COURT FILE NUMBER	1501-00955
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended
APPLICANTS	LUTHERAN CHURCH — CANADA, THE ALBERTA — BRITISH COLUMBIA DISTRICT, ENCHARIS COMMUNITY HOUSING AND SERVICES, ENCHARIS MANAGEMENT AND SUPPORT SERVICES, AND LUTHERAN CHURCH — CANADA, THE ALBERTA — BRITISH COLUMBIA DISTRICT INVESTMENTS LTD.
DOCUMENT	**BRIEF OF DELOITTE RESTRUCTURING INC. REGARDING THE APPLICATION FOR AN ORDER SANCTIONING THE DISTRICT PLAN OF COMPROMISE AND ARRANGEMENT AND THE APPLICATION FOR AN ORDER REMOVING AND REPLACING THE MONITOR**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	CASSELS BROCK & BLACKWELL LLP Suite 1250, 440 – 2nd Avenue SW LLP Calgary, AB T2P 5E9 Telephone (403) 351-2921 File No. 49073-1 Attention: Jeffrey L. Oliver

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

I. INTRODUCTION

1. Deloitte Restructuring Inc. ("**Deloitte**"), in its capacity as monitor (the "**Monitor**") of Lutheran Church – Canada, The Alberta – British Columbia District (the "**District**"), Encharis Community Housing and Services ("**ECHS**"), Encharis Management and Support Services ("**EMSS**") and Lutheran Church – Canada, The Alberta – British Columbia District Investments Ltd. ("**DIL**", and, together with the District, ECHS, and EMSS, the "**Debtors**") respectfully submits that this Honourable Court:

   (a) dismiss the application of Elvira Kroeger, Randy Kellen, Sharon Sherman and Marilyn Huber (the "**Creditor Applicants**"), for an order that would, among other things, remove and replace Deloitte as Monitor for some or all purposes; and

   (b) approve the Amended Plan of Compromise and Arrangement of the District (the "**District Plan**") and grant an order sanctioning the District Plan.

2. The Creditor Applicants have, in support of their application for removal and replacement of the Monitor, made numerous allegations of wrongdoing on the part of the Monitor. They allege that the Monitor has a conflict of interest which prevents it from providing the Court with a neutral and objective opinion concerning certain aspects of the District Plan, and that the Monitor has breached its fiduciary duty to the Court and to the District's creditors by making deficient and misleading disclosure in respect of certain aspects of the District Plan.

3. In the Monitor's respectful submission, there is no basis for the Creditor Applicants' allegations. In particular:

   (a) in relation to the alleged conflict, there is no evidence that the Monitor is likely to personally benefit from any provision of the District Plan such that a reasonable person would apprehend any potential conflict or bias. Simply stated, the District Plan does not prevent Deloitte's sister company, Deloitte LLP, from being named as a defendant in the Representative Action, and vests in a subcommittee comprised of independent fiduciaries the ability to determine, without Monitor influence, the proper parties to such action; and

   (b) there was no deficient or misleading disclosure on the part of the Monitor. The District Plan was always intended to preserve a variety of future options to management of Newco and its shareholders with respect to the Prince of Peace of Peace Properties, and the District Plan does <u>not</u> prescribe development. The extent of the disclosure in relation to the District Plan and the opportunity for stakeholder input in this proceeding exceeds, by a considerable margin, what occurs in a standard CCAA proceeding. Simply put, the Monitor has provided more than sufficient information to Eligible Creditors to allow them to consider the District Plan.

4. In any event, the Monitor has provided a detailed review of its conduct in order to ensure that the Court has all of the information necessary to critically assess the Creditor Applicants' allegations. Based on this detailed review, it is clear that the Monitor has conducted itself appropriately at all times and that there is no justification for removing and replacing it for any purpose, particularly given that doing so would significantly increase the cost and length of this process with no ascertainable benefit to stakeholders.

5. In addition, the Monitor supports the application to sanction the District Plan on the basis that the District Plan complies with all of the statutory requirements as well as the previous orders of the Court, nothing has been done or purported to be done that is not authorized by the *Companies' Creditors Arrangement Act* (Canada) RSC 1985 c C-36 ("**CCAA**"), and the District Plan is fair and reasonable.

6. In the Monitor's submission, the application to sanction the District Plan must be considered in light of its unique context. The plans in respect of ECHS, EMSS and DIL (the "**DIL Plan**") have received the overwhelming approval of their respective creditors, and the District Plan has similarly received very strong support. Notwithstanding that, a small group of creditors has now advanced numerous allegations with a view to persuading this Court not to approve the District Plan. In light of these circumstances, the Monitor respectfully submits that the Creditor Applicants bear a very heavy onus and that this Court should sanction the District Plan unless the Creditor Applicants establish an exceptional and compelling case that the District Plan is unfair and unreasonable.

7. Capitalized terms not defined herein have the meanings set out in the District Plan.

II. FACTS

Background

8. On January 23, 2015, an initial order (the "**Initial Order**") was granted pursuant to the CCAA with respect to the Debtors.

> Initial Order of Justice K.D. Yamauchi, filed January 23, 2014, Court of Queen's Bench Action No. 1501-00955 ["**Initial Order**"].

9. The Initial Order appointed Deloitte as the Monitor.

> Initial Order at para 29.

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

> Initial Order at para 19.

11. Eight extensions of the Stay Period have since been granted. The most recent extension was granted on June 21, 2016 and extended the Stay Period until September 30, 2016.

> Order of Justice B.E.C. Romaine, filed June 22, 2016, Court of Queen's Bench Action No. 1501-00955.

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

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

13. On March 3, 2016, the Court heard the Debtors' application (the "**DIL Sanction Application**") for an Order sanctioning the DIL Plan. On March 9, 2016, the Court deferred the determination of that application until the hearing of the application for an order sanctioning the District Plan.

Order of Justice B.E.C. Romaine, filed April 7, 2016, Court of Queen's Bench Action No. 1501-00955.

First Report to the Creditors of the District, dated March 28, 2016, Court of Queen's Bench Action No. 1501-00955 at para. 14 ["**District Report**"].

14. Both the DIL Plan and the District Plan contain provisions related to a future legal action or actions which may be undertaken on behalf of certain affected creditors of DIL (the "**DIL Depositors**") and the District (the "**District Depositors**") by way of a class proceeding or otherwise (the "**Representative Action**"). As both the DIL Plan and the District Plan include substantively the same provisions outlining a process whereby the Representative Action could be advanced, and have both been created with a view to restructuring the Debtors' affairs, the Court was of the view that both sanction applications should be determined at such time as both plans had been considered and voted on by the respective creditors of each entity.

District Report at para. 14.

Transcript of Proceedings dated March 9, 2016, Court of Queen's Bench Action No. 1501-00955 ["**March 9 Transcript**"] at p. 2 l. 40 – p. 3 l. 9.

15. In the course of the DIL Sanction Application, the parties made fulsome submissions regarding the provisions in the DIL Plan with respect to the Representative Action and the releases to be provided to various parties. Those provisions are substantively identical to those in the District Plan. Accordingly, the Monitor adopts its prior submissions in respect of the Representative Action and the releases and will not reargue those matters in respect of the District Plan.

District Plan

16. The District Plan was formulated by the District subject to input from the CRO, the District Committee, the Monitor, and other stakeholders. The District Plan was originally dated February 12, 2016 and was filed on February 16, 2016. The District Plan was subsequently amended five times, as described below (the definition of "District Plan" includes all subsequent amendments except where otherwise noted).

