Court No. 32-2714829
Estate No. 32-2714829

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED

AND IN THE MATTER OF THE PROPOSAL OF O.B. WIIK CANADA LTD., OF THE TOWN OF SIMCOE IN THE PROVINCE OF ONTARIO

BRIEF OF AUTHORITIES

May 12, 2021

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BRIEF OF AUTHORITIES

TAB

1. *Re Kitchener Frame Ltd*, 2012 ONSC 234
2. *Re Abou-Rached*, 2002 BCSC 1022
3. *Re Gardner* (1921), 1 CBR 424 (Ont Div Ct)
4. *Re Lutheran Church – Canada*, 2016 ABQB 419

TAB 1

Re Kitchener Frame Ltd, 2012 ONSC 234

CITATION: Kitchener Frame Limited (Re), 2012 ONSC 234
COURT FILE NO.: CV-11-9298-00CL
DATE: 20120203

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

RE: **IN THE MATTER OF THE CONSOLIDATED PROPOSAL OF KITCHENER FRAME LIMITED AND THYSSENKRUPP BUDD CANADA, INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **Edward A. Sellers and Jeremy E. Dacks, for the Applicants**

Hugh O'Reilly, Non-Union Representative Counsel

L. N. Gottheil, Union Representative Counsel

John Porter, for Ernst & Young Inc., Proposal Trustee

Michael McGraw, for CIBC Mellon Trust Company

Deborah McPhail, for Financial Services Commission of Ontario

ENDORSEMENT

[1] At the conclusion of this unopposed motion, the requested relief was granted. Counsel indicated that it would be helpful if the court could provide reasons in due course, specifically on the issue of a third-party release in the context of a proposal under Part III of the *Bankruptcy and Insolvency Act* ("*BIA*").

[2] Kitchener Frame Limited ("KFL") and Thyssenkrupp Budd Canada Inc. ("Budd Canada"), and together with KFL, (the "Applicants"), brought this motion for an order (the "Sanction Order") to sanction the amended consolidated proposal involving the Applicants dated August 31, 2011 (the "Consolidated Proposal") pursuant to the provisions of the *BIA*. Relief was also sought authorizing the Applicants and Ernst & Young Inc., in its capacity as proposal trustee

of each of the Applicants (the "Proposal Trustee") to take all steps necessary to implement the Consolidated Proposal in accordance with its terms.

[3] The Applicants submit that the requested relief is reasonable, that it benefits the general body of the Applicants' creditors and meets all other statutory requirements. Further, the Applicants submit that the court should also consider that the voting affected creditors (the "Affected Creditors") unanimously supported the Consolidated Proposal. As such, the Applicants submit that they have met the test as set out in s. 59(2) of the *BIA* with respect to approval of the Consolidated Proposal.

[4] The motion of the Applicants was supported by the Proposal Trustee. The Proposal Trustee filed its report recommending approval of the Consolidated Proposal and indicated that the Consolidated Proposal was in the best interests of the Affected Creditors.

[5] KFL and Budd Canada are inactive entities with no operating assets and no material liquid assets (other than the Escrow Funds). They do have significant and mounting obligations including pension and other non-pension post-employment benefit ("OPEB") obligations to the Applicants' former employees and certain former employees of Budcan Holdings Inc. or the surviving spouses of such former employees or others who may be entitled to claim through such persons in the *BIA* proceedings, including the OPEB creditors.

[6] The background facts with respect to this motion are fully set out in the affidavit of Mr. William E. Aziz, sworn on September 13, 2011.

[7] Affiliates of Budd Canada have provided up to date funding to Budd Canada to enable Budd Canada to fund, on behalf of KFL, such pension and OPEB obligations. However, given that KFL and Budd Canada have no active operations, the *status quo* is unsustainable.

[8] The Applicants have acknowledged that they are insolvent and, in connection with the *BIA* proposal, proceedings were commenced on July 4, 2011.

[9] On July 7, 2011, Wilton-Siegel J. granted Procedural Consolidation Orders in respect of KFL and Budd Canada which authorized the procedural consolidation of the Applicants and permitted them to file a single consolidated proposal to their creditors.

[10] The Orders of Wilton-Siegel J. also appointed separate representative counsel to represent the interests of the Union and Non-Union OPEB creditors and further authorized the Applicants to continue making payments to Blue Cross in respect of the OPEB Claims during the *BIA* proposal proceedings.

[11] On August 2, 2011, an order was granted extending the time to file a proposal to August 19, 2011.

[12] The parties proceeded to negotiate the terms of the Consolidated Proposal, which meetings involved the Applicants, the Proposal Trustee, senior members of the CAW, Union Representative Counsel and Non-Union Representative Counsel.

[13] An agreement in principle was reached which essentially provided for the monetization and compromise of the OPEB claims of the OPEB creditors resulting in a one-time, lump-sum payment to each OPEB creditor term upon implementation of the Consolidated Proposal. The Consolidated Proposal also provides that the Applicants and their affiliates will forego any recoveries on account of their secured and unsecured inter-company claims, which total approximately $120 million. A condition precedent was the payment of sufficient funds to the Pension Fund Trustee such that when such funds are combined with the value of the assets held in the Pension Plans, the Pension Fund Trustee will be able to fully annuitize the Applicants' pension obligations and pay the commuted values to those creditors with pension claims who so elected so as to provide for the satisfaction of the Applicants' pension obligations in full.

[14] On August 19, 2011, the Applicants filed the Consolidated Proposal. Subsequent amendments were made on August 31, 2011 in advance of the creditors' meeting to reflect certain amendments to the proposal.

[15] The creditors' meeting was held on September 1, 2011 and, at the meeting, the Consolidated Proposal, as amended, was accepted by the required majority of creditors. Over 99.9% in number and over 99.8% in dollar value of the Affected Creditors' Class voted to accept the Consolidated Proposal. The Proposal Trustee noted that all creditors voted in favour of the Consolidated Proposal, with the exception of one creditor, Canada Revenue Agency (with 0.1% of the number of votes representing 0.2% of the value of the vote) who attended the meeting but abstained from voting. Therefore, the Consolidated Proposal was unanimously approved by the Affected Creditors. The Applicants thus satisfied the required "double majority" voting threshold required by the *BIA*.

[16] The issue on the motion was whether the court should sanction the Consolidated Proposal, including the substantive consolidation and releases contained therein.

[17] Pursuant to s. 54(2)(d) of the *BIA*, a proposal is deemed to be accepted by the creditors if it has achieved the requisite "double majority" voting threshold at a duly constituted meeting of creditors.

[18] The *BIA* requires the proposal trustee to apply to court to sanction the proposal. At such hearing, s. 59(2) of the *BIA* requires that the court refuse to approve the proposal where its terms are not reasonable or not calculated to benefit the general body of creditors.

[19] In order to satisfy s. 59(2) test, the courts have held that the following three-pronged test must be satisfied:

(a) the proposal is reasonable;

(b) the proposal is calculated to benefit the general body of creditors; and

(c) the proposal is made in good faith.

See *Mayer (Re)* (1994), 25 CBR (3d) 113; *Steeves (Re)*, 25 CBR (4th) 317; *Magnus One Energy Corp. (Re)*, 53 CBR (5th) 243.

[20] The first two factors are set out in s. 59(2) of the *BIA* while the last factor has been implied by the court as an exercise of its equitable jurisdiction. The courts have generally taken into account the interests of the debtor, the interests of the creditors and the interests of the public at large in the integrity of the bankruptcy system. See *Farrell (Re)* 2003, 40 CBR (4th) 53.

[21] The courts have also accorded substantial deference to the majority vote of creditors at a meeting of creditors; see *Lofchik, Re* [1998] O.J. No. 322 (Ont. Bktcy). Similarly, the courts have also accorded deference to the recommendation of the proposal trustee. See *Magnus One, supra*.

[22] With respect to the first branch of the test for sanctioning a proposal, the debtor must satisfy the court that the proposal is reasonable. The court is authorized to only approve proposals which are reasonable and calculated to benefit the general body of creditors. The court should also consider the payment terms of the proposal and whether the distributions provided for are adequate to meet the requirements of commercial morality and maintaining the integrity of the bankruptcy system. For a discussion on this point, see *Lofchik, supra*, and *Farrell, supra*.

[23] In this case, the Applicants submit that, if the Consolidated Proposal is sanctioned, they would be in a position to satisfy all other conditions precedent to closing on or prior to the date of the proposal ("Proposal Implementation Date").

[24] With respect to the treatment of the Collective Bargaining Agreements, the Applicants and the CAW brought a joint application before the Ontario Labour Relations Board ("OLRB") on an expedited basis seeking the OLRB's consent to an early termination of the Collective Bargaining Agreements. Further, the CAW has agreed to abandon its collective bargaining rights in connection with the Collective Bargaining Agreements.

[25] With respect to the terms and conditions of a Senior Secured Loan Agreement between Budd Canada and TK Finance dated as of December 22, 2010, TK Finance provided a secured creditor facility to the Applicants to fund certain working capital requirements before and during the *BIA* proposal proceedings. As a result of the approval of the Consolidated Proposal at the meeting of creditors, TK Finance agreed to provide additional credit facilities to Budd Canada such that the Applicants would be in a position to pay all amounts required to be paid by or on behalf of the Applicants in connection with the Consolidated Proposal.

[26] On the issue as to whether creditors will receive greater recovery under the Consolidated Proposal than they would receive in the bankruptcy, it is noted that creditors with Pension Claims are unaffected by the Consolidated Proposal. The Consolidated Proposal provides for the satisfaction of Pension Claims in full as a condition precedent to implementation.

[27] With respect to Affected Creditors, the Applicants submit that they will receive far greater recovery from distributions under the Consolidated Proposal than the Affected Creditors

would receive in the event of the bankruptcies of the Applicants. (See Sanction Affidavit of Mr. Aziz at para. 61.)

[28] The Proposal Trustee has stated that the Consolidated Proposal is advantageous to creditors for the reasons outlined in its Report and, in particular:

(a) the recoveries to creditors with claims in respect of OPEBs are considerably greater under the Amended Proposal than in a bankruptcy;

(b) payments under the Amended Proposal are expected in a timely manner shortly after the implementation of the Amended Proposal;

(c) the timing and quantum of distributions pursuant to the Amended Proposal are certain while distributions under a bankruptcy are dependent on the results of litigation, which cannot be predicted with certainty; and

(d) the Pension Plans (as described in the Proposal Trustee's Report) will be fully funded with funds from the Pension Escrow (as described in the Proposal Trustee's Report) and, if necessary, additional funding from an affiliate of the Companies if the funds in the Pension Escrow are not sufficient. In a bankruptcy, the Pension Plans may not be fully funded.

[29] The Applicants take the position that the Consolidated Proposal meets the requirements of commercial morality and maintains the integrity of the bankruptcy system, in light of the superior coverage to be afforded to the Applicants' creditors under the Consolidated Proposal than in the event of bankruptcy.

[30] The Applicants also submit that substantive consolidation inherent in the proposal will not prejudice any of the Affected Creditors and is appropriate in the circumstances. Although not expressly contemplated under the *BIA*, the Applicants submit that the court may look to its incidental, ancillary and auxiliary jurisdiction under s. 183 of the *BIA* and its equitable jurisdiction to grant an order for substantive consolidation. See *Ashley v. Marlow Group Private Portfolio Management Inc*. (2006) 22 CBR (5th) 126 (Ont. S.C.J.) (Commercial List). In deciding whether to grant substantive consolidation, courts have held that it should not be done at the expense of, or possible prejudice of, any particular creditor. See *Ashley, supra*. However, counsel submits that this court should take into account practical business considerations in applying the *BIA*. See *A & F Baillargeon Express Inc. (Trustee of) (Re)* (1993), 27 CBR (3d) 36.

[31] In this case, the Applicants submit that substantive consolidation inherent in the Consolidated Proposal is appropriate in the circumstances due to, among other things, the intertwined nature of the Applicants' assets and liabilities. Each Applicant had substantially the same creditor base and known liabilities (other than certain Excluded Claims). In addition, KFL had no cash or cash equivalents and the Applicants are each dependant on the Escrow Funds and borrowings under the Restated Senior Secured Loan Agreement to fund the same underlying pension and OPEB obligations and costs relating to the Proposal Proceedings.

[32] The Applicants submit that creditors in neither estate will be materially prejudiced by substantive consolidation and based on the fact that no creditor objected to the substantial consolidation, counsel submits the Consolidated Proposal ought to be approved.

[33] With respect to whether the Consolidated Proposal is calculated to benefit the general body of creditors, TK Finance would be entitled to priority distributions out of the estate in a bankruptcy scenario. However, the Applicants and their affiliates have agreed to forego recoveries under the Consolidated Proposal on account of their secured and unsecured inter-company claims in the amount of approximately $120 million, thus enhancing the level of recovery for the Affected Creditors, virtually all of whom are OPEB creditors. It is also noted that TK Finance will be contributing over $35 million to fund the Consolidated Proposal.

[34] On this basis, the Applicants submit that the Consolidated Proposal is calculated to benefit the general body of creditors.

[35] With respect to the requirement of the proposal being made in good faith, the debtor must satisfy the court that it has provided full disclosure to its creditors of its assets and encumbrances against such assets.

[36] In this case, the Applicants and the Proposal Trustee have involved the creditors pursuant to the Representative Counsel Order, and through negotiations with the Union Representative Counsel and Non-Union Representative Counsel.

[37] There is also evidence that the Applicants have widely disseminated information regarding their *BIA* proposal proceedings through the media and through postings on the Proposal Trustee's website. Information packages have also prepared by the Proposal Trustee for the creditors.

[38] Finally, the Proposal Trustee has noted that the Applicants' conduct, both prior to and subsequent to the commencement of the *BIA* proposal proceedings, is not subject to censure in any respect and that the Applicants' have acted in good faith.

[39] There is also evidence that the Consolidated Proposal continues requisite statutory terms. The Consolidated Proposal provides for the payment of preferred claims under s. 136(1) of the *BIA*.

[40] Section 7.1 of the Consolidated Proposal contains a broad release in favour of the Applicants and in favour of certain third parties (the "Release"). In particular, the Release benefits the Proposal Trustee, Martinrea, the CAW, Union Representative Counsel, Non-Union Representative Counsel, Blue Cross, the Escrow Agent, the present and former shareholders and affiliates of the Applicants (including Thyssenkrupp USA, Inc. ("TK USA"), TK Finance, Thyssenkrupp Canada Inc. ("TK Canada") and Thyssenkrupp Budd Company), as well as their subsidiaries, directors, officers, members, partners, employees, auditors, financial advisors, legal counsel and agents of any of these parties and any person liable jointly or derivatively through any or all of the beneficiaries of the of the release (referred to individually as a "Released Party").

[41] The Release covers all Affected Claims, Pension Claims and Escrow Fund Claims existing on or prior to the later of the Proposal Implementation Date and the date on which actions are taken to implement the Consolidated Proposal.

[42] The Release provides that all such claims are released and waived (other than the right to enforce the Applicants' or Proposal Trustee's obligations under the Consolidated Proposal) to the full extent permitted by applicable law. However, nothing in the Consolidated Proposal releases or discharges any Released Party for any criminal or other wilful misconduct or any present or former directors of the Applicants with respect to any matters set out in s. 50(14) of the *BIA*. Unaffected Claims are specifically carved out of the Release.

[43] The Applicants submit that the Release is both permissible under the *BIA* and appropriately granted in the context of the *BIA* proposal proceedings. Further, counsel submits, to the extent that the Release benefits third parties other than the Applicants, the Release is not prohibited by the *BIA* and it satisfies the criteria that has been established in granting third-party releases under the *Companies' Creditors Arrangement Act* ("*CCAA*"). Moreover, counsel submits that the scope of the Release is no broader than necessary to give effect to the purpose of the Consolidated Proposal and the contributions made by the third parties to the success of the Consolidated Proposal.

[44] No creditors or stakeholders objected to the scope of the Release which was fully disclosed in the negotiations, including the fact that the inclusion of the third-party releases was required to be part of the Consolidated Proposal. Counsel advises that the scope of the Release was referred to in the materials sent by the Proposal Trustee to the Affected Creditors prior to the meeting, specifically discussed at the meeting and adopted by the unanimous vote of the voting Affected Creditors.

[45] Counsel also submits that there is no provision in the *BIA* that clearly and expressly precludes the Applicants from including the Release in the Consolidated Proposal as long as the court is satisfied that the Consolidated Proposal is reasonable and for the general benefit of creditors.

