter, nor was there any complaint about their hourly rate. I have reviewed the detailed time billings sheets of Deloitte & Touche Inc. with respect to these other professionals including Mr. MacKinnon, Brian Groves, a senior manager, Gordon Halley, a senior, and other less involved, less experienced representatives of Deloitte & Touche. Nothing in their detailed time billing records leaps out at me as a cause for concern.

23 No applicant for relief under the CCAA is guaranteed that the Court will grant that relief. Success in obtaining relief under the CCAA is very much dependant upon the quality of the analysis which goes into preparation of the application and the quality of the application itself. The pre-filing preparatory stages of a CCAA application is a generally very intense time for all professionals involved, in particular the accountants and the legal counsel. Generally the applicant company is receiving threatening correspondence from its creditors and very considerable pressure is brought to bear upon the applicant to have the claims of its creditors satisfied. Nothing in the material before me indicates, on its face, that there are any inappropriate charges of professional time to the account. With respect to the hourly rates of the professionals involved, I am satisfied that the involvement of accounting professionals with a high level of experience in restructuring applications is a cost effective method of approaching a crisis situation which, by its very nature, demands a prompt response. It would be a false economy not to avail of such professionalism where it is available. To attempt to prepare a comprehensive CCAA application using professionals whose experience in the area of large financial restructuring is limited or nonexistent, would result in delay and unnecessary expense in paying for the "learning curve" of such professionals. I am therefore satisfied that

the rates charged by Ms. Cramm and Mr. Whitehead to the file during this time frame are appropriate and I would allow this billing number one in the amount of $127,397.00 (inclusive of HST), in its entirely.

Second billing

24 The second billing from Deloitte & Touche Inc. covers the period February 10th - 16th, 2002. It is comprised of:

Professional fees	-	$55,007.00
HST	-	8,251.05
Total	-	$63,258.05

25 Again Ms. Cramm and Mr. Whitehead are involved in the time ascribed to this billing. Ms. Cramm has charged 24.5 hours and Mr. Whitehead has charged 50.5 hours. During this time frame Ms. Cramm is involved in a review and analysis of the position of the applicant's principal banker, the Canadian Imperial Bank of Commerce. As well she is involved in an initiation of an auction process and reviewing and amending various versions of the Ontrac's letter agreement. She additionally has lengthy discussions with representatives of John Deere Limited and John Deere Credit Inc. and provides input with respect to a 26 week cashflow, an equipment list etc. Mr. Whitehead is involved on analysis and providing input with respect to double security registrations and meeting with Hickman's legal counsel with respect to PPSA security liens. He also provides input with respect to the Ontrac's arrangement and reviews various equipment issues with various creditors. He also produces the new six month's cashflow and meets with representatives of Hickman to discuss it.

26 Again there was no detailed cross-examination of Mr. MacKinnon with respect to the individual components of this billing. Having reviewed the individual time entries by the various professionals involved in the file, my observations with respect to the level of detail to those entries is the same as with respect to the first billing, i.e. that the entries are naturally laconic as typifies this type of billing record. Nothing was added to my understanding of them due to the lack of cross-examination with respect to the details of these time entries. It my review of the detailed time sheets, again I find nothing inappropriate in the nature of the various services being performed by the various professionals assigned to the file. While obviously there is some degree of professional overlap in the sense that less senior professionals are reporting to and discussing their findings with more senior professionals, this is hardly unusual and does not in my view constitute any type of double teaming of a nature that would be obviously inappropriate.

27 I am therefore satisfied to allow this account in the amount of $63,258.05 (HST included).

Third billing

28 The third billing is for the period February 17 - 22, 2002. In this billing the time charged by Ms. Cramm is 11.5 hours and by Mr. Whitehead 22.5 hours. Local representatives of Deloitte & Touche Inc. appear, from the number of hours inputted, to be assuming a greater role (at least in terms of numbers of hours work) with respect to the matter. This seems logical in the sense that the time frame in which the highly experienced advice of the Toronto office professionals of Deloitte & Touche is waning because the initial crisis portion of the mandate is passing.

29 Again with respect to this billing there was no cross-examination of the details of the billing by counsel for Ingersoll-Rand and Wells Fargo. My observations of this bill are essentially the same as with the previous two accounts. There is nothing in the individual time billings which is patently inappropriate, and without any detailed analysis thereof by way of cross-examination, there has not been any challenge to the detail of the account.

30 The total of the account is as follows:

Professional time	-	$40,966.00
Out-of-pocket expenses	-	4,620.96
Subtotal	-	45,586.96
HST @ 15%	-	6,638.04
Total	-	$52,225.00

I allow this account in this amount.