District Report at para. 16.

Plan of Compromise and Arrangement of the District, dated February 12, 2016, Court of Queen's Bench Action No. 1501-00955.

17. On March 21, 2016, the Court granted an Order authorizing and directing the District to file the District Plan, subject to any further amendments being made, and to present the District Plan for approval at a meeting of District's creditors (the "**District Meeting Order**"). The District Meeting Order set out, *inter alia*, how the District's creditors were to receive notice of the District Meeting to vote on the District Plan.

Order of Justice B.E.C. Romaine, granted March 21, 2016, Court of Queen's Bench Action No. 1501-00955.

18. The District Plan was subsequently amended with the fifth amended plan being filed on June 10, 2016.

Fifth Amended Plan of Compromise and Arrangement of the District, dated June 10, 2016, Court of Queen's Bench Action No. 1501-00955 [the "**District Plan**"].

19. The District Plan includes only one class of affected creditors consisting of the District Depositors and trade creditors (the "**Trade Creditors**") with proven claims or disputed claims that have not yet been settled or adjudicated (the "**Eligible Affected Creditors**").

Twentieth Report of the Monitor, dated June 14, 2016, Court of Queen's Bench Action No. 1501-00955 at para. 17 (the "**Twentieth Report**").

20. At the date of the Initial Order, and as subsequently confirmed by a claims process approved by the Court on February 20, 2016 (the "**Claims Process**"), there were approximately 2,600 Eligible Affected Creditors, who had claims totalling approximately $96.7 million. Those claims can be broken down as follows:

(a) approximately 2,592 District Depositors with proven claims of approximately $95.7 million; and

(b) approximately 12 Trade Creditors, four of whom are also District Depositors, with proven claims of approximately $956,700.

Twentieth Report at para. 18.

21. The Monitor subsequently prepared and circulated a report dated March 28, 2016 for the purpose of providing the Eligible Affected Creditors with specific information relating to the District Plan.

District Report.

Aspects of the District Plan

22. The District Plan is described in detail at paragraphs 17-84 of the District Report. In brief, the District Plan has the following key aspects:

(a) each Eligible Affected Creditor would be paid a Convenience Payment;

(b) the Non-Core Assets would be liquidated, and, each time the quantum of funds held in trust from the liquidation (net of the Restructuring Holdback and the Representative Action Holdback) reaches $3.0 million, funds would be distributed on a pro-rata basis to the Eligible Affected Creditors, based on their remaining proven claims after deducting the Convenience Payments;

(c) NewCo would be formed, and, pursuant to a tax structured transaction, NewCo would purchase the Prince of Peace Properties from ECHS in exchange for the NewCo Shares;

(d) ECHS would transfer the NewCo Shares to the District in partial satisfaction of the District —ECHS Mortgage;

(e) Eligible Affected Creditors who are not paid in full pursuant to the Convenience Payments would receive 100% of the NewCo Shares on a pro-rata basis, based on their remaining proven claims after deducting the Convenience Payments;

(f) the NewCo Shareholder Meeting will be held within six months at which time the NewCo Shareholders would have the opportunity to consider and vote on their preferred mandate for NewCo, taking into account NewCo Management's recommendations; and

(g) there would be a Representative Action and releases similar to those included in the DIL Plan.

The Monitor's Views Regarding the District Plan

23. The Monitor is of the view that the District Plan is fair and reasonable and appears to be in the general best interest of all parties for the following reasons:

(a) the Convenience Payments would serve to repay in full 62% of District Depositors and 77% of Trade Creditors. Following the Convenience Payments, approximately 1,001 Eligible Affected Creditors will continue to have outstanding proven claims.

(b) the District would continue to realize on the Non-Core Assets with all funds being made available to Eligible Affected Creditors as set out in the District Plan. Should the District Plan fail, the remaining Non-Core Assets may need to be liquidated under forced sale conditions, which would likely result in lower sale proceeds, delays in the realization of the Non-Core Assets and increased professional fees and expenses. The Monitor has estimated that pursuant to the District Plan and pursuant to various assumptions and events that may not materialize as expected, those Eligible Affected Creditors who have proven claims in excess of the Convenience Payments, may receive between approximately 15% and 20% of their remaining proven claim after deducting the Convenience Payments from the sale of the Non-Core Assets. If the District Plan was to fail, then the remaining unsold Non-Core assets would likely be realized upon through forced sale liquidation conditions (i.e. through a receivership) and the Monitor estimates that the realizations could be 10% to 20% lower than they would be pursuant to the District Plan.

(c) the NewCo Assets would be transferred into NewCo with Eligible Affected Creditors receiving the NewCo Shares. The NewCo Shares are anticipated to be valued at between 53% and 60% of District Depositors' remaining proven claims after deducting the Convenience Payments. The NewCo Shareholders would have the ability to vote on NewCo's mandate at the NewCo Shareholder Meeting. In lieu of receiving NewCo Shares, Non-Resident Affected Creditors would receive a further cash distribution equal to the value of their pro-rata share of the NewCo Shares, less a 20% discount.

(d) following the Convenience Payments having been made, it is estimated that District Depositors may receive distributions in the form of cash and shares totalling between 68% and 80% of their remaining proven claims, after deducting the Convenience Payments. As previously noted, the estimated distributions are based on assumptions regarding future events and, as such, will vary and these variances may be material.

(e) as previously noted, there are both risks and potential upside opportunities for Eligible Affected Creditors in becoming NewCo Shareholders. The Monitor,

however, is supportive of the creation of NewCo as outlined in the District Plan for the following reasons:

(i) the NewCo Articles were developed in consultation with the District Committee and afford some additional protections to Eligible Affected Creditors outside of what may be available to shareholders in the ordinary course;

(ii) through the NewCo Shareholder Meeting, Eligible Affected Creditors would have the ability to vote on NewCo's mandate, which may include the expansion of the Manor and Harbour seniors' care facilities, the orderly liquidation of all or a portion of NewCo's Assets, a joint venture to further develop the surrounding development and expansion lands or other options; and

(iii) the Prince of Peace Properties are currently not fully subdivided and this subdivision would be required to complete a meaningful sales process. In addition, the recent downturn in the Alberta real estate market would suggest that a short-term sale may not be the best option to maximize the value of the Prince of Peace Properties.

(f) should the District Plan fail, the Prince of Peace Properties and the ECHS Assets will remain in ECHS and the EMSS Assets will remain in EMSS. In that scenario, it is likely that a further insolvency proceeding, such as a receivership, would follow and that foreclosure proceedings would be required in order for the District to take possession of the Prince of Peace Properties and sell such properties, likely in a forced sale scenario, for the benefit of the Eligible Affected Creditors. It is also possible that the foreclosure proceedings may have repercussions for the ongoing operations of the Harbour and Manor seniors' care facilities, which operate pursuant to various agreements with Alberta Health Services. The complications associated with foreclosure proceedings and the fact that the Prince of Peace Properties would likely be sold pursuant to a further insolvency proceeding would serve to increase professional fees, reduce realizations and significantly extend the time frame for any recovery to Eligible Affected Creditors.

(g) the District Plan provides for a streamlined process for District Depositors to pursue the Representative Action Claims; and

(h) the District Committee has approved the District Plan.