[46] In this respect, it seems to me, that the governing statutes should not be technically or stringently interpreted in the insolvency context but, rather, should be interpreted in a manner that is flexible rather than technical and literal, in order to deal with the numerous situations and variations which arise from time to time. Further, taking a technical approach to the interpretation of the *BIA* would defeat the purpose of the legislation. See *NTW Management Group (Re)* (1994), 29 CBR (3d) 139; *Olympia & York Developments Ltd. (Re)* (1995), 34 CBR (3d) 93; *Olympia & York Developments Ltd. (Re)* (1997), 45 CBR (3d) 85.

[47] Moreover, the statutes which deal with the same subject matter are to be interpreted with the presumption of harmony, coherence and consistency. See *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24. This principle militates in favour of adopting an interpretation of the *BIA* that is harmonious, to the greatest extent possible, with the interpretation that has been given to the *CCAA*.

[48] Counsel points out that historically, some case law has taken the position that s. 62(3) of the *BIA* precludes a proposal from containing a release that benefits third parties. Counsel submits that this result is not supported by a plain meaning of s. 62(3) and its interaction with other key sections in the *BIA*.

[49] Subsection 62(3) of the *BIA* reads as follows:

> (3) The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.

[50] Counsel submits that there are two possible interpretations of this subsection:

> (a) It prohibits third party releases – in other words, the phrase "does not release any person" is interpreted to mean "cannot release any person"; or
>
> (b) It simply states that acceptance of a proposal does not automatically release any party other than the debtor – in other words, the phrase "does not release any person" is interpreted to mean "does not release any person without more"; it is protective not prohibitive.

[51] I agree with counsel's submission that the latter interpretation of s. 62(3) of the *BIA* conforms with the grammatical and ordinary sense of the words used. If Parliament had intended that only the debtor could be released, s. 62(3) would have been drafted more simply to say exactly that.

[52] Counsel further submits that the narrow interpretation would be a stringent and inflexible interpretation of the *BIA*, contrary to accepted wisdom that the *BIA* should be interpreted in a flexible, purposive manner.

[53] The *BIA* proposal provisions are designed to offer debtors an opportunity to carry out a going concern or value maximizing restructuring in order to avoid a bankruptcy and related liquidation and that these purposes justify taking a broad, flexible and purposive approach to the interpretation of the relevant provisions. This interpretation is supported by *Ted Leroy Trucking Ltd. (Re)*, 2010 SCC 60.

[54] Further, I agree with counsel's submissions that a more flexible purposive interpretation is in keeping with modern statutory principles and the need to give purposive interpretation to insolvency legislation must start from the proposition that there is no express prohibition in the *BIA* against including third-party releases in a proposal. At most, there are certain limited constraints on the scope of such releases, such as in s. 179 of the *BIA*, and the provision dealing specifically with the release of directors.

[55] In the absence of an express prohibition against including third-party releases in a proposal, counsel submits that it must be presumed that such releases are permitted (subject to compliance with any limited express restrictions, such as in the case of a release of directors). By extension, counsel submits that the court is entitled to approve a proposal containing a third-

party release if the court is able to satisfy itself that the proposal (including the third-party release) is reasonable and for the general benefit for creditors such that all creditors (including the minority who did not vote in favour of the proposal) can be required to forego their claims against parties other than the debtors.

[56] The Applicants also submit that s. 62(3) of the *BIA* can only be properly understood when read together with other key sections of the *BIA*, particularly s. 179 which concerns the effect of an order of discharge:

> 179. An order of discharge does not release a person who at the time of the bankruptcy was a partner or co-trustee with the bankrupt or was jointly bound or had made a joint contract with the bankrupt, or a person who was surety or in the nature of a surety for the bankrupt.

[57] The order of discharge of a bankrupt has the effect of releasing the bankrupt from all claims provable in bankruptcy (section 178(2) *BIA*). In the absence of s. 179, this release could result in the automatic release at law of certain types of claims that are identified in s. 179. For example, under guarantee law, the discharge of the principal debt results in the automatic discharge of a guarantor. Similarly, counsel points out the settlement or satisfaction of a debt by one joint obligor generally results in the automatic release of both joint obligors. Section 179 therefore serves the limited purpose of altering the result that would incur at law, indicating that the rule that the *BIA* generally is that there is no automatic release of third-party guarantors of co-obligors when a bankrupt is discharged.

[58] Counsel submits that s. 62(3), which confirms that s. 179 applies to a proposal, was clearly intended to fulfil a very limited role – namely, to confirm that there is no automatic release of the specific types of co-obligors identified in s. 179 when a proposal is approved by the creditors and by the court. Counsel submits that it does not go further and preclude the creditors and the court from approving a proposal which contains the third-party release of the types of co-obligors set out in s. 179. I am in agreement with these submissions.

[59] Specific considerations also apply when releasing directors of a debtor company. The *BIA* contains specific limitations on the permissible scope of such releases as set out in s. 50(14). For this reason, there is a specific section in the *BIA* proposal provisions outlining the principles governing such a release. However, counsel argues, the presence of the provisions outlining the circumstances in which a proposal can contain a release of claims against the debtor's directors does not give rise to an inference that the directors are the only third parties that can be released in a proposal. Rather, the inference is that there are considerations applicable to a release or compromise of claims against directors that do not apply generally to other third parties. Hence, it is necessary to deal with this particular type of compromise and release expressly.

[60] I am also in agreement with the alternative submissions made by counsel in this area to the effect that if s. 62(3) of the *BIA* operates as a prohibition it refers only to those limitations that are expressly identified in the *BIA*, such as in s. 179 of the *BIA* and the specific limitations on the scope of releases that can benefit directors of the debtor.

[61] Counsel submits that the Applicants' position regarding the proper interpretation of s. 62(3) of the *BIA* and its place in the scheme of the *BIA* is consistent with the generally accepted principle that a proposal under the *BIA* is a contract. See *Metcalfe & Mansfield Alternative Investments II Corp. (Ltd.)*, 2008 ONSC 587; *Employers' Liability Assurance Corp. v. Ideal Petroleum (1953) Ltd*., [1978] 1 SCR 230; and *Society of Composeurs, Authors & Music Publishers of Canada v. Armitage* (2000), 20 CBR (4th) 160 (C.A.). Consequently, counsel submits that parties are entitled to put anything into a proposal that could lawfully be incorporated into any contract (see *Air Canada (Re)* (2004), 2 CBR (5th) 4) and that given that the prescribed majority creditors have the statutory right under the *BIA* to bind a minority, however, this principle is subject to any limitations that are contained in the express wording of the *BIA*.

[62] On this point, it seems to me, that any provision of the *BIA* which purports to limit the ability of the debtor to contract with its creditors should be clear and explicit. To hold otherwise would result in severely limiting the debtor's ability to contract with its creditors, thereby the decreasing the likelihood that a viable proposal could be reached. This would manifestly defeat the purpose of the proposal provisions of the *BIA*.

[63] The Applicants further submit that creditors' interests – including the interests of the minority creditors who do not vote in favour of a proposal containing a third-party release – are sufficiently protected by the overriding ability of a court to refuse to approve a proposal with an overly broad third-party release, or where the release results in the proposal failing to demonstrate that it is for the benefit of the general body of creditors. The Applicants submit that the application of the *Metcalfe* criteria to the release is a mechanism whereby this court can assure itself that these preconditions to approve the Consolidated Proposal contained in the Release have been satisfied.

[64] The Applicants acknowledge that there are several cases in which courts have held that a *BIA* proposal that includes a third-party release cannot be approved by the court but submits that these cases are based on a mistaken premise, are readily distinguishable and do not reflect the modern approach to Canadian insolvency law. Further, they submit that none of these cases are binding on this court and should not be followed.

[65] In *Kern Agencies Ltd. (No. 2) (Re)* (1931), 13 CBR 11, the court refused to approve a proposal that contained a release of the debtor's directors, officers and employees. Counsel points out that the court's refusal was based on a provision of the predecessor to the *BIA* which specifically provided that a proposal could only be binding on creditors (as far as relates to any debts due to them from the debtor). The current *BIA* does not contain equivalent general language. This case is clearly distinguishable.

[66] In *Mister C's Ltd. (Re)*, (1995) 32 CBR (3d) 242, the court refused to approve a proposal that had received creditor approval. The court cited numerous bases for its conclusion that the proposal was not reasonable or calculated to benefit the general body of creditors, one of which was the release of the principals of the debtor company. The scope of the release was only one of the issues with the proposal, which had additional significant issues (procedural irregularities,

favourable terms for insiders, and inequitable treatment of creditors generally). I agree with counsel to the Applicants that this case can be distinguished.

[67] *Re Cosmic Adventures Halifax Inc*. (1999) 13 CBR (4th) 22 relies on *Kern* and furthermore the Applicants submit that the discussion of third-party releases is technically *obiter* because the proposal was amended on consent.

[68] The fourth case is *C.F.G. Construction Inc. (Re),* 2010 CarswellQue 10226 where the Quebec Superior Court refused to approve a proposal containing a release of two sureties of the debtor. The case was decided on alternate grounds – either that the *BIA* did not permit a release of sureties, or in any event, the release could not be justified on the facts. I agree with the Applicants that this case is distinguishable. The case deals with the release of sureties and does not stand for any broader proposition.

[69] In general, the Applicants' submission on this issue is that the court should apply the decision of the Court of Appeal for Ontario in *Metcalfe*, together with the binding principle set out by the Supreme Court in *Ted Leroy Trucking*, dictating a more liberal approach to the permissibility of third-party releases in *BIA* proposals than is taken by the Quebec court in *C.F.G. Construction Inc*. I agree.

[70] The object of proposals under the *BIA* is to permit the debtor to restructure its business and, where possible, avoid the social and economic costs of liquidating its assets, which is precisely the same purpose as the *CCAA*. Although there are some differences between the two regimes and the *BIA* can generally be characterized as more "rules based", the thrust of the case law and the legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible, encouraging reorganization over liquidation. See *Ted Leroy Trucking*.

[71] Recent case law has indicated that, in appropriate circumstances, third-party releases can be included in a plan of compromise and arrangement that is approved under the *CCAA*. See *Metcalfe*. The *CCAA* does not contain any express provisions permitting such third-party releases apart from certain limitations that apply to the compromise of claims against directors of the debtor company. See *CCAA* s. 5.1 and *Allen-Vanguard Corporation (Re),* 2011 ONSC 733.

[72] Counsel submits that although the mechanisms for dealing with the release of sureties and similar claimants are somewhat different in the *BIA* and *CCAA*, the differences are not of such significance that the presence of s. 62(3) of the *BIA* should be viewed as dictating a different approach to third-party releases generally from the approach that applies under the *CCAA*. I agree with this submission.

[73] I also accept that if s. 62(3) of the *BIA* is interpreted as a prohibition against including the third-party release in the *BIA* proposal, the *BIA* and the *CCAA* would be in clear disharmony on this point. An interpretation of the *BIA* which leads to a result that is different from the *CCAA* should only be adopted pursuant to clear statutory language which, in my view, is not present in the *BIA*.

[74] The most recent and persuasive example of the application of such a harmonious approach to the interpretation of the *BIA* and the *CCAA* can be found in *Ted Leroy Trucking*.

[75] At issue in *Ted Leroy Trucking* was how to resolve an apparent conflict between the deemed trust provisions of the *Excise Tax Act* and the provisions of the *CCAA*. The language of the *Excise Tax Act* created a deemed trust over GST amounts collected by the debtor that was stated to apply "despite any other Act of Parliament". The *CCAA* stated that the deemed trust for GST did not apply under the *CCAA*, unless the funds otherwise specified the criteria for a "true" trust. The court was required to determine which federal provision should prevail.

[76] By contrast, the same issue did not arise under the *BIA*, due to the language in the *Excise Tax Act* specifically indicating that the continued existence of the deemed trust depended on the terms of the *BIA*. The *BIA* contained a similar provision to the *CCAA* indicating that the deemed trust for GST amounts would no longer apply in a *BIA* proceeding.

[77] Deschamps J., on behalf of six other members of the court, with Fish J. concurring and Abella J. dissenting, held that the proper interpretation of the statutes was that the *CCAA* provision should prevail, the deemed trust under the *Excise Tax Act* would cease to exist in a *CCAA* proceeding. In resolving the conflict between the *Excise Tax Act* and the *CCAA*, Deschamps J. noted the strange asymmetry which would arise if the *BIA* and *CCAA* were not in harmony on this issue:

> Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

[78] It seems to me that these principles indicate that the court should generally strive, where the language of both statutes can support it, to give both statutes a harmonious interpretation to avoid the ills that can arise from "statute-shopping". These considerations, counsel submits, militate against adopting a strained reading of s. 62(3) of the *BIA* as a prohibition against third-party releases in a *BIA* proposal. I agree. In my opinion, there is no principled basis on which the analysis and treatment of a third-party release in a *BIA* proposal proceeding should differ from a CCAA proceeding.

[79] The Applicants submit that it logically follows that the court is entitled to approve the Consolidated Proposal, including the Release, on the basis that it is reasonable and calculated to

benefit the general body of creditors. Further, in keeping with the principles of harmonious interpretation of the *BIA* and the *CCAA*, the court should satisfy itself that the *Metcalfe* criteria, which apply to the approval of a third-party release under the CCAA, has been satisfied in relation to the Release.

[80] In *Metcalfe*, the Court of Appeal for Ontario held that the requirements that must be satisfied to justify a third-party release are:

(a) the parties to be released are necessary and essential to the restructuring of the debtor;

(b) the claims to be released are rationally related to the purpose of the Plan (Proposal) and necessary for it;

(c) the Plan (Proposal) cannot succeed without the releases;

(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan (Proposal); and

(e) the Plan (Proposal) will benefit not only the debtor companies but creditors generally.

[81] These requirements have also been referenced in *Canwest Global Communications Corp. (Re)*, 70 CBR (5th) 1 and *Angiotech Pharmaceuticals Inc. (Re)* 76 CBR (5th) 210.

[82] No single requirement listed above is determinative and the analysis must take into account the facts particular to each claim.

[83] The Applicants submit that the Release satisfies each of the *Metcalfe* criteria. Firstly, counsel submits that following the closing of the Asset Purchase Agreement in 2006, Budd Canada had no operating assets or income and relied on inter-company advances to fund the pension and OPEB requirements to be made by Budd Canada on behalf of KFL pursuant to the Asset Purchase Agreement. Such funded amounts total approximately $112.7 million in pension payments and $24.6 million in OPEB payments between the closing of the Asset Purchase Agreement and the Filing Date. In addition, TK Finance has been providing Budd Canada and KFL with the necessary funding to pay the professional and other costs associated with the *BIA* Proposal Proceedings and will continue to fund such amounts through the Proposal Implementation Date. Moreover, TK Canada and TK Finance have agreed to forego recoveries under the Consolidated Proposal on account of their existing secured and unsecured inter-company loans in the amount of approximately $120 million.

[84] Counsel submits that the releases provided in respect of the Applicants' affiliates are the *quid pro quo* for the sacrifices made by such affiliates to significantly enlarge recoveries for the unsecured creditors of the Applicants, particularly the OPEB creditors and reflects that the affiliates have provided over $135 million over the last five years in respect of the pension and OPEB amounts and additional availability of approximately $49 million to allow the Applicants to discharge their obligations to their former employees and retirees. Without the Releases,

counsel submits, the Applicants' affiliates would have little or no incentive to contribute funds to the Consolidated Proposal and to waive their own rights against the Applicants.

[85] The Release in favour of Martinrea is fully discussed at paragraphs 121-127 of the factum. The Applicants submit that the third-party releases set out in the Consolidated Proposal are clearly rationally related, necessary and essential to the Consolidated Proposal and are not overly broad.

[86] Having reviewed the submissions in detail, I am in agreement that the Released Parties are contributing in a tangible and realistic way to the Consolidated Proposal.

[87] I am also satisfied that without the Applicants' commitment to include the Release in the Consolidated Proposal to protect the Released Parties, it is unlikely that certain of such parties would have been prepared to support the Consolidated Proposal. The releases provided in respect of the Applicants' affiliates are particularly significant in this regard, since the sacrifices and monetary contributions of such affiliates are the primary reason that the Applicants have been able to make the Consolidated Proposal. Further, I am also satisfied that without the Release, the Applicants would be unable to satisfy the borrowing conditions under the Amended and Restated Senior Secured Loan Agreement with respect to the Applicants having only certain permitted liabilities after the Proposal Implementation Date. The alternative for the Applicants is bankruptcy, a scenario in which their affiliates' claims aggregating approximately $120 million would significantly erode recoveries for the unsecured creditors of the Applicants.