Fourth billing

31 The next billing is for the period February 23 - March 9, 2002. In this account Ms. Cramm's billings total only 19 hours of a total of 397 professional hours charged. Mr. Whitehead is not credited with any portion of this particular billing.

32 Counsel for Ingersoll-Rand and Wells Fargo objects to a portion of this billing and to all or substantially all of the subsequent billing. The nature of the objection is this - that sometime in early March (the precise date not being determined) Mr. MacKinnon became aware that a continuation of the reorganization or liquidation of Hickman under the **CCAA** had become impossible because of the material adverse change which occurred by reason of the significantly lower estimated realizations upon the equipment of the company as revealed by the Ritchie Brothers' and LVG Auctions' appraisals. The argument of counsel for Ingersoll-Rand and Wells Fargo is that at this particular point Deloitte & Touche Inc. should have simply "downed tools" and done no further significant work as Monitor. When cross-examined Mr. MacKinnon indicated that he had not been aware that his attendance at Court would require him to discuss in detail the individual time billings of Deloitte & Touche Inc. with respect to this matter. He therefore was unable to say with precision exactly when he became aware of this material adverse change. His general recollection was for sometime early in March. Clearly the last date on which it could be said Mr. MacKinnon had received this information was on the 8th of March, on which date Hickman filed an interlocutory application wherein the Court was advised that Hickman had concluded that continuing with the restructuring under the **CCAA** was impossible and that a Court appointed receivership should occur. I have reviewed the detailed time accounts of Deloitte & Touche Inc. to see if I could determine from them at what specific point in time Mr. MacKinnon was aware of the material adverse change. His time entries for the 1st of March indicate "Meet Ritchies" and his entries of March 4th indicate "Meeting at HML re Ontrac/Ritchie/LVG" and "Conference call re future strategy". I am satisfied that no later than March 4th Mr. MacKinnon had the necessary information to conclude that a continuation of the reorganization plan under the **CCAA** was doomed to inevitable failure. The question then is, What is the appropriate level of activity for the Monitor thereafter?

33 It is simplistic to suggest that the Monitor should have simply closed up its shop with respect to Hickman and done nothing further after it became aware of the inevitability of the failure of the reorganization under the **CCAA**. Such a suggestion ignores the ongoing obligations of the Monitor as a Court appointed officer. Having been appointed by the Court and held out to the creditors as someone they could contact, it is reasonable to expect that the Monitor would have a continuing dialogue with those interested in the affairs of the company and would assist in preparing it to make a transition from monitorship to the proposed Court appointed receivership. In addition the Monitor would have ongoing duties to provide its regular reports to the Court until the time that its mandate was terminated. The hearing for the Court appointed receiver was on March 13th. The particular billing of Deloitte & Touche with which we are now dealing terminates on March 9th. As I review the detailed time slips I see, using a cutoff date of March 4th, that from March 5th onward Mike Abbott, a senior with Deloitte & Touche, worked on accounting matters and helped with preparation of a receipts and disbursements summary. In addition he made phone calls to creditors, helped with preparation of the Monitor's Report and had conference calls with Alan MacKinnon and Karen Cramm, and prepared and revised pro forma balance sheets. He assisted in making changes to the various schedules to the second Monitor's Report and completed bank reconciliations, as well as spoke to several individuals about claims against the company. Of a total of 83.5 hours in total billings for this particular billing period, 32.5 occurred March 5th and onwards. Nothing in Mr. Abbott's activities strikes me as being unusual or unnecessary. They are all directly linked to the Monitor's obligations to report to the Court and to monitor the affairs of the company. His work in attempting to deal with claims against the company is entirely appropriate and, while we have no particular evidence on the point, because of a lack of cross-examination on this issue, presumably his assistance in this regard provided some benefit in the ultimate receivership. Karen Cramm's billings after March 4th constituted a total 12.5 hours out of a total of 19 hours billed by her. Eleven point five of these hours involved work with respect to the second Monitor's Report. One hour involved various discussions on pending Court proceedings. Again there is nothing bizarre or inappropriate in this billing. Brian Groves, a senior manager with Deloitte & Touche, provided 7 hours of professional service after March 4th out of a total of 61 hours billed. All of this involved preparation of lien holdings' listings which is an entirely appropriate activity for him to be involved in.