District Report at para. 84.

Information Meetings

24. The Monitor attended five information meetings in Alberta and British Columbia to review the contents of the District Plan and respond to any inquiries by Eligible Affected Creditors related to the District Plan (the "**Information Meetings**"). The Information Meetings were each between approximately two and a half and four hours long.

Twenty-First Report of the Monitor, dated July 7, 2016, Court of Queen's Bench Action No. 1501-00955 at para. 33 ["**Twenty-First Report**"].

25. The Creditor Applicants have made various allegations in respect of the Information Meetings held by the Monitor.

26. In particular, the affidavit of Marilyn Huber sworn June 26, 2016 (the "**Huber Affidavit**") alleges that the Monitor impeded Ms. Huber and Ms. Sherman from distributing material at the Information Meetings. To the Monitor's knowledge, the first Information Meeting attended by Ms. Huber and Ms. Sherman was in Sherwood Park, Alberta (the "**Sherwood Park Meeting**"). Ms. Huber and Ms. Sherman were present, handed-out material and requested contact information from other Sherwood Park Meeting attendees. Some of the Sherwood Park Meeting attendees did express confusion, however, as to who authored the material being handed out by Ms. Huber and Ms. Sherman and as to who was requesting their contact information. In order to avoid confusion, the Monitor requested that Ms. Huber and Ms. Sherman hand-out material at a reasonable distance from the room entrance to the Sherwood Park Meeting and communicate clearly to attendees that the material they were handing out was not authored, endorsed or being circulated by the Monitor and that they were not requesting contact information on behalf of the Monitor.

> Twenty-First Report at para. 36.

27. The Monitor's communication with Ms. Huber and Ms. Sherman was reiterated in correspondence from the Monitor's legal counsel to the Creditor Applicants, dated May 6, 2016, a copy of which is attached as Schedule 3 to the Twenty-First Report, that outlined the procedures to be followed at the District Meeting (the "**District Meeting Procedures**"). The Monitor's purpose in sharing the District Meeting Procedures with the Creditor Applicants are described by the Monitor's legal counsel therein as follows:

> > The Monitor recognizes that your clients have expressed views thus far which are in opposition to the District's plan. Of course it is up to each depositor, including your clients, to decide how to vote. We also recognize that any party, including your clients, are entitled to voice their support or opposition to the District's plan. However, in the interest of ensuring an efficient meeting that respects the CCAA process and the interests of other depositors in attendance, the Monitor is implementing the below referenced rules and procedures. These rules and procedures are intended to provide your clients with the ability to convey their opinions in a fashion, which does not impede the meeting and respects the rights of other parties in attendance.
>
> Twenty-First Report at para. 36.

28. The District Meeting Procedures included the following, which specifically related to the Creditor Applicants or their representatives (collectively, the "**Applicant Attendees**"):

(a) the Monitor had a table established for the use of the Applicant Attendees within reasonable proximity to the entrance to the room in which the District Meeting was held. The Applicant Attendees were entitled to circulate written information to attendees within the reasonable vicinity of that table. The Applicant Attendees were not permitted to disseminate any written material within the room or in the doorway entering the room in which the District Meeting was held;

(b) any written communication circulated by the Applicant Attendees required a prominently displayed disclaimer that such materials was not authored, endorsed

or being circulated by the Monitor. In addition, the Applicant Attendees were not, at any time, to advise any person in attendance at the District Meeting that they were a representative of the Monitor or were associated with the Monitor; and

(c) a sign identifying the Applicant Attendees was to be prepared by them and displayed at the table established for their use.

Twenty-First Report at para. 37.

29. The Huber Affidavit also makes allegations that the Monitor presented a biased view at the Sherwood Park and Red Deer Meetings. The Monitor is of the view that the information presented at the Information Meetings was presented fairly with a view to providing Eligible Affected Creditors with sufficient information to consider their decision on the District Plan. The Monitor further notes the following:

(a) although each of the Information Meetings was not identical, the Monitor prepared and relied on a general script for use at the Information Meetings, which included wording to the effect that the Monitor's advice with respect to the District Plan was based on business considerations and did not need to be accepted by Eligible Affected Creditors, who needed to make their own decisions in accordance with their own particular circumstances and views. The Monitor clearly stated that it was not telling Eligible Affected Creditors how to vote, but that it was supportive of the District Plan. The Monitor further advised that it was the Eligible Affected Creditors who would ultimately determine if the District Plan was approved and should be considered by the Court. This wording is also reflected in the Minutes of the District Meeting; and

(b) the Applicant Attendees had the ability to attend all of the Information Meetings. The Applicant Attendees were in attendance and actively participated in the Information Meeting in Langley, BC. The Applicant Attendees were also in attendance, actively participated in and handed out material at the Sherwood Park Meeting, the Red Deer Meeting and at the District Meeting. Both counsel for the Creditor Applicants were also in attendance and participated in the District Meeting. The Monitor is also aware of at least two emails that were widely circulated by Mr. Don Specht, who the Monitor understands to be related to Ms. Kroeger, outlining what the Monitor understands to be the views of the Applicant Attendees on the District Plan. As such, the Monitor is of the view that the Applicant Attendees and their counsel have actively participated in the process leading up to the District Meeting and the Reconvened District Meeting and have had the opportunity to communicate their views to the Eligible Affected Creditors at large.

Twenty-First Report at para. 39.

30. Paragraph 21 of the brief filed by Ms. Kroeger and Mr. Kellen on June 30, 2016 (the "**Kellen Brief**") asserts that at the Information Meetings the Monitor invited attendees to cast their votes on the District Plan immediately and without waiting for the District Meeting to be convened. At the Information Meetings the Monitor clearly communicated to attendees the options available to Eligible Affected Creditors for voting on the District Plan and the deadlines associated with each option. They also communicated that Eligible Affected Creditors who wished to do so could provide the Monitor with any paperwork they had brought with them. The Monitor did not encourage Eligible Affected

Creditors one way or another with respect to submitting their votes at the Information Meetings.

Twenty-First Report at para. 40.

District Meeting

31. As previously reported, the District Meeting was held on May 14, 2016, but was adjourned and reconvened on June 10, 2016 (the "**Reconvened District Meeting**"). The Monitor complied with the notice requirements prescribed in the District Meeting Order.

Nineteenth Report of the Monitor, dated May 27, 2016, Court of Queen's Bench Action No. 1501-00955 at paras. 26-34 ["**Nineteenth Report**"].

Twentieth Report of the Monitor, dated June 14, 2016, Court of Queen's Bench Action No. 1501-00955 at para. 20 ["**Twentieth Report**"].

32. The District Meeting included a fulsome discussion of the District Plan. Toward the end of the District Meeting, a motion was put forward from the floor to adjourn the District Meeting so that congregations could have more time to consult prior to voting on the District Plan. This motion was passed by the majority in dollar value of those Eligible Affected Creditors who were present and voting either in person or by proxy at the time that the motion was made. As described in further detail below, the Monitor subsequently consulted with the Eligible Affected Creditors who are congregations to determine the amount of additional time required and scheduled the Reconvened District Meeting accordingly.

Nineteenth Report at paras. 28-31.

33. At the Reconvened District Meeting, approximately 50% of the Eligible Affected Creditors voted on the District Plan and the claims of those Eligible Affected Creditors who voted represented 88% of the total proven claims of those Eligible Affected Creditors. Of the Eligible Affected Creditors who voted, approximately:

(a) 83% in number and 76% in dollar value voted in favour of the District Plan; and

(b) 17% in number and 24% in dollar value voted against the District Plan.