[88] I am also satisfied that the Releases benefit the Applicants and creditors generally. The primary non-affiliated Creditors of the Applicants are the OPEB Creditors and Creditors with Pension Claims, together with the CRA. The Consolidated Proposal, in my view, clearly benefits these Creditors by generating higher recoveries than could be obtained from the bankruptcies of the Applicants. Moreover, the timing of any such bankruptcy recoveries is uncertain. As noted by the Proposal Trustee, the amount that the Affected Creditors would receive in the event of the bankruptcies of the Applicants is uncertain both in terms of quantum and timing, with the Applicants' funding of OPEB Claims terminating on bankruptcy, but distributions to the OPEB Creditors and other Creditors delayed for at least a year or two but perhaps much longer.

[89] The Applicants and their affiliates also benefit from the Release as an affiliate of the Applicants may become enabled to use the net operating losses (NOL) following a series of transactions that are expected to occur immediately following the Proposal Implementation Date.

[90] I am also satisfied that the Applicants have provided full and adequate disclosure of the Releases and their effect. Full disclosure was made in the proposal term sheet circulated to both Representative Counsel in early August 2011. The Release was negotiated as part of the Consolidated Proposal and the scope of the Release was disclosed by the Proposal Trustee in its Report to the creditors on the terms of the Consolidated Proposal, which Report was circulated by the Proposal Trustee to the Applicants' known creditors in advance of the creditors' meeting.

[91] I am satisfied that the Applicants, with the assistance of the Proposal Trustee, took appropriate steps to ensure that the Affected Creditors were aware of the existence of the release provisions prior to the creditors' meeting.

[92] For the foregoing reasons, I have concluded that the Release contained in the Consolidated Proposal meets the *Metcalfe* criteria and should be approved.

[93] In the result, I am satisfied that the section 59(2) *BIA* test has been met and that it is appropriate to grant the Sanction Order in the form of the draft order attached to the Motion Record. An order has been signed to give effect to the foregoing.

MORAWETZ J.

Date: February 3, 2012

TAB 2

Re Abou-Rached, 2002 BCSC 1022

2002 BCSC 1022
British Columbia Supreme Court

Abou-Rached, Re

2002 CarswellBC 1642, 2002 BCSC 1022, [2002] B.C.W.L.D. 861,
[2002] B.C.J. No. 1588, 114 A.C.W.S. (3d) 991, 35 C.B.R. (4th) 165

In the Matter of the Proposal of Roger Georges Abou-Rached

In the Matter of the Proposal of R.A.R. Investments Ltd.

Ross J.

Heard: April 9-11, 24-26, 2002
Judgment: July 8, 2002
Docket: Vancouver 219307VA01, 219301VA01

Counsel: *David A. Gray*, *M. Nielsen*, for Trustee, Campbell Saunders Ltd.
Bruce E. McLeod, for Genesee Enterprises Ltd.
Alan E. Keats, for Jean de Grasse, Robert de Grasse, Andre de Grasse, Claire de Grasse, Frank de Grasse, Eric Boulton, D'Arcy Boulton, Gurdrun Kate Parkes, Kenneth James Parkes, Michael A. Parkes, Greg Findlay, Susan Findlay, Phil Argue, Glenn Morris and Four Weal Ventures Ltd.
Andrew G. Sandilands, for Roger Abou-Rached, R.A.R. Investments Ltd.
Jennifer L. Harry, for Stanley Rodham Investments Ltd., Randers International Ltd., Rosebar Enterprises Limited, Sirmac International Ltd., Veda Consult S.A., Yarold Trading Ltd.
Heather M. Ferris, for Georges Abou-Rached, Hilda Abou-Rached, RAR Consulting Ltd., Garmeco Canada International Consulting Engineers Ltd.

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy --- Proposal — Approval by court — Conditions — Reasonable terms

Individual debtor developed new construction technology — Debtor purchased rights to technology from employer — Debtor incorporated four companies, in which he held 100 per cent interest, to license technology — Debtor executed guarantees and pledged shares to companies' investors — Investors' repeated requests for conversion of shares were refused — Investors commenced action against individual and corporate debtors for oppression and conflict of interest — As result of litigation, investors were awarded $982,746 in damages — Debtors' major creditor issued demand — Trustee in bankruptcy recommended two proposals put forward by debtors — First proposal estimated creditors would receive 15 cents on dollar — Second proposal offered creditors right to elect potential recovery of all claims — Eighty-five per cent of creditors voted

in favour of proposals — Debtors brought application for approval of proposals — Application granted — In event of bankruptcy, no unencumbered assets existed that could be available to unsecured creditors — Amount of excess income was minimal — Guaranteed payment existed for some recovery by unsecured creditors — Proposals had reasonable prospect of succeeding according to terms — Proposals were not filed solely to avoid judgment — Recovery would be greater under proposals than in bankruptcy — Proposals were in interests of creditors.

Bankruptcy --- Proposal — Approval by court — Conditions — Interests of creditors

Individual debtor developed new construction technology — Debtor purchased rights to technology from employer — Debtor incorporated four companies, in which he held 100 per cent interest, to license technology — Debtor executed guarantees and pledged shares to companies' investors — Investors' repeated requests for conversion of shares were refused — Investors commenced action against individual and corporate debtors for oppression and conflict of interest — As result of litigation, investors were awarded $982,746 in damages — Debtors' major creditor issued demand — Trustee in bankruptcy recommended two proposals put forward by debtors — First proposal estimated creditors would receive 15 cents on dollar — Second proposal offered creditors right to elect potential recovery of all claims — Eighty-five per cent of creditors voted in favour of proposals — Debtors brought application for approval of proposals — Application granted — In event of bankruptcy, no unencumbered assets existed that could be available to unsecured creditors — Amount of excess income was minimal — Guaranteed payment existed for some recovery by unsecured creditors — Proposals had reasonable prospect of succeeding according to terms — Proposals were not filed solely to avoid judgment — Recovery would be greater under proposals than in bankruptcy — Proposals were in interests of creditors.

Bankruptcy --- Proposal — Approval by court — Bankrupt offering less than 50¢ on dollar

Individual debtor developed new construction technology — Debtor purchased rights to technology from employer — Debtor incorporated four companies, in which he held 100 per cent interest, to license technology — Debtor executed guarantees and pledged shares to companies' investors — Investors' repeated requests for conversion of shares were refused — Investors commenced action against individual and corporate debtors for oppression and conflict of interest — As result of litigation, investors were awarded $982,746 in damages — Debtors' major creditor issued demand — Trustee in bankruptcy recommended two proposals put forward by debtors — First proposal estimated creditors would receive 15 cents on dollar — Second proposal offered creditors right to elect potential recovery of all claims — Majority of creditors voted in favour of proposals — Debtors brought application for approval of proposals — Application granted — Debtors' assets were less than 50 cents on dollar for unsecured liabilities — Individual debtor had assets to support guarantees at time guarantees were given — Debtors were not responsible for shortfall in value of assets — Shortfall was attributed to circumstances for which debtors could not be held responsible — Debtors gave satisfactory account for loss of assets or deficiency of assets.

Bankruptcy --- Proposal — Approval by court — Misconduct of bankrupt

Individual debtor developed new construction technology — Debtor purchased rights to technology from employer — Debtor incorporated four companies, in which he held 100 per cent

interest, to license technology — Debtor executed guarantees and pledged shares to companies' investors — Investors' repeated requests for conversion of shares were refused — Investors commenced action against individual and corporate debtors for oppression and conflict of interest — As result of litigation, investors were awarded $982,746 in damages — Debtors' major creditor issued demand — Trustee in bankruptcy recommended two proposals put forward by debtors — First proposal estimated creditors would receive 15 cents on dollar — Second proposal offered creditors right to elect potential recovery of all claims — Majority of creditors voted in favour of proposals — Debtors brought application for approval of proposals — Application granted — Debtors' conduct during litigation was reprehensible — Dissenting creditors established pursuant to s. 173(1)(f) of Bankruptcy and Insolvency Act that debtors' defence was frivolous and vexatious — Trustee examined transactions conducted prior to litigation and concluded further investigation was necessary to determine whether transactions were settlement or fraudulent preference — Since no conviction or finding of fraud existed against debtors from judgment in criminal or civil court, finding of fraud could not be made on allegations — More than mere suspicion required to find proposals were not reasonable by virtue of debtors' conduct — Proposals were still reasonable within meaning of s. 59 of Act — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 59, 173(1)(f).

Bankruptcy --- Meeting of creditors — Voting — Who may vote

Individual debtor developed new construction technology — Debtor purchased rights to technology from employer — Debtor incorporated four companies, in which he held 100 per cent interest, to license technology — Debtor executed guarantees and pledged shares to companies' investors — Investors' repeated requests for conversion of shares were refused — Investors commenced action against individual and corporate debtors for oppression and conflict of interest — As result of litigation, investors were awarded $982,746 in damages — Debtors' major creditor issued demand — Trustee in bankruptcy recommended two proposals put forward by debtors — Majority of creditors voted in favour of proposals — Dissenting creditors appealed trustee's decision to allow certain creditors to vote at meeting of creditors — Appeal dismissed — Trustee found creditors' claims were sufficient and that promissory notes held by creditors were evidence of debt — Creditors showed they had claims provable in proposal — No evidence existed that corporate creditor's debts were not bona fide — Corporate creditor was not related person to either individual or corporate bankrupt pursuant to s. 4 of Bankruptcy and Insolvency Act — No evidence of bonds of dependence, control, influence or moral pressure existed to indicate debtors and corporate creditor were not dealing at arms' length — No evidence existed that transactions entered by individual debtor after commencement of litigation with dissenting creditors were directed to collusive end so as to prevent dissenting creditors from collecting award from litigation — Transactions in dispute were of investments in development of technology — No evidence existed that investment funds were diverted or used for other purposes — No basis existed to disallow creditors in question from voting on proposal — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 4.

Bankruptcy --- Practice and procedure in courts — Discovery and examinations — By creditor

Individual debtor developed new construction technology — Debtor purchased rights to technology from employer — Debtor incorporated four companies, in which he held 100 per cent interest, to license technology — Debtor executed guarantees and pledged shares to companies' investors — Investors' repeated requests for conversion of shares were refused — Investors commenced action against individual and corporate debtors for oppression and conflict of interest — As result of litigation, investors were awarded $982,746 in damages — Debtors' major creditor issued demand — Trustee in bankruptcy recommended two proposals put forward by debtors — Majority of creditors voted in favour of proposals — Dissenting creditors brought application for order for cross-examination of individuals — Application dismissed — Dissenting creditors did not meet threshold of sufficient cause so as to order examinations.

Table of Authorities

Cases considered by *Ross J.*:

DeGrasse v. Stephenson (June 9, 1995), Doc. Vancouver A943129 (B.C. S.C.) — considered

Forsberg, Re, 26 C.B.R. (4th) 204, 2001 SKQB 289, 2001 CarswellSask 445, *(*sub nom. *Forsberg (Bankrupt), Re)* 209 Sask. R. 196 (Sask. Q.B.) — referred to

Genesee Enterprises Ltd. v. Abou-Rached, 2001 BCSC 59, 2001 CarswellBC 84, 84 B.C.L.R. (3d) 277 (B.C. S.C.) — referred to

Gingras, Robitaille, Marcoux Ltée v. Beaudry, [1980] C.S. 468, *(*sub nom. *Tremblay, Re)* 36 C.B.R. (N.S.) 111, 1980 CarswellQue 59 (C.S. Que.) — followed

Grobstein v. Brock Mills Ltd., *(*sub nom. *Orchid Fashions Inc., Re)* 2 C.B.R. (N.S.) 103, 1961 CarswellQue 29 (C.S. Que.) — referred to

Gustafson Pontiac Buick Cadillac GMC Ltd., Re, 30 C.B.R. (3d) 280, *(*sub nom. *Gustafson Pontiac Buick Cadillac GMC Ltd. (Bankrupt), Re)* 129 Sask. R. 293, 1995 CarswellSask 4 (Sask. Q.B.) — considered

Hartland Pipeline Services Ltd. (Trustee of) v. Bennett Jones, 2000 CarswellAlta 592, 18 C.B.R. (4th) 28, *(*sub nom. *Hartland Pipeline Services Ltd. (Bankrupt) v. Bennett Jones)* 272 A.R. 319 (Alta. Q.B.) — considered

Herd, Re, 77 C.B.R. (N.S.) 209, 1989 CarswellBC 377 (B.C. C.A.) — distinguished

Lofchik, Re, 1998 CarswellOnt 194, 1 C.B.R. (4th) 245 (Ont. Bktcy.) — considered

McNamara v. McNamara, 53 C.B.R. (N.S.) 240, 1984 CarswellOnt 186 (Ont. Bktcy.) — referred to

NsC Diesel Power Inc., Re, 1997 CarswellNS 406, 49 C.B.R. (3d) 213 (N.S. S.C. [In Chambers]) — referred to

NsC Diesel Power Inc., Re, 1998 CarswellNS 331, *(*sub nom. *NsC Diesel Power Inc. (Bankrupt), Re)* 170 N.S.R. (2d) 236, *(*sub nom. *NsC Diesel Power Inc. (Bankrupt), Re)* 515 A.P.R. 236, 6 C.B.R. (4th) 96 (N.S. C.A.) — referred to

Paskauskas, Re, 36 C.B.R. (3d) 288, 1995 CarswellOnt 948 (Ont. Bktcy.) — referred to

R.L. Coolsaet of Canada Ltd., Re, 45 C.B.R. (3d) 30, 1996 CarswellOnt 5202 (Ont. Bktcy.) — considered

Touhey v. Barnabe, 1995 CarswellOnt 3495 (Ont. Bktcy.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — considered

s. 3 — considered

s. 4 — considered

s. 4(1) "related group" — considered

s. 4(1) "unrelated group" — considered

s. 59 — considered

s. 59(2) — considered

s. 59(3) — considered

s. 91(1) — referred to

s. 109(6) — considered

s. 111 — considered

s. 172 — considered

s. 163(1) — referred to

s. 163(2) — considered

s. 173 — considered

s. 173(1)(a) — considered

s. 173(1)(d) — considered

s. 173(1)(f) — considered

s. 173(1)(g) — considered

s. 173(1)(k) — considered

Bills of Exchange Act, R.S.C. 1985, c. B-4

s. 179(2) — considered

APPLICATION by debtors to approve proposal; APPEAL by dissenting creditors of trustee in bankruptcy's decision to allow certain creditors to vote at meeting of creditors; CROSS-APPLICATION by dissenting creditors for order to cross-examination of individuals.

***Ross J.*:**

I Introduction

1 This was a hearing to deal with several matters in relation to two proposals filed under the *Bankruptcy and Insolvency Act*, RSC 1985 c. B-3 (the "*Act*").

2 The parties are:

(a) the Trustee, Campbell Saunders Ltd.;

(b) Mr. Abou-Rached and RAR Investments Ltd. ("RAR") who each filed a proposal;

(c) two groups of creditors supporting the proposals:

(i) Stanley Rodham Investments ("SRI"), Randers International Ltd., Rosebar Enterprises Ltd., Sirmac International Ltd., Veda Consult S.A., and Yarold Trading Ltd.; and

(ii) RAR Consulting Ltd. ("RARC"), Garmeco Canada International Consulting Engineers Ltd., Georges Abou-Rached, and Hilda Abou-Rached;

(d) two creditors who are in opposition to the proposal:

(i) Genesee Enterprises Ltd., a judgment creditor ("Genesee"); and

(ii) Jean de Grasse, Robert de Grasse, Andre de Grasse, Claire de Grasse, Frank de Grasse, Eric Boulton, D'Arcy Boulton, Gurdrun Kate Parkes, Kenneth James Parkes, Michael A. Parkes, Greg Findlay, Susan Findlay, Phil Argue, Glenn Morris and Four Weal Ventures Ltd., defendants by counterclaim in litigation involving Genesee as plaintiff (the "Defendants by Counterclaim")

(collectively the "dissenting creditors".)

3 The matters are:

(a) appeals by the dissenting creditors from the decision of the Trustee to permit certain creditors to vote at the meeting of creditors;

(b) applications for court approval of the Proposals. These are opposed by the dissenting creditors on the grounds that the Proposals do not meet the criteria under s. 59 of the *Act* and that facts under s. 173 of the *Act* are present;

(c) an application by the dissenting creditors for orders for the cross-examination of several individuals.