34 Gordon Halley, also a senior with Deloitte & Touche, spent 16.5 hours after March 4th of a total of 43 hours billed. Most of this work centered around preparation of tenders with respect to the ShowTech and Celebration Rentals division of the Company. In addition he provided services with respect to assessment of various bids received and dealt with parts

inventory issues with respect to operations in Labrador. Again there is nothing unusual or untoward in this work and, although again there was no evidence elicited by way of cross-examination, presumably this work, particularly in regard to the tender process for the ShowTech and Celebration Rentals divisions, was of assistance in the ultimate receivership.

35 Alan MacKinnon provided 29.5 hours of professional service after March 4th. This is out of a total of 72 hours billed on this particular billing. His service involved various conferences with counsel for Hickman and with Albert Hickman, as well as discussions with Canadian Imperial Bank of Commerce officials and solicitors for various creditors. He participated in the preparation and finalization of the second Monitor's Report and reviewed and revised various schedules thereto. Again, there is nothing unusual, untoward or improper with respect to billings of this nature.

36 Greg MacLeod, a partner with Deloitte & Touche billed 10.3 hours after March 4th. This is out of a total of 54.3 hours for this particular billing period. His services included preparation of portions of the second Monitor's Report, phone conferences with Monitor's counsel and Hickman's counsel re the company's pending motion for termination of the CCAA proceedings and included preparing for and chairing creditors' meetings by telephone conference. Again these activities do not seem inappropriate.

37 Randy Musselman, a senior manager with Deloitte & Touche, provided 14.5 hours after March 4th out of a total of 40 hours billed for this time frame. Most of his involvement appears to have been with respect to preparation of the Monitor's Report. The Report was of course a requirement of the Initial Order and therefore billings associated with its preparation are entirely appropriate. There having been no cross-examination with respect to the detail of these time entries, I can only rely on my own review of same. In doing so I find neither the nature nor the amount of these billings to be inappropriate.

38 There are miscellaneous other minor billings by support staff and junior accountants which in nature and type are not significant to warrant further comment. I therefore allow the account in the amount of $110,311.45 (HST included).

Fifth billing

39 The next billing from Deloitte & Touche Inc. covers the period March 10th to March 28, 2002. The hearing for issuance of the Receivership Order was on March 13th and the Order was filed on March 14th. This account is made up as follows:

Professional fees	-	$17,401.00
Out-of-pocket Expenses	-	3,585.00
Subtotal	-	20,986.00
HST at 15%	-	3,147.90
Total	-	$24,133.90

40 There was no specific cross-examination with respect to this particular account. In reviewing the detailed time slips of Deloitte & Touche Inc., the activities which appear to have been involved in the individual time inputs seem appropriate for such a transition between CCAA and Court appointed receivership. No individual time docket, either by nature of work or amount, appears patently unreasonable. I therefore allow this account at $24,133.90 (HST included).

Sixth billing

41 The final account was for services rendered April 1 to May 15, 2002 in connection with the final billing and the passing of accounts and included services for the preparation of the billing summary, various meetings with Monitor's counsel, meetings with the Receiver to examine payroll data, and preparation and completion of necessary documents for the passing of the Monitor's accounts and attendance at Court to be examined thereon. The professional time charged is $6,295.00 plus HST at 15% in the amount of $944.25 for a total of $7,239.25.

42 Again no detailed cross-examination with respect to this aspect of the billings of Deloitte & Touche occurred. Again nothing on the face of the billing strikes me as being patently unreasonable either in terms in the nature of the service provided or the time allotted thereto. I therefore allow this billing in the amount of $7,239.25, inclusive of HST.

Other issues

43 Counsel for Ingersoll-Rand and Wells Fargo examined Alan MacKinnon with respect to some issues on which it had specific concerns. The first of these was that in the affidavit of Albert Hickman supporting the originating application (*ex parte*) for relief under the **CCAA**, Mr. Hickman had deposed that Hickman was current in respect of payroll remittances to Canada Customs and Revenue Agency (hereinafter "CCRA") except for the remittance of January 24, 2002 in the amount of approximately $65,000.00. Subsequent Monitor's Reports were alleged to have revealed source deduction liabilities and payments totalling approximately $400,000.00. Mr. MacKinnon testified that when Deloitte & Touche Inc. first became involved in preparing for the **CCAA** application, they were aware that there were total liabilities to the CCRA approximating $200,000.00. $65,000.00 of this amount was the amount deposed to by Albert Hickman. In his testimony Mr. MacKinnon could not recall what the remaining $135,000.00 owing to CCRA was owed in respect of. He suspected that it was HST and therefore was not "payroll remittances" or "source deductions". He postulated therefore that Mr. Hickman's statement in his affidavit that source deduction arrears of $65,000.00 may in fact have been correct. In any event, Mr. MacKinnon advised that he took no part in the preparation of the affidavit deposed by Mr. Hickman and therefore cannot explain what was in Mr. Hickman's mind in this regard. Mr. MacKinnon did not see this affidavit before it was filed with the Court. Mr. Hickman was not called to testify at the passing of the Monitor's accounts.