34. As such the District Plan was approved by the required majority, being two-thirds in dollar value and a majority in number of voting Eligible Affected Creditors.

Twentieth Report at paras 26-27.

35. In accordance with the resolution that was passed at the Reconvened District Meeting, the Eligible Affected Creditors agreed to and accepted the District Plan and requested that the Court sanction the District Plan.

Twentieth Report at para 27.

36. The Creditor Applicants have suggested that the Eligible Affected Creditors did not have sufficient time or information to consider the District Plan. The Monitor notes that the information that was provided to Eligible Affected Creditors related to the District Plan is attached as Schedules 1 to 6 and 9 to 14 of the Nineteenth Report. This information included the following:

(a) the District Report;

(b) hand-outs entitled "Further information for creditors of the District – The basics and what you need to do", which were tailored to provide high level information to specific groups of Eligible Affected Creditors (the "**Hand-Outs**");

(c) five documents entitled "Answers to Frequently Asked Questions" (the "**FAQs**") that were created to publish information to address common questions or requests for clarification received by the Monitor from Eligible Affected Creditors. The FAQs related to multiple topics including NewCo, the potential outcomes of the CCAA proceedings, estates, trust accounts, the assignment of NewCo Shares by Eligible Affected Creditors and the potential future subdivision of the Prince of Peace Properties (the "**Subdivision Q&A**"); and

(d) commentary regarding information provided by the CRO related to NewCo.

Twenty-First Report at para. 31.

37. The bulk of the information provided to Eligible Affected Creditors was both posted on the Monitor's website and mailed to Eligible Affected Creditors. Those Eligible Affected Creditors who were congregations were also provided with this information via email. Ordinarily in CCAA proceedings, creditors would only be provided with the information that was prescribed in the Meeting Order, which in this case would include the District Plan, the District Meeting Order, Notice of the District Meeting, a form of proxy, a form of election letter, a form of notice of opting out, a Guardian's Acknowledgment of Responsibility and the District Report. As such, the Monitor notes that the volume of information provided to Eligible Affected Creditors was far in excess of what would ordinarily be provided to creditors in CCAA proceedings.

Twenty-First Report at para. 32.

38. The District Meeting was held for approximately six hours on May 14, 2016 but was adjourned and reconvened on June 10, 2016. The reason given for the motion from the floor to adjourn the District Meeting was so that congregations could have more time to consult prior to voting on the District Plan. As previously reported, following the District Meeting, the Monitor reached out via email to the approximately ninety-three Eligible Affected Creditors who are congregations and asked them to comment on whether they required additional time to consider the information that had been provided to them or whether they had any requests for additional information. The Monitor received responses from twenty-four congregations. Twenty indicated that they did not require any additional time to consider the information that had been provided to them and did not have any requests for additional information. Four congregations provided additional requests for information which were responded to by the Monitor. Of the twenty congregations, who indicated that they did not require any additional time or information, eight congregations indicated that they were disappointed with the delay resulting from the adjournment. Based on the responses received by those Eligible Affected Creditors, who are congregations and comments made by other Eligible Affected Creditors, the Monitor is of the view that the period of time provided for Eligible Affected Creditors to consider the District Plan was sufficient.

Twenty-First Report at para. 34.

39. The adjournment of the District Meeting provided additional time for Eligible Affected Creditors to consider and vote on the District Plan. It also allowed an opportunity for those Eligible Affected Creditors who had previously submitted a vote on the District Plan to change their vote, should they choose to do so. Normally, in CCAA proceedings, creditors could anticipate receiving approximately 30 days' notice of a meeting of creditors with much of the information on the CCAA debtor's plan of compromise and arrangement being posted only on the Monitor's website.

Twenty-First Report at para. 35.

40. The time provided to Eligible Affected Creditors to consider the District Plan and the manner in which information was provided to Eligible Affected Creditors was in excess of what would ordinarily be available to creditors in other CCAA proceedings.

Twenty-First Report at para. 35.

41. Paragraph 31 of the Kellen Brief references the notice of the Reconvened District Meeting, which was dated May 20, 2016. While the Kellen Brief acknowledges that the Monitor advised Eligible Affected Creditors of the fact that they had additional time to change their vote on the District Plan, should they choose to do so, it raises a concern with the fact that the Monitor did not provide Eligible Affected Creditors with a new form of election letters to be used for that purpose. The Monitor notes as follows with respect to these allegations:

(a) the information that was posted on the Monitor's website on March 28, 2016 and mailed to Eligible Affected Creditors by April 8, 2016 contained multiple copies of each of the forms that may be required by Eligible Affected Creditors related to the District Plan including a pre-populated election letter that was attached to each Hand-Out. Additional blank election letters were attached as Schedule 8 to the District Report and included in Schedule 1 of the District Report as part of an attachment to the District Plan; and

(b) Any Eligible Affected Creditor, who contacted the Monitor requesting a further copy of the election letter would have been provided with one.

Twenty-First Report at para. 41.

42. Eligible Affected Creditors had already been provided with more than one copy of the election letter. As such, in the Monitor's view, it was not necessary to attach a further copy of the election letter to the notice of the Reconvened District Meeting.

Twenty-First Report at para. 42.

Allegations Regarding Monitor's Involvement in Representative Action

43. Paragraph 43 of the Kellen Brief asserts that the Monitor will have ongoing communication with the District Depositors regarding the cost of participating in the Representative Action and the method for opting-out of the Representative Action and that this may involve the Monitor communicating with District Depositors with respect to the amount of a retainer that could ultimately be used to commence a derivative action against Deloitte LLP. Paragraph 44 of the Kellen Brief further asserts that the Monitor has suggested that if it was named as a defendant in the Representative Action that it

would step down as Monitor and a new monitor would be appointed. In reply to these assertions:

(a) the Monitor's role with respect to the Representative Action is limited to assisting in the formation of a subcommittee of the District Committee that will have conduct of the Representative Action (the "**Subcommittee**"), facilitating the review of qualifications of legal counsel (the "**Representative Counsel**") who wish to act in the Representative Action (for clarity, the Monitor will not participate in the selection of the Representative Counsel) and communicating with District Depositors, based on instructions given by the Subcommittee, with respect to the names of the members of the Subcommittee, the name of the Representative Counsel, the estimated amount of the Representative Action Holdback, the commencement date of the Representative Action, the deadline for opting-out of the Representative Action, and instructions on how to opt-out of the Representative Action should District Depositors choose to do so. The Monitor's involvement will be dictated by the Subcommittee and is anticipated to be limited to the tasks mentioned above. Should the Monitor or the Subcommittee determine that the Monitor has a conflict of interest in respect of completing any of the tasks outlined above, the Monitor would recuse itself from completing these tasks. The Monitor notes that they would need to be satisfied that the Subcommittee would undertake to fulfill these tasks in a manner that complied with the requirements of the District Plan and did not prejudice any rights of District Depositors under the District Plan.