4 On the basis of the reasons that follow, I have approved the Proposals and dismissed the balance of the relief sought.

II BACKGROUND

5 Mr. Roger Abou-Rached was born in Beirut, Lebanon in 1951. He is an engineer who received his training at the American University in Beirut and at Stanford University in California.

6 Mr. Abou-Rached's father, George Abou-Rached, is a prominent engineer. He held the position of Dean and Professor of Engineering at the American University in Beirut. In addition, he was involved in engineering projects in the Middle East, Asia and Africa through his company Garmeco International Consultants Ltd. ("Garmeco").

7 Garmeco employed Roger Abou-Rached as an engineer, at first, in Lebanon. His employment later continued in Canada when the family fled the Lebanese civil war in 1989 and immigrated to this country.

8 During the time that he was employed by Garmeco, Roger Abou-Rached developed a new construction technology (the "Technology"). The Technology is said to employ "a special reinforced concrete/pre-formed rigid insulation/cold formed metals method of construction" that utilized built-in, rectangular, hollow, metal section tubing as panel framing members. The system is said to be extremely flexible with respect to the type and quality of interior and exterior finish. It provides greater safety, energy efficiency, sound insulation and resistance to insect infestation. The system is also said to provide an environmentally sound building method potentially using recycled ferrous, plastics and organic fibers.

9 Mr. Abou-Rached acquired the rights to the Technology from Garmeco. Over the next several years a number of corporate entities became involved in the development. There were, in addition, a series of transactions, which are characterized by Mr. Abou-Rached and the creditors supporting the Proposals as being in relation to continuing efforts to raise funds in pursuit of that development. These transactions were primarily with SRI, an investment group in Europe, several private investors, as well as members of Mr. Abou-Rached's family and related companies.

10 Mr. Abou-Rached has stated that in excess of $20,000,000 has been invested in the development of the Technology, primarily by SRI, his family and related companies. He stated

that in order to obtain these funds, he executed guarantees and transferred and pledged shares in his companies to the investors.

11 The transactions are characterized by the dissenting creditors as collusive efforts to prejudice them. In the background and at the root of the issue is litigation between Mr. Abou-Rached and these dissenting creditors, the judgment of which is reported at *Genesee Enterprises Ltd. v. Abou-Rached*, 2001 BCSC 59 (B.C. S.C.) (the "Litigation").

12 The principal entities in respect of the development of the Technology are described in the Trustee's Report and the reasons of Justice Levine in the Litigation. Mr. Abou-Rached incorporated four companies, holding 100% of the shares of each at the outset. These companies were:

(a) RARC,

(b) R.A.R. International Assets Inc. ("RARI"),

(c) Canadian High-Tech Manufacturing Ltd ("CHT"), and

(d) RAR.

13 Roger Abou-Rached obtained the rights to the Technology from Garmeco pursuant to an Assignment of Technology effective September 11, 1990 and executed on August 31, 1993. The purchase price was $5,000,000 US. There was a written and executed promissory note from Mr. Abou-Rached in the amount of $5,000,000 US in favour of Garmeco dated September 12, 1990. In addition, there was an agreement that provided that the debt was to be repaid on a pro-rated basis from net cash flow from dividends paid by CHT to Roger Abou-Rached.

14 Effective April 1991, by agreement executed August 31, 1993, Mr. Abou-Rached assigned the absolute rights in the Technology to RARC. RARC granted a licence to CHT for the use of the Technology in Canada and a right of first refusal for its use in any other territory in the world.

15 In May 1993, Roger Abou-Rached transferred 65% of his shares in CHT to a publicly traded company, International Hi-Tech Industries Ltd. ("IHI") and acquired control of IHI in a "reverse take over" on the Vancouver Stock Exchange. CHT transferred the rights to the Technology in Canada to IHI. IHI is currently developing and marketing the Technology.

16 In 1990 and 1991, a number of individuals had made investments in various instruments related to CHT. These individuals were either members of the de Grasse family or introduced to Mr. Abou-Rached by the de Grasse family. In late 1991, Jean de Grasse, Robert de Grasse and Mr. Abou-Rached discussed a mechanism by which these investors could convert their investments into equity in CHT. It was substantially agreed that one entity, Genesee, would hold in trust all of the CHT shares issued to these investors. RAR had an option to buy, on notice given by CHT before November 1, 1996, any or all of the CHT shares held by Genesee for a purchase price calculated

according to a formula, payable at Genesee's option, in cash or shares in IHI. This agreement was finally executed in mid-1992 (the "Genesee Agreement").

17 In late 1993 several individuals who were parties to the Genesee Agreement requested conversion of their shares of CHT pursuant to that agreement. They were informed that the requests could not be honoured because the requests, pursuant to the Agreement, had to be made by Genesee.

18 Jean de Grasse, as President of Genesee, then gave notice of conversion on their behalf. That notice in turn was refused because it had not been approved by Genesee's Board of Directors.

19 The Board met, but the requests for conversion were not approved because of a deadlock on the Board. One director, Michael Stephenson, a director of both Genesee and IHI, and on behalf of Hang Guong, the fourth director, refused to approve the conversions.

20 In the result, an action was commenced in which a claim of oppression and conflict of interest was advanced. In *De Grasse v. Stephenson* (June 9, 1995), Doc. Vancouver A943129 (B.C. S.C.) (the "Petition"), Mr. Stephenson was found to be in a conflict of interest. Genesee was ordered to give notice of the requests for conversion. The requests were issued on July 7, 1995.

21 The requests were not honoured. Mr. Abou-Rached and RAR claimed that the Genesee Agreement did not provide for the conversion right claimed. The Litigation was commenced. In addition to raising several defences with respect to the Genesee Agreement, the defendants claimed that the Agreement should be rescinded on the basis of fraudulent misrepresentation. Claims of conspiracy and breach of fiduciary duty were also raised by the defendants.

22 The individuals who had sought conversion through Genesee, the Defendants by Counterclaim, were named in a counterclaim which repeated the allegations raised in the defence.

23 In June 1995, RARC granted a licence agreement for the international rights to the Technology, excluding Canada, to IHI International Holdings Ltd. ("IHIL"). IHIL is owned 51% by IHI and 49% by Mr. Abou-Rached's family.

24 Judgment in the Litigation was pronounced January 9, 2001. The plaintiff, Genesee, was awarded damages of $982,746.94 plus interest. The counterclaim was dismissed. In supplementary reasons for judgment, reported at 2001 BCSC 1172 (B.C. S.C.), Justice Levine awarded the plaintiff and the Defendants by Counterclaim special costs.

25 Following the pronouncement of the reasons for judgment SRI, one of the major creditors of Mr. Abou-Rached and RAR, issued a demand. Mr. Abou-Rached and RAR each then filed a Notice of Intention to File a Proposal, as they were unable to meet their financial obligations

as they became due. Mr. Abou-Rached and RAR, after obtaining two extensions from the court, ultimately filed the Proposals on January 7, 2002.

26 Campbell Saunders Ltd. is the Trustee under the Proposals.

27 The Proposals were summarized by the Trustee as follows

Option A

a) An amount totaling $150,000 CDN, to be provided by SRI ($75,000) and the Debtor's parents or other family members ("the family") ($75,000);

b) Common shares in the capital of IHI having a market value of $150,000 as at the date of the initial bankruptcy event, to be provided by SRI ($75,000) and the family ($75,000); and

c) (a) and (b) above are to be delivered to the Trustee no later than 31 days following Court approval.

The shares will be issued in or transferred in the name of the Creditor(s), to be held and distributed by an Authorized Representative agreed upon by the Creditor(s).

The Debtor also agrees that for a period of two years from the date of Court Approval, he shall deliver to the Trustee:

• 5% of any common shares, warrants, options or escrow shares he may receive from or in the capital of IHI; or

• anytime after 120 days following Court approval of the Proposal, provide $100,000 CDN in cash; or

• that number of common shares in the capital of IHI equal to $100,000 CDN.

The future shares delivered to the Trustee shall be issued in the name of the Authorized Representative in trust for the Creditors.

The Authorized Representative shall not sell the common shares and/or future shares at a rate exceeding 2% of the original total number of common shares and/or future shares each day.

Option B

The claim of the Creditors who elect this Option will survive for seven (7) years (or as agreed to by the Debtor and the Creditors).

The Creditors will be entitled to accrue or charge a maximum of 2% interest per annum to the amount of their claim.

With the exception of 2,600,000 stock options in the capital of IHI and 21,684,958 common shares held in escrow in the capital of IHI that are held in the name of Mira Mar Overseas Ltd. and all rights or entitlement accruing in relation thereto (the "Existing Encumbered Shares"), the Debtor shall for a period not exceeding seven years (or such other period of time as may hereafter be agreed to by the Debtor and the Creditors who elect to Option B of the Proposal) from the date of filing of the initial bankruptcy event, pledge and deliver to the Trustee 30% of any options, warrants, common or preferred shares whether held in escrow or not that the Debtor may receive or be entitled to receive in the capital of IHI from and after the date of the initial bankruptcy event (hereinafter any future right to receive options, warrants, common or preferred shares, whether held in escrow or not shall collectively be referred to as the "Option B Future Shares"). For greater certainty, the Option B Future Shares do not include the existing encumbered shares.

The Option B Future Shares shall be issued in the name of the Authorized Representative in trust for the Creditors and delivered to the Trustee within 30 days of receipt or soon thereafter as may be reasonable.

The Trustee shall forward to the Authorized Representative and the Authorized Representative shall not sell the shares at a rate greater than 2,000 common shares each trading day.

The Authorized Representative shall sell the shares upon receipt of written instructions delivered to it by the Creditors.

If the Creditors' claims are not paid by the last day of the seventh year (or such other period of time as may be agreed to by the Debtor and Creditors), such claim shall be released and shall not be recoverable.

Prior to the Creditors' Meeting, the Debtor will obtain from SRI and the Family irrevocable direction agreeing that they will elect to participate in Option B and waive or release any right or entitlement of the Option A Future Shares that they may have pursuant to any security given by the Debtor prior to the initial bankruptcy event.

The Debtor will only be obligated to deliver the Option B Future Shares to the Trustee to the extent necessary to repay in full the claims of those creditors who elect Option B.

The Debtor can at any time deliver to the Trustee the sum of money or number of shares in the capital of IHI necessary to repay in full the claims of the Creditors.

Upon delivery the Debtor shall be released and proved discharges.

28 In the course of these proceedings the Proposals were amended as follows:

• All creditors, except credit cards, banks, Canada Customs and Revenue Agency, and contingent creditors, have agreed to accept Proposal Option B;

• Within 30 days of Court Approval, the Proposal will provide that the Trustee will receive $150,000 cash;

• Within 30 days of Court Approval, the Proposal will provide that the Trustee will receive the shares as stated in Paragraph 15 of the Proposal. Should the Trustee be unable to realize a total of $150,000 within 90 days of Court Approval, the Proposal will provide that the Trustee will receive the additional funds in cash;

• Within 90 days of Court Approval, the Proposal will provide that the Trustee will receive shares to a value of $100,000 and should the Trustee be unable to realize a total of $100,000 within 150 days of Court Approval, the Proposal will provide that the Trustee will receive the additional funds in cash;

• The retainer held by the Trustee in the amount of $27,500, will be applied to the Trustee's fees and Mr. Rached's parents, who provided the retainer, will have no claim in the estate for that amount.

29 The Trustee estimates that, with the amendment, the creditors in Option A will realize at least 15 cents on the dollar for their claims.

30 The Trustee recommended the Proposals, stating:

> According to the Statement of Affairs, there are no unencumbered assets that would be available to the unsecured creditors in a Bankruptcy scenario. The amount of excess income that would be available is minimal and, in all likelihood, would be less than the Trustee's fees and disbursements.
>
> The only potential recovery available to the Estate would require the voiding of the various transfers, sales and pledges described herein. As indicated in this report, this would require further investigation and, in all likelihood, expensive litigation. The cost of this process would be great and beyond the availability of funds from tangible assets. Any effort in this regard would therefore require funding by the Creditors and there is no certainty that the required funding would be forthcoming. Finally, the conclusion of further investigation may be that all of the transactions are bona fide and for fair consideration.
>
> Accordingly, at this time we are unable to estimate with any degree of certainty the estimated realization in a Bankruptcy scenario. The terms of the Proposal, on the other hand, offer the creditors certainty as to recovery with the right to elect the potential recovery of all of their claims (under Option B) or a portion of their claims (under Option A).

In fact, the situation at the outset of the hearing and prior to the amendment was that recovery under the Proposals would have been in the order of 4 or 5 cents on the dollar.

31 The meeting of creditors was held on January 28, 2002. In the Proposal of Roger Georges Abou-Rached, the following was the result of the creditors' vote:

For: 48	$13,198,794.64	87.78%
Against: 2	$ 1,837,369.98	12.22%
	$15,036,164.62	

In the Proposal of R.A.R. Investments Ltd., the following was the result of the creditors' vote:

For: 48	$11,542,876.46	86.26%
Against: 2	$ 1,837,369.98	13.74%
	$13,380,846.44	

32 Creditors Genesee and the Defendants by Counterclaim voted against the Proposals. Their claims were with respect to the judgment arising from the litigation and the award of special costs.

33 Following the meeting of creditors, a series of appeals were brought. Registrar Sainty, in reasons dated April 3, 2002, with respect to one appeal, allowed the unsecured claim of the Defendants by Counterclaim at 70% rather than the 50% allowed by the Trustee in the RAR proposal. Accordingly, the dollars voted against that Proposal were increased, but not by enough to change the outcome of the vote.

III. APPEAL FROM THE TRUSTEE'S DECISION TO ALLOW CERTAIN CREDITORS TO VOTE ON THE PROPOSALS

34 The dissenting creditors appealed against the Trustee's decision to permit certain creditors to vote on the Proposals. First, the dissenting creditors submit that the Trustee erred in allowing the claims of Ka Po Cheung, Larry Coston, and the Five Small Creditors; namely, Han Hoang, IACS Technologies Inc., Thinh Le, Nhan Thi Le and Hong Dinh Le.

35 Han Hoang is a former director of Genesee. The dissenting creditors asserted that, following the ruling of Justice Henderson in the Petition, Ms. Hoang avoided attending the directors meeting of Genesee, which was required in order to permit Genesee to formally request conversion of the shares, and thereby assisted Mr. Abou-Rached and RAR in their opposition to the conversion requests.

36 Ms. Hoang submitted three proofs of claim in Mr. Abou-Rached's Proposal, for $1,000, $1,500 and $300,000. The $1,000 claim arises from a cheque of Ms. Hoang in the amount of $5,000, said to represent five $1,000 loans from the Five Small Creditors. She was only permitted to vote with respect to the first two claims as the Trustee concluded that the large claim was a contingent claim. In the RAR Proposal, Ms. Hoang claims $1,000 and $300,000. The Trustee's decision with respect to voting was the same with respect to that Proposal.

37 Ko Po Cheung filed a proof of claim in the Proposal of Mr. Abou-Rached in the amount of $2,159.12, Larry Coston filed a proof of claim in the amount of $1,500, The Five Small Creditors filed proofs of claim in the amount of $1,000 each.

38 The dissenting creditors' complaints with respect to these claims are that:

- There is no evidence that any consideration was given for the promissory notes provided by Mr. Abou-Rached and RAR.
- There is no evidence that Ms. Hoang received $1,000 each from IACS Technologies Inc., Thinh Le, Nhan Thi Le and Hong Dinh Le in relation to the $5,000 cheque.
- The $5,000 cheque is made out to I.H.I. Holdings Ltd. The Promissory Note is signed by Mr. Abou-Rached on behalf of both himself and RAR with no explanation.
- The timing of the debt is questionable. It arises shortly after judgment in the Litigation. Prior to that, there was no debt between the Small Five Creditors and CHT.

39 In addition, they note that Mr. Coston voted on behalf of 27 creditors with similar cheques and promissory notes filed as proofs of claim or invoices and agreements to pay. Moreover, he was observed at the meeting soliciting the assistance of Mr. Abou-Rached and his counsel in filling out the forms.

40 The Trustee submits that the proofs of claim had been reviewed by both the Trustee and representative from the office of the Superintendent of Bankruptcy. They concluded that the claims were sufficient. He submits further that a promissory note is evidence of a debt and noted that there were warnings with respect to false filings on the proof of claim forms. These claims were for amounts smaller than the potential fines. He observed that the documentation with respect to these claims was in fact more extensive than that frequently encountered in bankruptcy proceedings.

41 Upon a review of the evidence and submissions, I have concluded, for the reasons as stated by the Trustee, that the creditors Cheung, Coston, Hoang, IACS, Thinh Le, Nhan Thi Le and Hong Dinh Le have, on the balance of probabilities, and based on the evidence before me, have established that they have claims provable in the proposal.