44 Mr. MacKinnon advised that the approximately $200,000.00 for "source deductions" involved payment of earned vacation pay and source deductions for staff terminated after the Initial Order. I am satisfied with these explanations by Mr. MacKinnon and conclude that Deloitte & Touche Inc. were not involved in any manner whatsoever in a misrepresentation of the state of affairs of Hickman to the Court at the time of the originating application. As the hearing Judge who granted relief under the **CCAA**, I would not have been dissuaded from granting relief under the **CCAA** had it been revealed that, rather than $65,000.00 being owing to CCRA at the relevant time, $200,000.00 was owing. Therefore the Initial Order would still have been issued.

45 Counsel for Ingersoll-Rand and Wells Fargo also asked how payroll requirements for the five weeks from February 7th to March 13th shown in the cashflow projection at $58,000.00, grew to $205,000.00 plus source deductions. They wanted to know when the Monitor became aware of this and the fact that staff had not been laid off. Mr. MacKinnon testified that when the company was preparing its T4 slips in February of 2002 for the taxation year 2001 it realized, for the first time, that it had failed to remit to CCRA approximately $187,000.00 owing in respect of source deductions for a former senior employee. Mr. MacKinnon testified that he was satisfied that the senior officials of the company and Mr. Albert Hickman in particular who provided an affidavit in support of the originating application, was not aware of this unremitted source deduction. No detailed examination of Mr. MacKinnon on the issue of the termination dates of various employees took place. Counsel for Ingersoll-Rand and Wells Fargo expressed some concerns about the Debtor-in-Possession financing being used to pay off these debts to CCRA because the Debtor-in-Possession financing was secured. I am satisfied that there is nothing improper in the Monitor approving of payment of these amounts through the Debtor-in-Possession financing because no creditor is prejudiced thereby. The Debtor-in-Possession financing security has absolutely no priority over existing secured creditors. Additionally, had the payments not been made, CCRA would still have retained their priority over the assets of Hickman for these unremitted deductions in priority to secured creditors. It is probable that there will not be any recovery by the unsecured creditors of Hickman, nor by the Debtor-in-Possession secured creditor (a related company). Therefore there is no real prejudice to any creditor by reason of these payments.

46 Ingersoll-Rand and Wells Fargo in their Notice of Objection had requested information as to why HST remittances were made in the amount of $49,266.00 when during the relevant time frame the only equipment sale which had taken place was $27,503.00. It was pointed out to counsel for Ingersoll-Rand and Wells Fargo that the information which they sought in this regard was fully available in the Monitor's Report and the Court was satisfied with the explanation contained therein.

Monitor's fiduciary duties

47 Counsel for Wells Fargo and Ingersoll-Rand made a general objection to the Monitor's fees and disbursements based upon an alleged breach of fiduciary duty on the part of the Monitor in not revealing to the creditors the extensive involvement of its accounting arm Deloitte & Touche LLP with the extended Hickman Group of Companies and Albert and Howard Hickman. Counsel argued that notwithstanding any lack of actual conflict of interest, it was improper for Deloitte & Touche

Inc. to accept the role of Monitor when there was a possible appearance of conflict of interest. The contention was that a monitor under the **CCAA** essentially has the same fiduciary obligations as does a receiver. Counsel cited *Canadian Co-operative Leasing Services v. Price Waterhouse Ltd.*, [1992] N.B.J. No. 399 (N.B. Q.B.) (Quicklaw citation), a decision of Higgins, J. of the New Brunswick Court of Queen's Bench. In that case Price Waterhouse Ltd. had accepted appointment as a Court appointed receiver of United Maritime Fishermen Co-op and its affiliate Bluenose Fisheries Limited. Price Waterhouse Ltd. had failed to reveal to the Court at the time of its appointment that it had, approximately two years earlier, provided professional advice to the principal lender to United Maritime Fishermen Co-op and Bluenose Fisheries Limited wherein it had recommended a specific strategy to this principal lender to help the lender extract itself from the difficult loan situation which it faced with the debtor. The Court accepted that a Court appointed receiver had fiduciary duties and quoted, with approval on the issue of conflict of interest, **Ellis: Fiduciary Duties in Canada**, p. 104, para. 4(2)(a); at p. 26 of the Quicklaw report as follows:

> "As to the issue of conflict of interest I refer to Ellis: Fiduciary Duties in Canada, p. 104, para. 4(2)(a):
>
> > It is important to review the practical manifestations of a concept as ephemeral as 'utmost good faith' and heightened loyalty. In essence, the law requires the individual subject to the duty to scrupulously avoid placing himself in a possible or potential conflict of interest. Therefore, the fact that a conflict could have arisen, but did not, does not exculpate the fiduciary from wrongdoing. It is evidenced throughout the case law that judicial departure from the prohibition against the possibility of potential conflict of interest (in other words, any judicial relaxation of the concept, whereby actual conflict must be proved) has caused certain of the judiciary to evaluate the very creation of a fiduciary relationship upon whether or not there has been an operative conflict of interest. This clearly cannot be supported and, in reality, is akin to the proverbial 'tail wagging the dog'. Entering into a potential conflict of interest is a breach whether or not the conflict is operative; once such a conflict becomes operative to jeopardize the beneficiary or his property, the fiduciary breach would then give rise to the remedies available in law. The point is important: to wait until damage or prejudice actually occurs is to prejudice the beneficiary's right to utmost loyalty and avoidance of conflict. If such a schism in theory is allowed, the law would be encouraging a finding that the duty 'piggy-backs' the damage caused rather than premising damage on the basis of duty."

48 The Court at p. 27 continued:

> "I believe the standard to be applied by a court reviewing the conduct of its appointee is stated by Galligan, J.A. in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont.C.A.) at pp. 5-6 as follows:
>
> > Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court."

49 As stated earlier in this judgment I, as the application hearing Judge, was clearly aware that Deloitte & Touche LLP had a significant and substantial professional relationship with the Hickman Group of Companies by reason of being auditor for those companies. I considered the *jurisprudence* and the statements contained in **Houlden and Morawetz: Bankruptcy and Insolvency Law of Canada** set out in paragraphs [6] and [7] hereof. Clearly the *jurisprudence* and learned authors in Canada support the proposition that it is not improper (and therefore obviously not automatically a conflict of interest) for the auditor of a company to act as monitor under the **CCAA**. As stated earlier, this principle, I believe, is based upon the clear commercial expedient of requiring professional advice such as a company auditor can provide, in the early stages of a reorganization plan under the **CCAA**. Not to allow the company auditor to serve as monitor is counterproductive to the

objectives of a reorganization under the **CCAA** and a requirement that auditors not serve as monitors might have the effect of forcing companies deserving of **CCAA** protection into bankruptcy by reason of being unable to promptly respond to their deteriorating financial position. I am therefore satisfied that there has been adequate disclosure to and knowledge on the part of the Court of the role of Deloitte & Touche LLP in relation to the Hickman Group of Companies. No creditor actually took the step of formally asking the Court to remove Deloitte & Touche Inc. as monitor. I am satisfied that the Monitor's Reports and the minimal cross-examination of the Monitor reveal no actual conflict on the part of the Monitor which appears to have performed its duties under the Initial Order entirely properly.

50 I am not at all satisfied that the **Canadian Cooperative Leasing Services** case is similar to the case at hand even though it does provide an interesting discussion of the role of fiduciaries. In **Canadian Cooperative Leasing**, there was no disclosure to the Court of the potential conflict of the earlier role of Price Waterhouse Ltd. That places it on an entirely different footing than the case at hand. I therefore conclude that there is no basis to deny payment of the Monitor's accounts based upon any alleged potential conflict of interest.

Accounts of counsel to the Monitor

51 No objection whatsoever has been taken by counsel for Wells Fargo and Ingersoll-Rand to the accounts of counsel to the Monitor which have totalled $56,658.11 to March 15th and an additional $16,570.91 (both HST inclusive) for the period March 16 to May 15, 2002. The various narratives provided by the Monitor's counsel with respect to the services provided are considerably more detailed than those provided by the Monitor itself. A review of the detailed services provided reveals nothing, in the opinion of this Court, which is untoward in terms of the nature or quantity of service provided. The rate claimed is $200.00 per hour which the Court finds to be reasonable in the circumstances. The lack of challenge to the accounts of counsel to the Monitor by creditors adds support to that reasonableness. Therefore the accounts of Monitor's counsel as set out above are approved.

Summary

52 The accounts of the Monitor in the total amount of $384,564.65 are hereby approved.

53 The accounts of counsel to the Monitor in the total amount of $73,229.02 are approved.

54 No costs are allowed to the objecting creditors with respect to this application.

Application granted.

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