(b) the communication to be provided by the Monitor to District Depositors related to the Representative Action is to be provided as above prior to the commencement of the Representative Action; and

(c) the Monitor has not indicated that they would step down as Monitor if Deloitte LLP were to be named in the Representative Action. The Monitor has, however, indicated that it would recuse itself from any activities that would result in it having knowledge with respect to the parties to be named or the activities to be undertaken in the Representative Action. The Monitor will not have any ongoing role in the Representative Action beyond overseeing the distributions under the District Plan (such as with respect to the release of any unused portion of the Representative Action Holdback). The Monitor anticipates that the Representative Action Holdback will be determined on a global basis and communicated by the Subcommittee to the Monitor on a global basis i.e. the Monitor will have no knowledge of the considerations or calculations that went into establishing the Representative Action Holdback. Further, the Monitor does not need to be and will not be under any circumstances privy to any information regarding the strategy that the Representative Counsel chooses to communicate to District Depositors, including the parties to be named in the Representative Action, whether or not Deloitte LLP is ultimately named in the Representative Action.

Twenty-First Report at para. 30.

Disclosure

44. The Creditor Applicants allege that the Monitor has breached its fiduciary duty to the Court and to the District's creditors by making deficient and misleading disclosure to the

Eligible Affected Creditors related to the feasibility of the potential future subdivision and/or development of the Prince of Peace Properties.

45. In particular, the Creditor Applicants allege that the Monitor has not provided adequate disclosure with respect to the following:

(a) A master-site development plan (the "**MSDP**") that was prepared for the District by Alvin Fritz Architect Inc. in December 2012 and was subsequently approved by the Municipal District of Rocky View County (the "**MD of Rocky View**"). For clarity, a master-site development plan is a site-specific study and plan that includes site information, layout and analysis of activities, facilities, maintenance and operations that is generally created for the purpose of establishing planning and design principals for a contemplated development. The MSDP focuses on approximately 55 acres of development land, which make up part of the Prince of Peace Properties. The MSDP provided a context for land-use and the associated population density; and

(b) An approved area structure plan for Conrich (the "**Conrich ASP**"), which was put forward by the MD of Rocky View and includes the Prince of Peace Properties. An appeal is outstanding between the City of Chestermere and the MD of Rocky View related to the Conrich ASP.

Twenty-First Report at para. 22.

46. The Monitor says the following in reply to the allegations of insufficient and misleading disclosure regarding the MSDP and the Conrich ASP:

(a) It has never been contemplated that the further development of the Prince of Peace Properties would occur pursuant to the CCAA proceedings, although, it is one of the recognized options available to NewCo or to a third party purchaser of the Prince of Peace Properties. If the District wished to further develop the Prince of Peace Properties during the CCAA proceedings, additional reporting to and approvals by both the District Committee and the Court would have been required. The District Plan, as presented to the Eligible Affected Creditors, does not include the further development of the Prince of Peace Properties. It simply establishes a structure whereby Eligible Affected Creditors can maintain a larger number of available options to maximize the value of the Prince of Peace Properties. Further development is only one of these options;

(b) As previously reported, NewCo's mandate is not established by the District Plan and a vote on the District Plan is not a vote in favour of any particular mandate for NewCo. The District Plan contemplates that the NewCo Shareholders' Meeting will be held within six months of the District Plan taking effect at which time the NewCo Shareholders will vote on a proposed mandate for NewCo, which may include the expansion of the Harbour and Manor seniors' care facilities, the subdivision and orderly liquidation of all or a portion of the assets held by NewCo, a joint venture to further develop the Prince of Peace Properties or other options. These options will need to be investigated and reported on by NewCo Management ahead of the NewCo Shareholders' Meeting;

(c) The Monitor has not and does not intend to complete a fulsome investigation with respect to the merits of the various mandates available to NewCo, which will

ultimately be reviewed and reported on by NewCo Management and voted on by the NewCo Shareholders at the NewCo Shareholders' Meeting. In the Monitor's view, it is appropriate that the merits of NewCo's potential mandates be investigated and reported on by NewCo Management, who will ultimately be tasked with implementing the mandate chosen by NewCo Shareholders;

(d) The fact that that the MSDP was approved by the MD of Rocky View suggests that some reliance may be placed on it with respect to the ability to further develop the Prince of Peace Properties. Having said that, the MSDP was prepared specifically for ECHS based on the development being contemplated by ECHS at the time. The MSDP contemplates medium density residential as well as additional assisted living capacity, ground level retail and a parkade structure. The MSDP is outdated and a new developer would likely consider diverse development options, which may or may not align with the MSDP. The most recent appraisal prepared by Colliers International Realty Advisors Inc. ("**Colliers**") as at October 15, 2015 on the lands included in the Prince of Peace Properties (the "**Colliers Appraisal**") was based on low density development since Colliers considered that more likely than other development alternatives. In the circumstances, the Monitor considers the MSDP to be of limited utility since it reflects views at a different time in relation to what will likely be a different development scenario than what will ultimately be pursued;

(e) As noted above, the Conrich ASP is currently being appealed by the City of Chestermere. The City of Calgary had also previously filed an appeal related to the Conrich ASP but this has now been resolved, as set out in a Memorandum of Agreement between the City of Calgary and the MD of Rocky View dated June 17, 2016. The Monitor notes that the Colliers Appraisal takes into account all of the work that would need to be undertaken by any third party who wished to further develop the lands included in the Prince of Peace Properties; and

(f) The formation of NewCo allows for a professional management team to investigate the mandates available to NewCo outside of the CCAA proceedings, which will allow for reduced professional fees compared to if such a review were completed as part of the CCAA proceedings. In addition, as noted above, the establishment of NewCo helps to maintain a larger number of options to maximize the value of the Prince of Peace Properties. Even in a liquidation scenario, the establishment of NewCo may provide some benefit in that any sale of the Prince of Peace Properties will be completed outside of formal insolvency proceedings and with a more flexible timeline, which considers market conditions.

Twenty-First Report at paras. 23.

47. The affidavit of Courtney Clark filed June 29, 2016 (the "**Clark Affidavit**") exhibits (as Exhibit "E") correspondence from counsel for Mr. Kellen and Ms. Kroeger to counsel for the Monitor and the District (the "**May 19 Letter**"). The Monitor notes that it had not seen the May 19 Letter prior to service of the Clark Affidavit on June 30, 2016. Upon investigating further, the Monitor's legal counsel determined that the May 19 Letter was sent to the incorrect email address for counsel to the Monitor, and, as a result, it was not received by counsel to the Monitor or directly by the Monitor and was not subsequently disclosed to counsel to the Monitor or the Monitor by any other party.

The May 19 Letter alleges that the Subdivision Q&A prepared by the Monitor is inaccurate, incomplete and misleading in material ways.

Twenty-First Report at paras. 27.

48. The Monitor disagrees with the allegations made in the May 19 Letter and makes the following reply:

(a) the May 19 Letter suggests that a municipal water tie-in to the Conrich water line (the "**Conrich Tie-In**") is a prerequisite to any subdivision of the Prince of Peace Properties. The Monitor notes that the Prince of Peace Properties could ultimately be subdivided in a number of different ways depending on the mandate that is chosen for NewCo. The Monitor understands that the Conrich Tie-In is not a precursor to the subdivision of the Prince of Peace Properties as long as such subdivision is not done in the context of a larger development plan and no additional water demand is required such as was contemplated in the MSDP. An example of such a subdivision could be the consolidation of the Harbour and Manor seniors' care facilities on one lot, the Prince of Peace Church and School on another, and vacant unimproved development land on the third. This effectively changes the lands described within the Prince of Peace development from two lots to three. Even in the event that the District Plan were to fail and the Prince of Peace Properties were to be liquidated in the short-term, some subdivision would likely still be undertaken. If the District Plan is approved, the mandate established for NewCo by the NewCo Shareholders will determine the manner in which the Prince of Peace Properties are subdivided.