42 The dissenting creditors also appeal the decision of the Trustee to allow SRI to vote on the proposals. The dissenting creditors submitted that SRI was not dealing at arms length, and that the debts claimed were not *bona fide*.

43 Section 109(6) of the *Act* provides:

> **Creditor not dealing at arm's length** — Except as otherwise provided by this Act, a creditor is not entitled to vote at any meeting of creditors if the creditor did not, at all times within the period beginning on the day that is one year before the date of the initial bankruptcy event in respect of the debtor and ending on the date of the bankruptcy, both dates included, deal with the debtor at arm's length.

44 The question of what is meant by arms length, for purposes of the *Act*, is dealt with in ss. 3 and 4, which provide:

> 3.(1) **Reviewable transaction** — for the purposes of this Act, a person who has entered into a transaction with another person otherwise than at arm's length shall be deemed to have entered into a reviewable transaction.
>
> (2) **Question of fact** — It is a question of fact whether persons not related to one another within the meaning of section 4 were at a particular time dealing with each other at arm's length.
>
> (3) **Presumption** — Persons related to each other within the meaning of section 4 shall be deemed not to deal with each other at arm's length while so related.
>
> 4.(1) **Definitions** — In this section
>
> "related group" means a group of persons each member of which is related to every other member of the group;
>
> "unrelated group" means a group of persons that is not a related group.
>
> (2) **Definition of "related persons"** — For the purposes of this Act, persons are related to each other and are "related persons" if they are
>
> (a) individuals connected by blood relationship, marriage, common-law partnership or adoption;
>
> (b) a corporation and
>
> (i) a person who controls the corporation, if it is controlled by one person,
>
> (ii) a person who is a member of a related group that controls the corporation, or

(iii) any person connected in the manner set out in paragraph (a) to a person described in subparagraph (i) or (ii); or

(c) two corporations

(i) controlled by the same person or group of persons,

(ii) each of which is controlled by one person and the person who controls one of the corporations is related to the person who controls the other corporation,

(iii) one of which is controlled by one person and that person is related to any member of a related group that controls the other corporation,

(iv) one of which is controlled by one person and that person is related to each member of an unrelated group that controls the other corporation,

(v) one of which is controlled by a related group a member of which is related to each member of an unrelated group that controls the other corporation, or

(vi) one of which is controlled by an unrelated group each member of which is related to at least one member of an unrelated group that controls the other corporation.

(3) **Relationships** — For the purposes of this section,

(a) where two corporations are related to the same corporation within the meaning of subsection (2), they shall be deemed to be related to each other;

(b) where a related group is in a position to control a corporation, it shall be deemed to be a related group that controls the corporation whether or not it is part of a larger group by whom the corporation is in fact controlled;

(c) a person who has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acquire, shares in a corporation, or to control the voting rights of shares in a corporation, shall, except where the contract provides that the right is not exercisable until the death of an individual designated therein, be deemed to have the same position in relation to the control of the corporation as if he owned the shares;

d) where a person owns shares in two or more corporations, he shall, as shareholder of one of the corporations, be deemed to be related to himself as shareholder of each of the other corporations;

(e) persons are connected by blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;

> (f) persons are connected by marriage if one is married to the other or to a person who is connected by blood relationship or adoption to the other;
>
> (f.1) persons are connected by common-law partnership if one is in a common-law partnership with the other or with a person who is connected by blood relationship or adoption to the other; and
>
> (g) persons are connected by adoption if one has been adopted, either legally or in fact, as the child of the other or as the child of a person who is connected by blood relationship, otherwise than as a brother or a sister to the other.

45 There is no evidence before me that SRI is a related person with respect to either Mr. Abou-Rached or RAR within the meaning of section 4 of the *Act*.

46 The next question is whether SRI is, in any event, not dealing at arm's length with Mr. Abou-Rached or RAR. This is a question of fact. The test articulated in *Gingras, Robitaille, Marcoux Ltée v. Beaudry* (1980), 36 C.B.R. (N.S.) 111 (C.S. Que.), at 112 is:

> . . . a transaction at arm's length could be considered to be a transaction between persons between whom there are no bonds of dependence, control or influence, in the sense that neither of the two co-contracting parties has available any moral or psychological leverage sufficient to diminish or possibly influence the free decision-making of the other. Inversely, the transaction is not at arm's length where one of the co-contracting parties is in a situation where he may exercise a control, influence or moral pressure on the free will of the other. Where one of the co-contracting parties is, by reason of his influence or superiority, in a position to pervert the ordinary rule of supply and demand and force the other to transact for a consideration which is substantially different than adequate, normal or fair market value, the transaction in question is not at arm's length.

47 While considerable time was spent in submissions with respect to this issue, there is, in my view, no evidence before me of bonds of dependence, control, influence or moral pressure between Mr. Abou-Rached and SRI such that the ordinary rules of supply and demand are not operative. The dissenting creditors have not satisfied me on a balance of probabilities that SRI and Mr. Abou-Rached were not dealing at arm's length.

48 The dissenting creditors submit that the debts of SRI and the Group of Five; namely, Randers International Ltd., Rosebar Enterprises Limited, Sirmac International Ltd., Veda consult S.A. and Yarold Trading Ltd. are not *bona fide*, but rather represent a collusive effort on the part of Mr. Abou-Rached and the creditors to deprive the dissenting creditors of the fruits of the judgment in the Litigation. This argument is premised upon the assumption that virtually every transaction entered into by Mr. Abou-Rached or his associated companies since the first attempt at conversion

was in fact directed to this collusive end. There is, however, no evidence before me in support of this fundamental assumption.

49 There is another, and perhaps simpler, explanation for the transactions; namely, that the investors were investing in the development of the Technology. The Technology is a real innovation, apparently of some promise. The dissenting creditors, whatever their current views of Mr. Abou-Rached, believed in the promise of the Technology, at least at the outset. They invested in the development of the Technology. There is no reason to believe that other investors would not and did not have the same faith in the Technology as that of the dissenting creditors.

50 There is also no evidence that funds were diverted or used for some other purpose, although in fairness to the dissenting creditors, they do question whether and to what extent the funds represented by some of the proofs of claim were advanced at all. Again, however, there is no evidence before me that funds were not advanced.

51 The Trustee drew some comfort from the fact that the majority of these transactions occurred before judgment was pronounced in the Litigation and that the basic nature and kind of documentation of the transactions was similar from the very outset.

52 The dissenting creditors submit that there is reason to question the dates of many of the transactions. However, while the transactions may be questionable, there is no evidence before me which would support a conclusion that the transactions did not occur as reflected in the documents.

53 The dissenting creditors also submit that the date of judgment is not the critical date, but rather the key point is the date of the first request for conversion. However, that date is very close to the inception of the whole enterprise. Thus the period during which the dissenting creditors allege these collusive transactions occurred covers effectively the entire period during which investors were being sought to develop the Technology. Again there is no evidence before me that the impugned transactions were other than what they purport to be.

54 In short, I am unable to conclude that the transactions criticized by the dissenting creditors are other than *bona fide*.

55 Finally, the dissenting creditors rely upon s. 111 of the *Act*. That section provides:

> 111. **Creditor secured by bill or note** — A creditor shall not vote in respect of any claim on or secured by a current bill of exchange or promissory note held by him, unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the debtor, and who is not a bankrupt, as a security in his hands and to estimate the value thereof and for the purposes of voting, but not for the purposes of dividend, to deduct it from his claim.

56 The submission with respect to s. 111 was that, with respect to the claim of the Five Small Creditors, IHI was primarily liable for the debt and the debtor was a guarantor, secondarily liable. Since IHI is not a bankrupt or filing a proposal, when the IHI amount is deducted, the value of the claim is reduced to zero.

57 A similar argument was made with respect to all but the first $1.5 million of the SRI claim. The loan was made, it was submitted, to RARC, which is neither a party to the Proposals nor a bankrupt. It is the primary debtor and RAR was merely the guarantor. The amount to which the non-bankrupt party, RARC, is liable should therefore be subtracted from the claim for voting purposes.

58 Counsel were not able to provide any authorities commenting upon the interpretation of this provision of the *Act*.

59 Counsel for SRI and the Group of Five submitted that, pursuant to s. 179(2) of the *Bills of Exchange Act*, the relevant promissory notes are, in fact, joint and several promissory notes in that the notes bear the words "I promise to pay" and are signed by two or more people.

60 Second, SRI submitted that s. 111 does not require the reduction of any claim by reason of cross guarantees. Where there is a guarantee, the guaranteed amount can be claimed in full. The Trustee also submitted that, in his experience, this represents the practice.

61 Finally, counsel notes that SRI did in fact estimate the value of its security and subtract it from the amount of its claim. Its full claim was $18,812,876.46 from which it deducted $7,425,000 representing the security it holds.

62 I have concluded that the disputed claims are evidenced by loan agreements and promissory notes. The promissory notes are joint and several notes. The value of security held by the creditor has been deducted from the claims. There is no basis on which to disallow these claims from voting with respect to the proposal.

63 Accordingly, the appeals from the Trustee's decision to permit these creditors to vote with respect to the Proposals is dismissed.

IV. REVIEW OF THE PROPOSALS PURSUANT TO SECTION 59 OF THE *ACT*

64 The process with respect to court approval of a proposal is set out in s. 59 of the *Act* which provides in part:

> (2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the

proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

65 The court is not bound to approve a proposal even if it has an unqualified recommendation of the Trustee and the overwhelming support of creditors, see *Grobstein v. Brock Mills Ltd.* (1961), 2 C.B.R. (N.S.) 103 (C.S. Que.). However, where, as here, a proposal has been approved by a large majority of creditors and recommended by the Trustee, substantial deference will be given to their views.

66 For example, the Court in *Gustafson Pontiac Buick Cadillac GMC Ltd., Re* (1995), 30 C.B.R. (3d) 280 (Sask. Q.B.) cited the following passage from Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3rd ed., (Toronto: Carswell, 1993) in refusing to reject a proposal approved by a majority of creditors: "If, however, a large majority of creditors, i.e., substantially in excess of the statutory majority, have voted for acceptance of a proposal, it will take strong reasons for the court to substitute its judgment for that of the creditors".

67 In determining whether to approve a proposal, the court must consider the wishes and interests of the creditors, the conduct and interest of the debtor, the interests of the public and future creditors and the requirements of commercial morality, see *Lofchik, Re* (1998), 1 C.B.R. (4th) 245 (Ont. Bktcy.).

A. Are the Terms of the Proposal Reasonable?

68 The first question to be addressed is whether the terms of the proposal are reasonable. Reasonable in this context has been determined to mean that the proposal must have a reasonable possibility of being successfully completed in accordance with its terms. In addition, the proposal must meet the requirements of commercial morality and must maintain the integrity of the bankruptcy system, see *Lofchik, Re*, *supra*.

69 The onus is on the Trustee and the creditors who support the proposal to establish that the proposal is reasonable, see *McNamara v. McNamara* (1984), 53 C.B.R. (N.S.) 240 (Ont. Bktcy.).

70 The Trustee in this case concluded that there were no unencumbered assets of any value which could be ascertained that would be available to unsecured creditors in the event of a bankruptcy. The amount of excess income was minimal and likely less than the Trustee's fees and disbursements.

71 The Proposals provide for certain recovery for the unsecured creditors. There is a guaranteed payment by means of an infusion of cash.

72 The dissenting creditors submit that the Proposals are simply another attempt by the debtors to avoid honouring the judgment debt owed to Genesee and the costs awarded to the Defendants

by Counterclaim in the Litigation. They submit that the proposals are not reasonable. The factors on which they rely include: the past conduct of the debtor, the reviewable transactions, the limited recovery provided by the proposal, and the fact that the proposals would preclude full investigation of the reviewable transactions. They add to this the fact that the proposal requires them to release the debtors with respect to any claims under the *Act* and any claims of fraudulent preferences, conveyance, settlement or trust.

73 It is clear that the proposal has a reasonable prospect of succeeding according to its terms. For the reasons cited by the Trustee, it is in the interests of the creditors.

74 The debtors have minimal assets. The Proposals contemplate an injection of cash and shares at a guaranteed value such that payments under the Proposals will be secured.

75 The assets which are the subjects of the allegedly fraudulent dispositions are, in any event, encumbered beyond their market value in favor of secured creditors.

76 Reprehensible conduct on the part of the debtor has been considered a basis for concluding that a discharge or proposal is not reasonable. In *Touhey v. Barnabe*, [1995] O.J. No. 2337 (Ont. Bktcy.), one such case, a discharge was refused. The grounds for refusal were summarized in the headnote as follows:

> . . . At the date of bankruptcy the bankrupt was not insolvent, and the evidence established that he declared bankruptcy solely to avoid the $100,000 debt resulting from the judgment. The bankrupt never made any payment to the creditors, nor did he ever attempt to settle with them. With the income available to him over such a long period of time it was inconceivable that the bankrupt actually had no personal assets. He had inappropriate expenses in light of his obligations. The bankrupt attempted to flaunt the system and his behaviour was reprehensible. He did not merit a discharge.

77 In the present case, Justice Levine found Mr. Abou-Rached's conduct in the Litigation to be worthy of rebuke. I have concluded that that conduct fell within the scope of s. 173(f) of the *Act*. However, I have not concluded, nor did the Trustee, that the Proposals were filed solely to avoid the judgment; that other s. 173 facts have been made out; or that there has been other reprehensible conduct such as dissipation or diversion of assets. Without for a moment condoning Mr. Abou-Rached's conduct in the course of the Litigation, I have nonetheless concluded that the requirements of commercial morality do not necessitate a refusal to approve the Proposals. I find the Proposals to be reasonable.

B. Are the Proposals Calculated to Benefit the General Body of Creditors?

78 Courts have refused to approve proposals on this basis where, for example, the proposal serves the interests of persons other than the creditors; where there has not been full disclosure of

the assets of the debtor and the encumbrances against those assets; where the proposal, by it terms, is bound to fail; or where the Trustee is able to delegate his duties to a group of the creditors, see *Houlden & Morawetz, 2001 Annotated, Bankruptcy & Insolvency Act* at para. E15(10)(c); *Lofchik, Re*, *supra*.

79 In the case of these Proposals, the Trustee and supporting creditors note that the Proposals provide for an evenhanded distribution. The claims of the family have not been included; nor have claims of related parties. There has been, it is submitted, full disclosure of assets and encumbrances. Moreover, it is submitted that the recovery is greater under the Proposals than it would be in the event of a bankruptcy.

80 The dissenting creditors submit that the Proposals are not in the interests of the creditors. They rely upon the arguments advanced in connection with the reasonableness of the proposal.

81 In addition, they submit that there has not been proper disclosure of the debtors' assets. Two matters in particular are raised in this connection:

(a) the disposition of personal assets valued by Mr. Abou-Rached in 1995 at $700,000;

(b) certain payments or income of the debtor;

82 With respect to the latter, the Trustee notes that he was aware of the payments or income. The Proposals are not dependent upon the cash flow of the debtors. They are funded by an infusion of cash from third parties. Hence the income has no effect upon the viability of the Proposals. In addition, the amounts at issue are modest.

83 With respect to the personal assets, the Trustee was aware of the issue and considered it in coming to his opinion. He was of the view, first, that the assets had been accounted for, and second, that their realizable value was not anywhere near $700,000.

84 For the reasons enumerated by the Trustee and in the earlier discussion with respect to reasonableness, I have concluded that the Proposals are in the interests of the creditors.

V. ARE ANY OF THE FACTS ENUMERATED IN SECTION 172 MADE OUT AGAINST THE DEBTORS?

85 Section 59(3) of the *Act* provides:

> Where any of the facts mentioned in s. 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payments of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

86 In this case, the dissenting creditors submit that the Proposals should not be approved because s. 173 facts are present and the Proposals do not provide for recovery of fifty cents on the dollar.

87 The following provisions of s. 173 of the *Act* are at issue in these proceedings:

> 173.(1) The facts referred to in section 172 are:
>
> (a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;
>
> . . . . .
>
> (d) the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities;
>
> . . . . .
>
> (f) the bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt;
>
> . . . . .
>
> (k) the bankrupt has been guilty of any fraud or fraudulent breach of trust;

A. Value less than fifty cents on the dollar

88 It is common ground that the debtors' assets are less than fifty cents on the dollar of the unsecured liabilities. The question, therefore, is whether this shortfall has arisen from circumstances for which the bankrupt cannot justly be held responsible.