(b) the May 19 Letter references several obstacles to the further development of the Prince of Peace Properties, including the possible requirement to upgrade the sanitary sewer lift station, the possible requirement to further expand the sanitary sewer treatment plant in Langdon, Alberta, the disposal of storm water and the appeal of the Conrich ASP. These may be considerations for NewCo Management in making recommendations to the NewCo Shareholders with respect to the possible mandates available to NewCo. Having said that, Deloitte Real Estate has advised that, in general, these issues are typical of what would be encountered by a developer in considering any new development, whether within the MD of Rocky View or elsewhere; and

(c) the Monitor has made it clear that some information surrounding future events and contingencies, such as the mandate to be established for NewCo are not known at this time and, in the circumstances, the Monitor cannot report on them. Eligible Affected Creditors have had the opportunity to factor this uncertainty into their decision about whether to vote for or against the District Plan.

Twenty-First Report at para. 27.

49. Paragraph 6 of the Pre-Filing Report of the Proposed Monitor dated January 22, 2015 (the "**Pre-Filing Report**") includes disclosure of the consulting services provided by both Deloitte LLP and Deloitte between February 2014 and the Filing Date. Both the Kellen Brief and the affidavit of Lorraine Giese sworn June 17, 2016 (the "**Giese Affidavit**") appear to suggest that the Monitor may have been exerting influence over management in relation to the CCAA proceedings or their commencement or have been responsible

for communications prepared by management. In response to these allegations, the Monitor notes as follows:

(a) The pre-filing consulting services provided by the Monitor were disclosed to the Court prior to the Initial order being granted and did not preclude Deloitte from acting as Monitor or place Deloitte in a conflict of interest with respect to their engagement as Monitor in the CCAA Proceedings; and

(b) At no time has Deliotte acted in a management capacity with respect to the District nor did it prepare or issue specific correspondence on behalf of the District either prior to or during the CCAA proceedings.

Twenty-First Report at para. 43.

III. ISSUES

50. There are two issues to be determined:

(a) should the Court remove and replace Deloitte as Monitor for any purpose; and

(b) should the District Plan as approved by the Eligible Affected Creditors during the Reconvened Meeting be sanctioned by the Court?

IV. SUBMISSIONS

A. NO BASIS TO REMOVE AND REPLACE THE MONITOR FOR ANY PURPOSE

Alleged Conflict of Interest

51. The Creditor Applicants allege that the Monitor has a conflict of interest which prevents it from providing the Court with a neutral and objective opinion concerning the provisions of the District Plan related to the Representative Action. The Creditor Applicants suggest that this conflict arises from the fact that Deloitte LLP, a sister company to Deloitte, acted as the auditor of the District between 1990 and 1999 and may be named as a defendant in the Representative Action, and because of pre-filing services provided by Deloitte.

52. In summary, there is no basis to conclude that the Monitor has an actual, potential, or apparent conflict of interest given that:

(a) Neither the Monitor nor Deloitte LLP are benefiting from any releases as part of the District Plan; and

(b) The Monitor's involvement in this CCAA proceeding does not require that it review any previous work performed by it or Deloitte LLP.

53. The Monitor's involvement as the prior auditor of the District was disclosed by Deloitte in the Monitor's Fourth Report, which was prepared in June 2015, more than one year ago. As indicated in the Fourth Report, Deloitte had completed a conflict check prior to consenting to act as Monitor. Deloitte LLP's prior engagement as auditor of the District had not been flagged as part of that conflict check but was disclosed upon the Monitor becoming aware of it. Deloitte LLP's prior engagement was subsequently reported on several occasions, including in the Monitor's Fifteenth Report, the Sixteenth Report and the District Report.

Fourth Report of the Monitor, dated June 24, 2015, Court of Queen's Bench Action No. 1501-00955 at paras. 40-41 ["**Fourth Report**"].

Fifteenth Report of the Monitor, dated February 25, 2016, Court of Queen's Bench Action No. 1501-00955 at paras. 34-37 ["**Fifteenth Report**"].

Sixteenth Report of the Monitor, dated March 14, 2016, Court of Queen's Bench Action No. 1501-00955 at paras. 22-24 ["**Sixteenth Report**"].

District Report at para. 66.

Twenty-First Report at para. 29.1.

54. It is not necessarily improper or a conflict of interest for the auditor of a debtor company to act as the monitor in CCAA proceedings. The CCAA itself provides that a trustee who acted as the auditor of a debtor company at any time during the preceding two year period could not act as monitor in relation to that company, except with the permission of the court and on any conditions that the court might impose. Therefore, a trustee that has acted as the auditor for a debtor company more than two years prior to the commencement of the CCAA proceeding would *prima facie* be eligible to act as monitor.

Houlden and Morawetz Bankruptcy and Insolvency Analysis, WestlawNext Canada at N§115.

Companies' Creditors Arrangement Act (Canada) RSC 1985 c C-36 at s. 11.7(2).

55. This notion is also reflected in the case law. In the pre-amendment case of *Re Hickman Equipment*, the Court rejected the suggestion that Deloitte & Touche LLP could not act as monitor because it was the auditor of the debtor company. In that case, the Court was aware "that Deloitte & Touche LLP had a significant and substantial professional relationship" with the debtor company and certain related companies by reason of having been the auditor of those companies. The Court was also "satisfied that there ha[d] been adequate disclosure to and knowledge on the part of the Court of the role of Deloitte & Touche LLP" in relation to the companies. The Court was also satisfied that the monitor's reports "reveal[ed] no actual conflict on the part of the Monitor which appears to have performed its duties under the Initial Order entirely properly."

Re Hickman Equipment (1985) Ltd. (2002), 34 C.B.R. (4th) 203 (Nfld. L.S.C.) [***Hickman***] at para. 49.

56. It was open to the Court at any time to suggest to the Monitor that it was in a potential conflict and in no position to continue to act in this proceeding. No suggestion has been made thus far.

57. It was equally open to any party at any time to bring an application to seek to remove and replace the Monitor on the basis of a conflict.

58. In the respectful submission of the Monitor, it is appropriate for this Honourable Court to critically assess the Creditor Applicants position in relation to an alleged conflict of the Monitor, and the timing associated with such allegations.

59. As referenced above, Deloitte & Touche LLP's role as auditor was disclosed in a report filed in June of 2015. As CCAA proceedings are considered to be "real time"

proceedings of a collective nature, it is incumbent upon parties thereto to raise issues in a prompt fashion. The basis for that requirement is that such proceedings operate in a "building blocks" fashion, wherein steps are taken in the restructuring in reliance upon earlier matters that were put before the Court and either approved or not objected to by interested parties.

60. The Creditor Applicants have been represented by counsel throughout the majority of this proceeding.

61. Prior to the March 3, 2016 application to sanction the DIL Plan of Arrangement, the Creditor Applicants were active participants in this proceeding. They were granted access to creditor committees, and their input into the preparation of the DIL and District Plans was adopted in part. However, no application was brought by the Creditor Applicants to replace the Monitor at that time. This is particularly significant given that the provisions in the District Plan concerning the Representative Action (which concern the Creditor Applicants) are substantially identical to those in the DIL Plan.

62. On March 3, 2016, the Court heard the DIL Sanction Application. During that hearing, counsel to the Monitor noted that the Creditor Applicants had not alleged that Deloitte LLP had done anything wrong despite asserting that the Monitor had a conflict of interest. Immediately after the hearing, on March 4, 2016, the Creditor Applicants issued correspondence (the "**Demand Letter**") to the District demanding that the District commence legal proceedings in negligence against the auditors who previously provided audit opinions to the District, which would include Deloitte LLP. The allegations in the Demand Letter, which are not particularized, relate to conduct that allegedly occurred between 1993 and 2012 (but, in the case of Deloitte LLP, could only relate to the time period between 1990 and 1999 – more than 16 years ago – when it acted as the auditor of the District.

Twenty-First Report at para. 29.2.

63. Following delivery of the Demand Letter, the Creditor Applicants advanced the position that the Monitor was in a direct conflict of interest by virtue of the Demand Letter.

Transcript of Proceedings dated March 21, 2016, Court of Queen's Bench Action No. 1501-00955 ["**March 21 Transcript**"] at pp. 33 l. 36 l. 14-22 and 36 – p. 37 l. 10.

64. The Creditor Applicants then applied, after the District Plan and DIL Plan were approved by the requisite majorities of creditors, and after the DIL Sanction hearing, to have the Monitor removed and replaced.

65. The timing of the Demand Letter and the application to remove the Monitor has, in the respectful submission of the Monitor, the appearance of the Creditor Applicants undertaking measures based upon tactical considerations.

66. An application for removal on the basis of an alleged conflict of interest should only be granted where the application has proceeded on the basis of a genuine concern with respect to the merits of the alleged conflict. Accordingly, where an application for removal is brought for the purpose of frustrating or delaying one's opponent, or to otherwise secure a tactical advantage, the application should be dismissed. Moreover, litigants must not be permitted to take steps after-the-fact so as to manufacture a conflict of interest for the purpose of pursuing a removal application.

Moffat v. Wetstein, 1996 CarswellOnt 2148 at para. 131.

Controlled Media Investments Inc. v. Penfund Capital (No. 1) Ltd. (2000), 10 B.L.R. (3d) 91 at para. 14.

67. On March 9, 2016, the Court granted an Order approving a stay of proceedings in respect of the class proceedings that the Creditor Applicants had previously attempted to undertake (the "**AB – BC Proceedings**"). In addition, the Court made the following remarks in response to the suggestion that the Monitor had a conflict of interest:

> The issue of a possible Monitor conflict with respect to the District was completely disclosed in the Monitor's 4th Report. I note that, yesterday, I received a letter from Mr. Oliver advising that Deloitte & Touche LLP was also the auditor for DIL in 1998 and 1999, which had been missed in the conflict check until early this week. While unfortunate, this additional information does not add any material concern with respect to the possibility of conflict as the audit engagement with respect to the District between 1990 and 1990 was previously disclosed and handled appropriately, as described in the 15th Report.

March 9 Transcript at para. 14.

Twenty-First Report at para. 29.2.

68. There is no basis to conclude that the Monitor has an actual or apparent conflict of interest given that, among other things:

(a) Neither the Monitor nor Deloitte LLP are benefiting from any releases as part of the District Plan;

(b) The District Plan contemplates that conduct of the Representative Action will be carried out by the Subcommittee;

(c) The District Committee will decide who to name to the Subcommittee and the Monitor will have no role in that process;

(d) The members of the Subcommittee will be fiduciaries independent of the Monitor;

(e) The Monitor will have no involvement in the conduct of the Representative Action; and

(f) The Monitor's involvement in this CCAA proceeding does not require that it review any previous work performed by it or Deloitte LLP.

69. The Monitor also notes that as the provisions of the District Plan related to the Representative Action create a process for Eligible Affected Creditors to pursue future litigation, the Monitor would have been unable to provide such an opinion without extensive legal advice. The advice of counsel, rather than just the business judgment of the Monitor, was critical to formulating an opinion on the Representative Action.

Twenty-First Report at para. 29.4.

70. The above fact also illustrates why removal and replacement of Deloitte as the Monitor would fail to provide any ascertainable benefit to the stakeholders: any replacement Monitor would similarly rely on the advice of counsel rather than its business judgment in formulating its opinion on the Representative Action.

71. Moreover, in addition to being reviewed by the Monitor and the Monitor's legal counsel, the provisions of the District Plan related to the Representative Action were also reviewed by the creditors' committees for the District and DIL, who act in a fiduciary capacity with respect to the creditors of those respective entities and by each committee's independent legal counsel. In addition, as the Representative Action addresses legal matters rather than business matters, this Honourable Court is qualified to opine on its reasonableness independently, without the assistance of a separate monitor.

Twenty-First Report at para. 29.4.

72. In summary, the Monitor is of the view that there has been extensive legal advice and review in relation to the Representative Action. As such, the assistance of a further limited purpose Monitor would likely be of little to no further assistance to this Honourable Court and result in increased professional costs to the detriment of Eligible Affected Creditors.

Twenty-First Report at para. 29.4.

73. The Creditor Applicants assert that the Monitor is "clearly in a conflict of interest" and "cannot with any degree of neutrality or objectivity advise the Court on the reasonableness and fairness" to the Representative Action provisions of the District Plan. However, the Creditor Applicants have failed to explain how this alleged mischief could realistically arise in light of the above facts. There is no conflict merely because the Subcommittee, with the benefit of independent legal advice, determines that it does or does not wish to pursue Deloitte LLP in the Representative Action. If there is merit to a potential claim against Deloitte LLP, the Subcommittee would presumably recommend that such action be taken. The Creditor Applicants' position is based upon the assumption that the Subcommittee either cannot be trusted to do its job, or will be subject to undue influence in relation to claims against Deloitte LLP. Those assumptions are inappropriate and unsupported by evidence.

74. Alternatively, the Creditor Applicants want the ability to advance claims individually against Deloitte LLP outside of the Representative Action in the theoretical circumstance that the Subcommittee refuses to do so. Deloitte LLP and the Monitor do not benefit from such a theoretical circumstance on the basis that at that stage, the Subcommittee has independently made a determination on the merits of such a potential claim. If there is no merit to such a claim, then there is no tangible benefit given to the Monitor or Deloitte LLP, and no tangible prejudice to individual depositors if such proceedings cannot be pursued.

Kellen Brief at para. 41.

75. Finally, an order removing and replacing the Monitor would substantially increase the expense and length of this process. Deloitte has acted as the Monitor for nearly 18 months, and has, during that period, invested considerable time and resources in becoming intimately knowledgeable about the affairs and business of the Debtors. If Deloitte were removed as the Monitor, numerous expenses would necessarily be duplicated and this process would be significantly delayed for no identifiable benefit.

Alleged Deficient and Misleading Disclosure

76. The Creditor Applicants also allege that the Monitor has breached its fiduciary duty to the Court and to the District's creditors by making deficient and misleading disclosure related to the feasibility of the potential future subdivision and/or development of the Prince of Peace Properties.

77. The following submissions address these allegations at a relatively high level, as the specifics of the Creditor Applicants' allegations, and the Monitor's detailed response, are principally canvassed at paragraphs 22-28 of the Twenty-First Report. The nature and volume of the information provided is also described above at paras. 36-37.