89 The Trustee concluded that the debtors were not responsible for the shortfall of the assets. His report states:

> 1. In order to raise money to finance the operations of IHI and to develop the technology licensed to IHI, the Debtor was required to pledge all of his interest in IHI as well as guarantee (directly and indirectly) various investments made by others in IHI;
>
> 2. A downturn in the stock market, and a decrease in the trading price of shares in IHI in the stock market made it more difficult to raise funds for the ongoing operations of IHI and the Debtor continued to incur further financial obligations;
>
> 3. A Judgment was pronounced and a legal action commenced against the Debtor, R.A.R. Investments Ltd. ("RAR") and CHT. The legal action that led to the Judgment was

ongoing for approximately four and one-half years and throughout that time, the Debtor steadfastly believed the Plaintiff's claim would be dismissed in its entirety. A significant portion of that claim resulted in a Judgment being pronounced against the Debtor and RAR. The Debtor had not expected any part of the Plaintiff's claim to be successful. The amount of that Judgement was approximately $975,000 (excluding costs);

4. One of the Debtor's major Creditors made demand upon learning of the said Judgment; and

5. Although an appeal of the Judgment has been filed, the Debtor concluded that it would be in the best interest of his Creditors and himself if his remaining sources of funds and energy were directed to payment of all of his Creditors rather than to prosecuting the appeal.

90 The dissenting creditors, relying on *Forsberg, Re* (2001), 26 C.B.R. (4th) 204 (Sask. Q.B.), submit that Mr. Abou-Rached is responsible for the shortfall in assets because he provided guarantees in circumstances in which he knew that he did not have sufficient assets to satisfy the guarantees.

91 Counsel for Mr. Abou-Rached disputes this claim noting that, although the majority of the shares had not yet been released from escrow, Mr. Abou-Rached held some 25,000,000 shares in IHI. Between 1995 and 1999, the median share price was $2.41 (see *Genesee Enterprises Ltd.*, *supra*, at p. 337). Thus, at the time he provided the guarantees, he had assets to support the guarantees given.

92 I have concluded that the dissenting creditors have not established that the debtors are responsible for the shortfall in the value of their assets.

B. Has the debtor failed to account satisfactorily for any loss of assets or for any deficiency of assets?

93 The submissions with respect to this allegation have been dealt with above. In order for the dissenting creditors to make out this allegation, they must rely upon the values set out by Mr. Abou-Rached in earlier statements of net worth that he prepared. Mr. Abou-Rached deposed that these values were overstated. I put little weight on this assertion; however, the Trustee was of the same opinion, in other words, that the net worth statements upon which the dissenting creditors rely, do not reflect the realizable value of the assets.

94 I have concluded that the dissenting creditors have not established that the debtor has not given a satisfactory account for loss of assets or deficiency of assets.

C. Has the debtor put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him?

95 The dissenting creditors submit that the reasons of Justice Levine in the Litigation establish that this fact has been made out. That the action was properly brought is established by the fact that the plaintiff enjoyed substantial success, being awarded damages of $982,746.94 plus court order interest. However, it must also be noted that the plaintiff's success was not complete; the recovery was substantially less than the amount claimed.

96 Justice Levine made extensive findings with respect to Mr. Abou-Rached's credibility and conduct in the Litigation. First, with respect to credibility:

> Mr. Abou-Rached accuses Robert de Grasse in particular of fabricating evidence, including documents, and stealing documents relevant to the proof of the defendants' case. He claims that Jean de Grasse and the other defendants by counterclaim either misstated the facts or failed to accurately recall them.
>
> . . . . .
>
> In general, however, I find myself skeptical about the credibility of the evidence of Mr. Abou-Rached with respect to many of the details of events, documents or transactions.

97 After a second hearing to deal with costs, Justice Levine ordered special costs to the plaintiff of its claim for 45 of the 49 days of trial, special costs to the plaintiff and the Defendants by Counterclaims of defending the counterclaim . Her reasons state:

> [6] This litigation is almost a case-study on the factors that the courts have considered in awarding special costs. I have no trouble finding that the conduct of the defendants was "reprehensible, deserving of reproof or rebuke", and in some cases, "scandalous and outrageous" (*Garcia v. Crestbrook Forest Industries Ltd.* (1997), 9 B.C.L.R. (3d) 242 at 249 (C.A.)).
>
> [7] The conduct of the defendants that I find justifies an order of special costs includes improper allegations of fraud, unlawful conspiracy, breach of fiduciary duty and criminal conduct; improper conduct during the proceedings; and improper motive for bringing the proceedings.
>
> **(a) Improper allegations of fraud, unlawful conspiracy, breach of fiduciary duty and criminal conduct**
>
> [8] The allegations of criminal conduct included a claim that the plaintiff was claiming interest in excess of the criminal rate set by the ***Criminal Code***. This allegation was withdrawn on the eve of trial.
>
> [9] At examination for discovery and during his testimony at trial, Mr. Abou-Rached accused Robert de Grasse of forging Mr. Abou-Rached's signature on documents, preparing false documents and stealing documents from the defendants. He accused plaintiff's counsel of

obstruction of justice, including witness tampering. There was no evidence to support any of these claims.

[10] The defendants' claims of fraudulent misrepresentation, unlawful conspiracy and breach of fiduciary duty were all dismissed. The evidence simply did not support them. The defendants repeatedly failed to give the plaintiff and defendants by counterclaim particulars of the alleged fraud, conspiracy, breach of fiduciary duty, or damages, and failed to provide any particulars of damages in their closing submissions at trial.

. . . . .

[13] The defendants conducted themselves improperly during the proceedings in a number of ways.

[14] Firstly, the defendants did not disclose documents in the manner required by the ***Rules of Court***, standards of practice, or in response to court orders. In *Clayburn Industries v. Piper* (1998), 62 B.C.L.R. (3d) 24 at 51 (S.C.), the failure to produce documents was a significant factor in determining that special costs were appropriate.

. . . . .

[16] Some documents were produced in part only (for example, one page of several of a memorandum) and documents which would have been in the defendants' possession and control were never produced (such as the executed Genesee Agreement for each investor, letters sent to prospective investors in CHT and employment records of Robert de Grasse). The defendants produced documents that supported their case (such as the "Fadel Agreement" and a document with handwritten notes purporting to confirm Mr. Abou-Rached's conversations with Robert de Grasse concerning this agreement), but did not produce those which contradicted it (such as the "Gougassian agreement").

[17] Secondly, Mr. Abou-Rached, the key witness for the defendants, was deliberately non-responsive during both examination for discovery and at trial. I commented on Mr. Abou-Rached's testimony in my reasons for judgment at paras. 31 through 38, and need not repeat those comments here.

[18] Thirdly, some of Mr. Abou-Rached's testimony was obviously fabricated. These include his claim that he discussed the terms of the "Fadel Agreement" with Robert de Grasse and the document containing the handwritten notes purporting to record that conversation; his continual denial that he signed or read documents that were supportive of the plaintiff and DCCs; and his reference to a chart setting out the value of an investment in Genesee which he purportedly discussed with Jean de Grasse and Robert de Grasse. The testimony of Sandy Lucas and Robert de Grasse regarding documents purportedly signed by Sheik Fadel must lead to the conclusion that at least some of those were signed by Mr. Abou-Rached, which he denied.

[19] I am prepared to accept that some of Mr. Abou-Rached's fabrications were not deliberate or dishonest lies, but resulted from his belief in the strength of his case. On the other hand, some of his testimony was too contrived, particularly with respect to his relationship (personal and business) with Sheik Fadel, to accept as anything other than calculated to deceive the court.

[20] Fourthly, Mr. Abou-Rached's behavior during examination for discovery and at trial was often inappropriate to the point of accurately being described as "outrageous" or "scandalous". Mr. Abou-Rached insulted the DCCs, who were also witnesses for the plaintiff, and counsel. As already noted, he accused plaintiff's counsel of obstruction of justice and witness tampering, and questioned the competence of counsel for the plaintiff and DCCs.

(c) Improper motive

[21] The defendants' conduct throughout these proceedings indicates that they sought to delay and hinder the plaintiff from recovering its claim under the Genesee Agreement and to harass the DCCs.

[22] The defendants' claims that the parties had entered into a collateral "Investment Agreement", in addition to the claims of fraudulent misrepresentation, conspiracy and breach of fiduciary duty, had the direct effect of prolonging the trial so that the entire history of the parties' relationship, in particular that of Mr. Abou-Rached, Jean de Grasse and Robert de Grasse, could be explored in great detail. All of these claims were dismissed.

[23] The claims against the 13 DCCs other than Jean de Grasse and Robert de Grasse were particularly without merit, and were all but abandoned halfway through the trial. These DCCs had attempted to have their cases resolved by an aborted Rule 18A application, but the defendants refused to cooperate. They then sought to have their evidence admitted by affidavit, which the defendants again resisted. In ordering the 13 DCCs to attend the trial to be cross-examined, I noted that if their evidence proved not to be controversial or did not materially add to the information in the affidavits, costs could be ordered to remedy the situation (see Rules 40(50) and (51)). The 13 DCCs, other than Jean de Grasse and Robert de Grasse, are entitled to their costs of attending the trial, which their counsel has advised total $8,548.47.

[24] As I pointed out in my reasons for judgment, most of the evidence about Shiek Fadel, his existence and role in the Genesee Agreement, was interesting but unnecessary. The only issue (other than Mr. Abou-Rached's credibility) that related to Shiek Fadel was whether the Fadel Agreement amended the Genesee Agreement. I found no legal basis for that part of the defendants' claim. The pre-trial applications, evidence and argument on this issue unduly prolonged the trial in support of a clearly unmeritorious claim.

> [25] The defendants delayed and hindered these proceedings by refusing to comply with the rules relating to document disclosure, as outlined above. Mr. Abou-Rached's non-responsiveness on examination for discovery and at trial prolonged both pre-trial proceedings and the trial, increasing the expense for all parties.
>
> . . . . .
>
> [28] Mr. Abou-Rached took an interest in the ability of the plaintiff and DCCs to afford this litigation. He admitted at trial that he commented at his examination for discovery that he wondered how the DCCs were financing the litigation and that someone must be paying their legal expenses. At trial, he said that the plaintiff and DCCs could not afford to litigate.
>
> [29] Some of the factors described above could support, on their own, an award of special costs. Taken together, I find that this is an appropriate case to exercise my discretion and order that the plaintiff and DCCs recover special costs.

98 The Trustee relied upon Mr. Abou-Rached's professed conviction in the merits of his defence in support of his conclusion that the facts in s. 173(f) were not made out.

99 Counsel for Mr. Abou-Rached and RAR submits that the defence cannot be said to have been frivolous or vexatious because it was substantially successful in that the plaintiff obtained judgment, but for significantly less than the original claim.

100 Counsel conceded that the claim against the Defendants by Counterclaim was frivolous and vexatious, but submits that since the counterclaim was a claim advanced by the debtors, it fell under s. 173 (g) of the *Act* and not 173(f). Section 173(g) has a three month time limitation period from the original bankruptcy event. In this case, the original bankruptcy event was October 1, 2001. Accordingly, the counterclaim falls outside the limitation period and s. 173(g) therefore also does not apply.

101 I have concluded that the dissenting creditors have established the s. 173(f) facts in that the conduct of the defence was frivolous and vexatious. It is clear from Justice Levine's reasons and disposition with respect to costs, and from a review of the pleadings in the action, that the distinction between the defence and the prosecution of the counterclaim urged upon me cannot be supported.

102 Moreover, the scope of the section embraces the conduct of the litigation, hence neither the debtor's belief in the merits of his position, nor the fact that he enjoyed a measure of success in the outcome is a complete answer, see *Paskauskas, Re* (1995), 36 C.B.R. (3d) 288 (Ont. Bktcy.) and *Touhey*, *supra*. Here there is reprehensible conduct including deliberate deceit and delay, and a finding of improper motive. This is, in my view, clearly sufficient evidence to support a finding of a frivolous or vexatious defence under the section.

D. Have the debtors been guilty of fraud or fraudulent breach of trust?

103 The dissenting creditors alleged that the following transactions were fraudulent dispositions of property:

(a) in late 1999 and early 2000, Roger Abou-Rached transferred 2,733,333 IHI shares to Garmeco (Lebanon) at a value of $0.75 per share.

(b) In mid 2001, Roger Abou-Rached transferred to his parents for no, or alternatively inadequate consideration, all his interests in Lebanese real estate that he had variously valued in the past at $1.8 million or in excess of $4 million (USD).

(c) In August, 2000, R.A.R. transferred its interests in commercial property on West 10th Avenue, Vancouver, B.C. to a numbered company wholly owned by Roger Abou-Rached's mother.

(d) In late 1999 and 2000 Roger Abou-Rached transferred or pledged all his interests in R.A.R. and in R.A.R. Consulting Ltd. to his parents' companies or to a group of foreign corporations represented by Marco Becker.

(e) Roger Abou-Rached has not accounted for the transfer of personal property estimated by him to be worth $700,000 in 1995. (This claim is dealt with earlier in these reasons).

1. IHI Shares

104 The essence of this claim is that Mr. Abou-Rached, on the eve of the trial of the Litigation, transferred 2 million IHI shares to Garmeco Lebanon. In February 2000, a further 733,333 shares were transferred. Mr. Abou-Rached testified that these transfers went to repay the $5 million debt owed to Garmeco Lebanon incurred from the purchase of the Technology. However, counsel submits that the money was to be repaid only from cash flow or dividends.

105 The documents in relation to the agreement to transfer the Technology are as follows:

(a) Assignment of Technology signed August 31, 1993, effective September 11, 1990;

(b) Letter dated September 12, 1990 from Garmeco to Wild Horse Industries Ltd (later IHI). This document states in part:

> As well, Garmeco and Garmeco Int'l acknowledge the transfer of the technology of the building system developed by Roger Abou-Rached while employed by Garmeco Int'l which will be utilized by Canadian HI-TECH Manufacturing Ltd.. In return for the transfer of this technology to Mr. Roger Abou-Rached, he will provide remuneration for the direct expenses incurred by Garmeco Int'l (i.e. employee wages, materials, purchase

of equipment and computers, purchase of software, software development, consultation, etc.) during the research and development of the technology. The remuneration from Mr. Roger Abou-Rached to Garmeco Int'l will comprise of $5,000,000 US Dollars and will be paid on a prorata basis based on the following formula: $100,000 of every $1,000,000 of net cash flow from Canadian Hi-Tech Manufacturing Ltd. dividends to Roger Abou-Rached.

(c) a promissory note dated September 12, 1990 which provides in part:

FOR VALUE RECEIVED THE UNDERSIGNED HEREBY ACKNOWLEDGES ITSELF INDEBTED AND PROMISES TO PAY THE ABOVE PRINCIPAL SUM, ON DEMAND, TO OR TO THE ORDER OF GARMECO INTERNATIONAL CONS. (LEB) (THE "HOLDER") AND/OR ANY OF ITS NOMINEE AND/OR ANY ASSOCIATES AND/OR ANY AFFILIATED PERSONS OR ENTITIES THE HOLDER MAY DIRECT IN WRITING.

THE UNDERSIGNED MAY PAY THIS NOTE IN WHOLE OR IN PART WITHOUT NOTICE WITH 10% DISCOUNT TO BE CALCULATED AFTER THE WHOLE PRINCIPAL SUM IS PAID & PRIOR TO THE HOLDER SENDING ANY DEMAND NOTICE FOR PAYMENT OF THE ABOVE PRINCIPAL SUM IN FULL OR IN PART.

106 In response, counsel submit that there is no remedy under the *Act* with respect to this transaction because:

(a) it is not a settlement pursuant to s. 91(1) of the *Act* as it was not a gift, nor was any beneficial interest retained and it was to repay a debt;

(b) the initial bankruptcy event for both debtors was October 1, 2001 when the Notices of Intention to File Proposals were filed. The transactions fall outside the relevant limitation periods for review under the Act.

107 It is further submitted that the transactions are not reviewable under the Provincial legislation because there is no evidence that the transfers were made to delay or hinder creditors, or that they were made when the debtor was in insolvent circumstances. Moreover, it is submitted that the transfers were made for valuable consideration.

2. Lebanon Properties

108 Mr. Abou-Rached held interests in Lebanese real estate. The dissenting creditors assert that this real estate, valued in 1992 by Mr. Abou-Rached at $1,800,000, was transferred to his parents in the summer of 2001 for inadequate consideration. They asserted in addition that no transfer documents had been produced.