78. In essence, the Creditor Applicants complain that the Monitor has failed to make disclosure of all matters of interest to the Creditor Applicants. However, as acknowledged in the Kellen Brief, monitors are required to make disclosure of matters of relevance, not every matter irrespective of relevance. The same is true with respect to matters which are not relevant at the time but may become relevant at some future time if certain events and contingencies arise.

> Kellen Brief at para. 39.

79. Any requirement that monitors make disclosure of all matters irrespective of relevance would curtail their ability to efficiently inform creditors of the information necessary for them to decide how to vote in respect of a plan. Such a requirement would also risk overwhelming creditors and obscuring the information relevant to their decision.

80. The question of which matters are relevant is a matter of judgment for the Monitor. The courts will accord deference to the decisions of the monitor, and such deference should be equally warranted in respect of a monitor's decision regarding which matters are relevant and necessary for creditors to decide how to vote in respect of a plan.

> J. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Carswell, a Division of Thomson Reuters Canada Limited, 2013) at 573.
>
> *Calpine Canada Energy Ltd.*, Re, 2007 ABQB 49 at para. 53.
>
> *AbitibiBowater Inc., Re,* 2009 QCCS 6460, at para. 59.

81. In this case, the Monitor has properly exercised its judgment and made disclosure of all matters of relevance, as detailed in the Twenty-First Report. In fact, during the hearing on March 21, 2016, Madam Justice Romaine indicated that the disclosure provided by the Monitor in the District Report was appropriate:

> I've read the proposed additional disclosure to be made to the creditors and the disclosure, in my view, is not deficient or misleading. The class action proceedings commenced by Ms. Poyner and Mr. Garber are disclosed with sufficient information that depositors can follow-up on the allegations made in those -- those proceedings if they care to. What would happen if the plan is not approved is disclosed. The risks of the ownership of shares is adequately disclosed, including the risk of liquidity of the shares ...
>
> March 21 Transcript at p. 38 l. 29 – p. 39 l. 2.

B. THE REQUIREMENTS FOR PLAN APPROVAL HAVE BEEN MET

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

CCAA at s 6(1).

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

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

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

(c) the plan must be fair and reasonable.

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

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

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

(i) There has been strict compliance with statutory requirements

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

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

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

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

(d) the creditors were properly classified;

(e) the meeting of creditors was properly constituted;

(f) the voting was properly carried out; and

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

Olympia at paras. 19-21.

Canadian Airlines at paras. 62-63.

85. In the Monitor's respectful submission, all of the above factors are satisfied in this case. To the Monitor's knowledge, since the commencement of the CCAA proceedings the

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

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

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

Canwest at para 16.

87. Accordingly, it is submitted that the statutory requirements for the sanction of the District Plan under section 6 of the CCAA have been satisfied.

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

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

Canadian Airlines at para 64.

Canwest at para 17.

89. In addition, the Debtors have, to the Monitor's knowledge, kept the Court apprised of ongoing developments throughout the CCAA proceeding by way of several affidavits filed with the Court.

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

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

(iii) The District Plan is fair and reasonable

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

Olympia at para 29.

Canadian Airlines at para 3.

Canwest at para 19.

93. In assessing the fairness and reasonableness of a plan of compromise or arrangement, the Court's discretion ought to be guided by the purpose of the CCAA — namely "to enable compromises to be made for the common benefit of the creditors and of the

company, particularly to keep a company in financial difficulty alive and out of the hands of liquidators". Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable to liquidation.

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

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

(a) classification of creditors and creditor approval;

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

(c) alternatives to the plan and bankruptcy;

(d) oppression;

(e) unfairness to shareholders; and

(f) the public interest.

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

95. In this case, consideration of these factors supports the conclusion that the plan is fair and reasonable, including for the reasons set out at paragraph 23 above.

96. A plan under the CCAA is a compromise and cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. A plan need not necessarily provide equal treatment to all parties in order to be equitable. In fact, equal treatment may at times be contrary to equitable treatment. The court must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests. Courts have approved plans of arrangement with differing treatment among creditors.

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

Canwest at paras 22-24.

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

Olympia at para 36.

Canadian Airlines at para 97.

98. As discussed above, of those Eligible Affected Creditors that voted on the District Plan, 83% in numbers and 76% in dollar value voted in favour of the District Plan. Additionally, the District Committee approves of the District Plan and has been actively involved in the preparation of the District Plan. This creates a strong inference that the District Plan is fair and reasonable.

99. The Court ought not to second guess the business decisions reached by stakeholders as a body when considering whether a plan of compromise is fair and reasonable by "descending into the negotiating arena and submitting [the court's] own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants." There is a heavy onus on parties objecting to a plan that has been approved by the required majority of creditors.

Olympia at para 37.

Central Guaranty at paras 3-4.

Muscletech Research & Development Inc, Re (2007), 30 CBR (5th) 59 (Ont Sup Ct J [Commercial List]) at para 18.

100. On the afternoon of July 6, 2016, the day before the deadline for service of the Monitor's court materials, counsel to Ms. Kroger and Mr. Kellen delivered several additional affidavits sworn June 23, 2016 and filed June 28, 2016, as well as an expert report of Doug McConnell dated June 30, 2016 (the "**Expert Report**"). The Creditor Applicants did not provide any notice of their intention to serve these materials.

101. The analysis in the Expert Report is focused solely on "whether NewCo Shares would be a suitable investment for ... Mrs. Elvira (Vera) Kroeger." (para. 1), and is based on various facts and assumptions regarding Ms. Kroeger's investment preferences.

102. There is some question as to whether the Expert Report is admissible given the timing of service, but, even if the Expert Report is admissible, it is irrelevant and does not assist the Creditor Applicants. Debt-to-equity conversions are very common features of CCAA plans, and, in considering a plan that includes a debt-to-equity conversion, the question for the Court is whether the plan is fair and reasonable, not whether the debt-to-equity conversion would result in an investment that suits the various unique investment preferences of the persons receiving it.

103. Following the issuance of the Convenience Payments, approximately 1,000 Eligible Affected Creditors will continue to have outstanding proven claims and would become NewCo Shareholders. It is unrealistic to believe that any CCAA plan of compromise and arrangement would be supported by all of a debtor company's creditors or that the compromise effected would be ideally suited to every creditors' personal situation.

104. By voting on the District Plan, however, Eligible Affected Creditors have had the opportunity to voice their individual views on the District Plan. The fact that the District Plan has been approved by the required double majority of creditors (being two-thirds in value and a majority in number of voting Eligible Affected Creditors) indicates that the majority of Eligible Affected Creditors are of the view that the approval and implementation of the District Plan is the preferred outcome.

105. Notably, there is nothing in the analysis in the Expert Report which compares the alternative to the formation of NewCo, being an immediate forced liquidation in a depressed real estate market that would likely result in a return of a reduced amount of Ms. Kroeger's investment. If the Expert Report had conducted that analysis, it might well reflect a different conclusion.

106. For all of the above reasons, the Monitor respectfully submits that the District Plan is fair and reasonable in the circumstances.

V. RELIEF REQUESTED

107. It is respectfully requested that this Honourable Court:

(a) dismiss the application for an order to remove and replace the Monitor; and

(b) sanction the District Plan as voted on by the Eligible Affected Creditors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of July 2016.

CASSELS BROCK & BLACKWELL LLP

Per

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

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