109 In response, it was asserted that the agreement to transfer the real estate was made on September 29, 1997. The consent of SRI was required for the transfer. Thus, there was a binding agreement to transfer the property well before the relevant limitation period, made at a time when the debtor was not insolvent.

110 It was further submitted that the transfer was made for fair and reasonable consideration. There was no evidence that it was made with an intent to hinder, delay or defraud creditors.

111 The registration of the transfer was not made until mid-2001; however, the reason for the delay in the registration was the negotiation to secure SRI's consent to the transfer.

3. RARC and RARI shares

112 The dissenting creditors also question a series of transactions which occurred at the beginning of the trial of the Litigation in which Mr. Abou-Rached transferred his interests in RARC and RARI to various companies, mainly SRI and five companies represented by Mr. Marco Becker, the principal representative of SRI. Mr. Abou-Rached transferred his interests in RARC to his parent's companies, Garmeco Canada and Garmeco Lebanon.

113 All pledges and transfers are subject to Mr. Abou-Rached recovering the shares on payment of an appropriate sum. The shareholders are obliged to maintain Mr. Abou-Rached as manager and director.

114 In response, it is submitted that these transfers were all made for fair consideration at a time when Mr. Abou-Rached was not insolvent. The transactions were not made with the intention to hinder or defeat creditors. They occurred outside the relevant limitation periods under the *Act*. In short, it is submitted that these are not reviewable transactions under the *Act* or under Provincial legislation.

4. 1096 West 10th Ave. Property

115 The final disputed transaction is in reference to the property located at 1096 West 10th Avenue, Vancouver. The dissenting creditors assert that RAR granted a second mortgage on the property to a numbered company wholly owned by Hilda Abou-Rached, 434088 B.C. Ltd. In June 1995, following the hearing of the Petition before Henderson J., Abou-Rached increased the value of the second mortgage from $400,000 to $1 million. Roger Abou-Rached has not explained or accounted for the increase.

116 RAR transferred the property to 434088 B.C. Ltd. August 2000, shortly after the conclusion of the Genesee trial. The reported consideration of $1,250,000 has not been documented. The consideration falls short of the value of $3,000,000 given by Abou-Rached in 1995.

117 In response, it is submitted that the property was owned by RARI not by Mr. Abou-Rached. In 1995, Hilda Abou-Rached, Mr. Abou-Rached's mother, purchased 434088 B.C. Ltd. (the "Company") for the amount due on the mortgage of the 1096 property when Mr. Abou-Rached could not refinance. At the time, Robert de Grasse was a director of the Company.

118 In August 2000, the property was transferred to the Company. The consideration was:

> (a) the assignment of the liability under the existing mortgages; namely $700,000 to CIBC Mortgage Corporation, $600,000 to the Company and $1,500,000 to SRI,
>
> (b) $50,000 for chattels, and
>
> (c) payment of a fee of $100,000 to SRI to permit assignment of the mortgage.

119 The value of the property at the time of the transfer was approximately $735,000. The property has an assessed value of $330,000.

120 It was submitted that the transaction was for fair consideration and is not a reviewable transaction. The debtor was not in insolvent circumstances when the transaction was entered into. Nor is there evidence that the transfer was made with the intent to defeat, hinder, delay or defraud creditors to give the Company a preference.

121 The Trustee reviewed these and other transactions and concluded:

> Further information and review is required before the Trustee can draw any definitive conclusions as to whether or not any particular transaction constitutes a settlement or fraudulent preference under the provisions of the ***Bankruptcy and Insolvency Act***. It is our preliminary view, however, certain transactions may be reviewable and warrant further investigation. To properly evaluate these transactions, an extensive forensic investigation or audit would be required and judicial consideration of the matters may be required. The time involved, expense, and risk of this process would be significant to the creditors. Moreover, if on completion of the forensic investigation or audit the inspectors and/or the creditors were of the view that one or more transactions were potentially voidable and they wished to challenge the validity of these transactions in Court, we are advised that any such challenges would be vigorously defended by the various secured and/or related parties. Therefore, although there may be an unknown recovery, there may also be a significant loss.

122 The jurisprudence in this province, binding upon me, is clear that, with respect to the factors enumerated in s. 173, an allegation of fraud or breach of trust can only be found where there had been a conviction or a finding of fraud by a judgment in a criminal or civil court, see *Herd, Re* (1989), 77 C.B.R. (N.S.) 209 (B.C. C.A.). There has been no such finding in this case.

123 The dissenting creditors submit that the *Act* is a federal statute and is to be applied consistently across Canada. There are jurisdictions in which a prior civil or criminal finding of fraud is not required. All jurisdictions require proof of fraud to have been met on at least the civil standard.

124 I am bound to follow the British Columbia jurisprudence and since there is no prior finding of fraud, that is the end of the matter. However, even if I were not so bound, I am satisfied that fraud has not been established on the evidence before me.

125 Questions arise with respect to the transactions in relation to their timing, the parties, and the underlying motivation. Mr. Abou-Rached's conduct in the Litigation was such as to give rise to questions in relation to any and all of his dealings. However, a substantial gulf separates questions and suspicions from a finding of fraud.

126 The dissenting creditors then submit, in the alternative, that if I conclude that there are "grounds for concern", the concern should form a basis upon which to conclude that the Proposals are not reasonable.

127 In the face of the Trustee's report and the approval of the majority of creditors, I am of the view that more than suspicion or grounds for concern must be shown in order for the Proposals to be found not to be reasonable. On a review of all of the circumstances, I remain satisfied that the Proposals are reasonable within the meaning of s. 59 of the *Act*.

VI. ORDER FOR CROSS-EXAMINATION

128 In the further alternative, the dissenting creditors seek orders, pursuant to s. 163(2) of the *Act* to cross examine some fifteen individuals.

129 Section 163(2) provides:

> On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court. (emphasis added)

130 Counsel for SRI submits that sufficient cause has not been shown so as to justify the order sought. She relies upon *Hartland Pipeline Services Ltd. (Trustee of) v. Bennett Jones*

(2000), 18 C.B.R. (4th) 28 (Alta. Q.B.), a decision in which two secured creditors sought cross-examination on an affidavit of a principal of the bankrupt company after the trustee had conducted an examination under section 163(1). In that decision, Paperny J. approved of the following passage from *NsC Diesel Power Inc., Re* (1997), 49 C.B.R. (3d) 213 (N.S. S.C. [In Chambers]):

> There must be some demonstrated connection between evidence, if any, of something being amiss and the ability of the named person to shed some light on it as it relates to the administration of the estate.

131 Counsel also made reference to the following statement from the Nova Scotia Court of Appeal in *NsC Diesel Power Inc., Re* (1998), 6 C.B.R. (4th) 96 (N.S. C.A.).

> The wording of s. 163(2) of the Act that requires an applicant to show sufficient cause to warrant the order being granted requires that the applicant put forth factual information in affidavit form or in sworn testimony that would disclose something more than a desire to go on a fishing expedition.

132 I have concluded that the material before me does not meet the threshold of sufficient cause. In my view the application suffers from the same lack of focus identified in *R.L. Coolsaet of Canada Ltd., Re* (1996), 45 C.B.R. (3d) 30 (Ont. Bktcy.), at 33, namely, " . . . a request in such broad terms suggests a lack of focus and a speculation that in a plethora of examinations some information may be forthcoming on which to frame an action."

133 The application for cross-examination is denied.

VII. REASONABLE SECURITY

134 The final issue, a fact pursuant to s. 173 having been proved, is whether the Proposal should be approved. It is common ground that the Proposals do not provide reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims. The question is whether, pursuant to s. 59(3) of the *Act*, the court is prepared to grant approval on the basis of some lesser recovery.

135 Given that the Proposals are viable and secured and given the paucity of assets of the debtors otherwise available to the creditors, I am prepared to exercise my discretion under s. 59(3) and approve the Proposals as amended.

VII. DISPOSITION

136 In the result, the Proposals of Mr. Abou-Rached and RAR, as amended, are approved. The appeals from the decision of the Trustee are dismissed. The application for cross-examination is dismissed.

Order accordingly.

End of Document

TAB 3

Re Gardner (1921), 1 CBR 424 (Ont Div Ct)

1921 CarswellOnt 3
Ontario Divisional Court

Gardner, Re

1921 CarswellOnt 3, 1 C.B.R. 424, 49 O.L.R. 252, 59 D.L.R. 555

In re Gardner

Order, J.

Judgment: January 31, 1921

Counsel: *J. M. Bullen*, for the Canadian Credit Men's Association, authorized trustee.
The opposing creditor, trading as Wm. Croft & Sons, in person.

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

VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.i General principles

Headnote
Bankruptcy --- Proposal — Approval by Court — General

Scheme of Arrangement — Composition with All but the Principal Creditor Advancing Fund for Payment of Dividend to Others — Benefit to General Body of Creditors — Reservation to Advancing Creditor of His Entire Claim — Bankruptcy Act, S. 13.

A scheme of arrangement may be approved notwithstanding the objection of a minority creditor under sec. 13 of *The Bankruptcy Act*, although it affords an opportunity for one of the creditors financing the scheme to retain his right to payment in full while all other creditors receive only a portion of their claims. Approval ordered as calculated to benefit the general body of creditors where the largest creditor agreed to advance a sum sufficient to pay all other creditors a substantially larger dividend than would be obtainable on a forced sale.

Application made by the authorized trustee under sec. 13 of *The Bankruptcy Act* for the approval by the Court of a scheme of arrangement of the insolvent debtor's affairs prepared by the debtor. The scheme is actively opposed by a creditor.

***Orde, J.*:**

1 The report of the authorized trustee shows that the debtor had assets consisting of stock in trade and fixtures nominally of the value of $66,163.44 and unsecured liabilities to the extent of $61,007.35, leaving an apparent surplus of $5,156.09. It was stated before me and not contradicted that the assets if forced to sale would hardly realize more than 35 cents on the dollar. Proof of claims to the amount of $57,636.07 was made to the trustee by 37 creditors. Of these creditors Gordon MacKay & Co., Ltd., are the largest, their claim amounting to $41,848.69. The next largest claim is

for $2,081.28, there are two for about $1,500 each and the remainder are all under $1,000 each. The proposal submitted to the creditors is that Gordon MacKay & Co. are willing to advance a sum sufficient to pay all the creditors, other than themselves, 55 cents on the dollar. This means, of course, that Gordon MacKay & Co. will still retain the right to call for payment of their claim in full, while the other creditors of the scheme if approved by the Court will forego 45 per cent of their claims.

2 At the meeting of creditors called by the trustee to consider the proposal, there were 29 creditors present or who had communicated their decision to the trustee by letter. Apart from Gordon MacKay & Co. 26 of these with claims aggregating $11,316.01 assented to the scheme, while two creditors with claims of $211.96 and $954.10 respectively dissented. I think it may fairly be assumed that those creditors who were notified and who failed either to attend or to communicate their decision to the trustee either assent, or at least do not actively dissent.

3 Upon the application for the approval of the scheme, the dissenting creditor for $954.10 did not appear but Wm. Croft & Sons whose claim amounts to $211.96 appear and object to the scheme being approved on the ground that its effect is to give a preference to Gordon MacKay & Co. by allowing them to be paid in full, and that in the interest of the debtor as well as of the other creditors, no minority creditor, no matter how small his claim may be, should be forced in effect to release part of his claim may be, should be forced in effect to release part of his claim unless all the creditors are placed upon an equal footing. There is much force in this objection, because if the object of such a scheme as this is not only to clear off the claims of the creditors, but to put the debtor on his feet again, that object may be defeated. The debtor's future solvency would undoubtedly be much greater if all the creditors were to abandon 45 cents on the dollar of their claims, whereas under the proposed scheme he will still have liabilities, all to one creditor, of approximately $51,000 or $52,000. This argument would have more weight if the debtor were proposing to borrow money elsewhere sufficient not only to compound with the other creditors but to pay Gordon MacKay & Co. in full. He could not, of course, obtain a loan of that amount, and if he did it would hardly seem proper to approve of it. But here a large creditor is willing to advance an additional $10,000 or $11,000, and to take the chance of getting repayment of that sum and also of its existing claim from the debtor, provided that it is permitted to retain the right to call for payment in full. It was pointed out that if Gordon MacKay & Co. were offering to buy the assets for a sum which would be sufficient to pay all the creditors 55 cents in the dollar, there could be no reasonable objection to the proposal. And yet the result here will be in many respects the same, so far as the creditors other than Gordon MacKay & Co. are concerned. The scheme of arrangement seems to me to be one which in the interests of the general body of creditors and of the debtor, ought to be approved unless there is some rule or principle applicable in bankruptcy matters which would make it improper or inequitable that I should, in the exercise of my discretion, give the Court's approval to it.

4 In determining whether or not this scheme should be approved, I am governed by the provisions of subsecs. (8), (9) and (16) of sec. 13. None of the creditors hold any security upon the property of the debtor and there are no preferential claims, so that subsec. (16) does not apply.

5 The terms of the proposal are reasonable, and they are calculated to benefit the general body of creditors, and they will provide for the immediate payment to the creditors, other than Gordon MacKay & Co., of more than 50 cents on the dollar. Gordon MacKay & Co. are willing to take the risk of getting payment of their claim from the debtor. If the arrangement whereby Gordon MacKay & Co. are to be entitled to payment in full, if they are ultimately able to obtain it, had not been disclosed to the creditors, the scheme could not be approved, but with full disclosure I am unable to find any principle which requires that the Court ought to exercise its discretion by disapproving of the scheme. It is my duty to take into consideration not only the wishes and interests of the creditors but the conduct of the debtor, the interests of the public and future creditors, and the requirements of commercial morality. The burden of proof is on the party who opposes the approval of the composition or scheme. *Baldwin on Bankruptcy*, 11 ed., pp. 784-5. The only case to which I was referred which approaches the point raised here, was *In re E.A.B.*, 9 Manson 105, [1902] 1 K.B. 457, 71 L.J.K.B. 356. It really does not afford much assistance, except as illustrating the care with which the Court will scrutinize the matter if there is any suggestion of collusion or secret advantage. Many of the cases cited were cases where a bankrupt was applying for an annulment of the bankruptcy order. The effect of such an order is different from that of a discharge,

because an annulment enables the debtor to face the world, not as a discharged bankrupt, but as one who has not been, or ought not to have been, declared bankrupt. In such cases the Court applies certain principles which do not seem to be necessarily applicable to an application of this sort.

6 The scheme of arrangement will therefore be approved, and an order of the Court will issue accordingly. The scheme provides that trustee's costs and expenses are to be included in the amount to be advanced by Gordon MacKay & Co.

Approval order granted.

End of Document

TAB 4

Re Lutheran Church – Canada, 2016 ABQB 419

2016 ABQB 419
Alberta Court of Queen's Bench

Lutheran Church - Canada, Re

2016 CarswellAlta 1484, 2016 ABQB 419, [2016] A.W.L.D. 3664, [2016] A.W.L.D. 3694, 269 A.C.W.S. (3d) 218, 38 C.B.R. (6th) 36

In the Matter of The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of Lutheran Church - Canada, the Alberta - British Columbia District, Encharis Community Housing and Services, Encharis Management and Support Services, and Lutheran Church - Canada, The Alberta - British Columbia District Investments Ltd.

B.E. Romaine J.

Heard: July 15, 2016
Judgment: August 2, 2016
Docket: Calgary 1501-00955

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Subject: Churches and Religious Institutions; Civil Practice and Procedure; Corporate and Commercial; Insolvency

Headnote

Debtors and creditors --- Receivers — Appointment — Monitors and consultants

Creditors asserted monitor in proceedings under Companies' Creditors Arrangement Act ("CCAA") was acting as advocate of debtor without sufficient degree of neutrality — Creditors asserted that monitor had conflict of interest because in pre-filing report monitor disclosed that it provided consulting services to District between specified date and date of initial order; Monitor advised that it recently determined that related professional accounting firm DTL acted as auditor for District; and Monitor advised that DTL completed DIL audit for years — Requisite double

majority, after significant disclosure and opportunities to review and question plans, voted in favour of plans — Creditors' Committees of DIL and District, who had duty to act in best interests of body of creditors, supported plans — Creditors asserted monitor breached its fiduciary duty by failing to disclose municipal planning documents — Creditors applied to replace monitor when last two plans of arrangement and compromise were approved by requisite double majority of creditors — Application dismissed — There was no reason arising from conflict or breach of duty to do so — Previous services did not on their face disqualify monitor from acting as monitor — It was not unusual for proposed monitor to be involved with debtor companies for period of time prior to CCAA filing — There was no realistic conflict arising from allegations — Monitor made full disclosure — Monitor went to great lengths to inform great number of creditors of ongoing proceedings, and to give its well-reasoned and measured opinion on myriad of issues in this complex proceeding — In retrospect, it may have been prudent for monitor to reference master-site development plan and approved area structure plan earlier, in substantially way it was later referenced in Monitor's QFA on development, but that was hindsight observation and unlikely to resolve other than one of complaints — Timing of application was strategic — Proposed plans were within court's jurisdiction to sanction, were fair and reasonable, and were to be sanctioned — Monitor supported plans, and there was no reason to give monitor's opinion less than usual deference and weight — Plans provided greater benefit to creditors than forced liquidation in depressed real estate market — Balance of interests favoured approval of plans.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Monitor

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Generally — referred to

APPLICATION by creditors to replace monitor when last two plans of arrangement and compromise were approved by requisite double majority of creditors.

***B.E. Romaine J.*:**

I. Introduction

1 This *CCAA* proceeding has been complicated by some unusual features. There are approximately 2,592 creditors of the Church extension fund with proven claims of approximately $95.7 million, plus 12 trade creditors with claims of approximately $957,000. There are 896 investors in the Church investment corporation with outstanding claims of $22.4 million. Many of these creditors and investors invested their funds at least in part because of their connection to the Lutheran Church. Many of them are elderly. Some of them are angry that what they thought were safe vehicles for investment, given the involvement of their Church, have proven not to be immune to insolvency. Some of them invested their life savings at a time of life when such funds are their only security during retirement. Inevitably, there is bitterness, a lack of trust and a variety of different opinions about the outcome of this insolvency restructuring.

2 A group of creditors have applied to replace the Monitor at a time when the last two plans of arrangement and compromise in these proceedings had been approved by the requisite double majority of creditors. I dismiss the application to replace the Monitor on the basis that there is no reason arising from conflict or breach of duty to do so. I find that the proposed plans are within my jurisdiction to sanction are fair and reasonable in the circumstances and should be sanctioned. These are my reasons.

II. Factual Overview

A. Background

3 On January 23, 2015, the 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 Investment Ltd. ("DIL", collectively the "District Group") obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended. Deloitte Restructuring Inc. was appointed as Monitor and a CRO was appointed for the District and DIL.

4 The District is a registered charity that includes the Church Extension Fund ("CEF"), which was created to allow District members to lend money to what are characterized as faith-based developments. Through the CEF, the District borrowed approximately $96 million from corporation, churches and individuals. These funds were invested by the District in a variety of ways, including loans and mortgages available to congregations to build or renovate churches and schools, real estate investments, and a mortgage on a real estate development known as the Prince of Peace Development.

5 CEF was managed by the District's Department of Stewardship and Financial Ministries and was not created as a separate legal entity. As such, District members who loaned funds to CEF are creditors of the District (the "District Depositors").

6 ECHS owned land and buildings within the Prince of Peace Development, including the Manor and the Harbour, senior care facilities managed by EMSS. EMSS operated the Manor and Harbour for the purpose of providing integrated supportive living services at the Manor and the Harbour to seniors.

7 The Prince of Peace Development also included a church, a school, condominiums, lands known as the Chestermere lands and other development lands.

8 DIL is a not-for-profit company that acted as a trust agent and investment manager of registered retirement savings plans, registered retirement income plans and tax-free savings accounts for annuitants. Concentra Trust acted as the trustee with respect to these investments. Depositors to DIL are referred to as the "DIL Investors". The District Depositors and the DIL Investors will collectively be referred to as the "Depositors".

9 Soon after the initial order, the District and the Monitor received feedback that the District Depositors and the DIL Investors wanted to have a voice in the *CCAA* process. Thus, on February 13, 2015, Jones, J granted an order creating creditors' committees for the District (the "District Creditors' Committee") and DIL (the "DIL Creditors' Committee"), tasked with representing the interests of the District Depositors and DIL Investors. The members of the committees were elected from among the Depositors. By the order that created them, they must act in a fiduciary capacity with respect to their respective groups of creditors. The committees were authorized to engage legal counsel, who have represented them throughout the *CCAA* process, and the committees and their counsel have been active participants in the process.

10 ECHS and EMSS prepared plans of compromise and arrangement that were approved by creditors and sanctioned by the Court in January 2016. Pursuant to those plans, ECHS' interest in

the condominiums was transferred to a new corporation that is to be incorporated under the District Plan ("NewCo"). The Chestermere lands were sold. The remainder of the lands and buildings (the "Prince of Peace properties") are dealt with in the District Plan.

11 On 22nd and 23rd of February, 2016, a Depositor and an agent of a Depositor commenced proceedings against Lutheran Church — Canada, Lutheran Church — Canada Financial Ministries, Francis Taman, Bishop & McKenzie LLP, John Williams, Roland Chowne, Prowse Chowne LLP, Concentra Trust, and Shepherd's Village Ministries Ltd., all defendants with involvement in the District Group's affairs, pursuant to the *Class Proceedings Act*, S.A. 2003, c. C-16.5 (Alberta). Two other Depositors issued a Notice of Civil Claim in the Supreme Court of British Columbia pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c.50 (British Columbia) against the same defendants (together with the Alberta proceeding, the "class action proceedings").

12 On March 3, 2016, DIL submitted a plan of arrangement that had been approved by creditors for sanction by the Court. I deferred the decision on whether to sanction the DIL plan until the District plan had been finalized, presented to District creditors, and, if approved, submitted for sanctioning. At the same time, I stayed the class action proceedings. The DIL and District plans contain similar provisions that are subject to controversy among some Depositors. There is considerable overlap among the DIL Investors and the District Depositors.

13 On July 15, 2016, the District applied for an order sanctioning the District plan. On the same day, the Depositors who commenced the class action proceedings applied for an order replacing the Monitor.

B. The District Plan

14 The District plan has one class of creditors. Pursuant to the claims process, there were 2,638 District Depositors. An emergency fund was implemented prior to the filing date and approved by the Court as part of the initial order, to ensure that District Depositors, many of whom are seniors, would have sufficient funds to cover their basic necessities. Taking into account those payments, District Depositors had proven claims of approximately $96.2 million as at December 31, 2015.

15 Under the plan, each eligible affected creditor will be paid the lesser of $5,000 or the total amount of their claim (the "Convenience Payment(s)") upon the date that the District plan takes effect. This will result in 1,640 District Depositors (approximately 62%) and 10 trades creditors (approximately 77%) being paid in full. The Convenience Payments are estimated to total $6.3 million.

16 The District plan contemplates the liquidation of certain non-core assets. Each time the quantum of funds held in trust from the liquidation of these assets, net of the "Restructuring Holdback" and the "Representative Action Holdback" referred to later in this decision, reaches $3 million, funds will be distributed on a pro-rata basis to creditors.

17 If the District plan is approved, a private Alberta corporation ("NewCo") will be formed following the effective date of the plan. NewCo will purchase the Prince of Peace properties from ECHS in exchange for the NewCo shares. The value of the NewCo shares would be based on the following:

a) the forced sale value of the Harbour and Manor seniors' care facilities based on an independent appraisal dated November 30, 2015;

b) the forced sale value of the remaining Peace of Peace properties, based on an independent appraisal dated October 15, 2015;

c) the estimated value of the assets held by ECHS that would be transferred to NewCo pursuant to the ECHS plan; and

d) the estimated value of the assets held by EMSS that would be transferred to NewCo pursuant to the EMSS plan.

18 ECHS will then transfer the NewCo shares to the District in partial satisfaction of the District — ECHS mortgage. The NewCo shares will be distributed to eligible affected creditors of the District on a pro-rata basis. The Monitor currently estimates that creditors remaining unpaid after the Convenience Payment will receive NewCo shares valued at between 53% and 60% of their remaining proven claims. The cash payments arising from liquidation of non-core assets and the distribution of shares are anticipated by the Monitor to provide creditors who are not paid in full by the Convenience Payments with distributions valued at between 68% and 80% of their remaining proven claims, after deducting the Convenience Payments. Non-resident creditors (8 in total) will receive only cash.

19 Distributions to creditors will be subject to two holdbacks:

a) the "Restructuring Holdback", to satisfy reasonable fees and expenses of the Monitor, the Monitor's legal counsel, the CRO, the District Group's legal counsel and legal counsel for the District Creditors' Committee, the amount of which will be determined prior to the date of each distribution based on the estimated professional fees required to complete the administration of the *CCAA* proceedings; and

b) the "Representative Holdback", an amount sufficient to fund the out-of-pocket costs associated with the "Representative Action" process described later in this decision, and to indemnify any District Depositor who may be appointed as a representative plaintiff in the Representative Action for any costs award against him or her. The Representative Action Holdback will be determined prior to any distribution based on guidance from a Subcommittee appointed to pursue the Representative Action and retain representative counsel.

20 The District will continue to operate but the District's bylaws and handbook will be amended such that the District would no longer be able to raise or administer funds through any type of investment vehicle. NewCo will continue to operate the Harbour and Manor seniors' care facilities.

21 NewCo's bylaws will include a clause requiring that 50% of the board of directors must be comprised of District Depositors or their nominees. Although NewCo is being created with the object of placing the NewCo assets in the hands of a professional management team with appropriate business and real estate expertise, the District Creditors' Committee wanted to ensure that affected Creditors will have representation equal to that of the professional management team on the NewCo board. The members of the NewCo board may change prior to NewCo being formed, subject to District Creditors' Committee approval. Subsequent changes to the NewCo board would be voted on at future shareholder meetings.

22 The articles of incorporation for NewCo will be created to include the following provisions, which are intended to provide additional protection for affected creditors:

a) NewCo assets may only be pledged as collateral for up to 10% of their fair market value, subject to an amendment by a special resolution of the shareholders of NewCo;

b) a redemption of a portion of the NewCo shares would be allowed upon the sale of any portion of the NewCo assets that generates net sale proceeds of over $5 million;

c) NewCo would establish a mechanism to join those NewCo shareholders who wished to purchase NewCo shares with those NewCo shareholders who wished to sell them;

d) a general meeting of the NewCo shareholders will be called no later than six months following the effective date of the plan for the purpose of having NewCo shareholders 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 or all or a portion of the NewCo assets or a joint venture to further develop the NewCo assets; and

e) to provide dissent rights to minority NewCo shareholders.

The Representative Action

23 The District plan establishes a Representative Action process whereby a future legal action or actions, which may be undertaken as a class proceeding, can be undertaken for the benefit of those District Depositors who elect or are deemed to elect to participate. The Representative Action would include only claims by District Depositors who are not fully paid under the District plan and specifically includes the following:

a) claims related to a contractual right of one or more of the District Depositors;

b) claims bases on allegations of misrepresentation or wrongful or oppressive conduct;

c) claims for breach of any legal, equitable, contractual or other duty;

d) claims pursuant to which the District has coverage under directors' and officers' liability insurance; and

e) claims to be pursued in the District's name, including any derivative action or any claims that could be assigned to a creditor pursuant to Section 38 of the *Bankruptcy and Insolvency Act*, if such legislation were applicable.

24 District Depositors may opt-out of the Representative Action process, in which case they would be barred from further participation. Evidently, some Depositors are precluded by their religious beliefs from participating in this type of litigation.

25 The District Depositors who elect to participate in the Representative Action process will have a portion of their cash distributions from the sale of assets withheld to fund the Representative Action Holdback. It will only be possible to estimate the value of the Representative Action Holdback once representative counsel has been retained. At that point, the Monitor will send correspondence to the participating Depositors with additional information, including the name of the legal counsel chosen, 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 they choose to do so.

26 A Subcommittee will be established to choose legal counsel to represent the participating District Depositors. The Subcommittee will include between three and five individuals and all members of the Subcommittee will be appointed by the District Creditors' Committee. The Subcommittee is not anticipated to include a member of the District Committee.

27 The duties and responsibilities of the Subcommittee will include the following:

a) reviewing the qualifications of at least three lawyers and selecting one lawyer to act as counsel;

b) with the assistance of counsel, identifying a party(ies) willing to act as the Representative Plaintiff;

c) remaining in place throughout the Representative Action with its mandate to include:

(i) assisting in maximizing the amount available for distribution;

(ii) consulting with and instructing counsel including communicating with the participating District Depositors at reasonable intervals and settling all or a portion of the Representative Action;

(iii) replacing counsel;

(iv) serving in a fiduciary capacity on behalf of the participating District Depositors;

(v) establishing the amount of Representative Action Holdback and directing that payments be made to counsel from the Representative Action Holdback; and

(vi) bringing any matter before the Court by way of an application for advice and direction.

28 The Representative Action process will be the sole recourse available to District Depositors with respect to the Representative Action claims.

29 The District plan releases:

a) the Monitor, the Monitor's legal counsel, the District Group's legal counsel, the CRO, the legal counsel for the District Committee and the District Committee members, except to the extent that any liability arises out of any fraud, gross negligence or willful misconduct on the part of the released representatives, to the extent that any actions or omissions of the released representatives are directly or indirectly related to the *CCAA* proceedings or their commencement; and

b) the District, the other *CCAA* applicants, the present and former directors, officers and employees of the District, parties covered under the D&O Insurance and any independent contractors of the District who were employed three days or more on a regular basis, from claims that are largely limited to statutory filing obligations.

30 The following claims are specifically excluded from being released by the District plan:

a) claims against directors that relate to contractual rights of one or more creditors or are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors as set out in Section 5.1(2) of the *CCAA*;

b) claims prosecuted by the Alberta Securities Commission or the British Columbia Securities Commission arising from compliance requirements of the *Securities Act* of Alberta and the *Financial Institutions Act* of British Columbia;

c) claims made by the Superintendent of Financial Institutions arising from the compliance requirements of the *Loan and Trust Corporations Acts* of Alberta and British Columbia; and

d) any Representative Action claims, whether or not they are insured under the District's directors and officers liability insurance, that are advanced solely as part of the Representative Action.

C. The District Meeting

31 On March 21, 2016, I granted an order authorizing the District to file the District plan of compromise and arrangement and present it to the creditors. A draft version of the Monitor's Report to District Creditors was provided to both the Court and counsel for the class action plaintiffs ahead of the District meeting order being granted. Neither class action counsel voiced specific concerns with the disclosure provided therein.

32 The first meeting of District creditors was held on May 14, 2016. Counsel for the BC and Alberta class action plaintiffs were in attendance and able to make submissions to the meeting and to question the Monitor. A number of attendees made submissions and asked questions. Certain documents that had been referenced in a Monitor's FAQ report on the issue of future potential development of the Prince of Peace properties (described later in this decision) were discussed in detail and questions with respect to these documents were answered by the Monitor. The meeting lasted approximately six hours. It was adjourned at the request of the representative of a Depositor who wanted more time to consider the Prince of Peace development disclosure and obtain further instructions from his congregation.

33 After making inquiries and being satisfied that congregations who wished further consultation had time to do so, the Monitor posted a notice on its website on May 20, 2016 that the reconvened meeting was to be held on June 10, 2016. The notice was sent by email to those creditors who are congregations on May 20, 2016 and sent by regular mail to all creditors on May 24, 2016. The notice advised creditors that they had additional time to change their vote on the District plan, should they choose to do so. Four congregations asked the Monitor for further information before the reconvened meeting.

34 The Monitor received a total of 1,294 votes on the District plan from eligible affected creditors with claims totalling approximately $85.1 million. Of these votes, 1,239 were received by way of election letters and 55 were received by way of written ballots submitted in person or by proxy at the District meeting. In total, 50% of eligible affected creditors voted and the claims of those creditors who voted represented 88% of the total proven claims of eligible affected creditors.

35 Of the creditors who voted, 1,076 or approximately 83% voted in favour of the District plan and 218 or approximately 17% voted against the District plan. Those creditors who voted in favour of the plan held claims totalling approximately $65 million, or approximately 76% in value of the voting claims, and those creditors who voted against the plan held claims totalling approximately $20.1 million or approximately 24% in value of the voting claims. Therefore, 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.

D. The DIL Plan

36 The DIL plan includes only one class of affected creditors consisting of DIL Investors. The DIL Investors reside in eight provinces and territories in Canada and in three U.S. states. Most of the accounts held by DIL Investors are RRSP and RRIF accounts.

37 Following the release of the original DIL package of meeting materials, based on discussions with DIL Investors, the Monitor prepared two documents entitled "Answers to frequently asked questions" (the "FAQs"), one of which was dated December 24, 2015 and the other dated January 18, and amended January 20, 2015.

38 The DIL plan contains provisions for the orderly transition of the registered accounts from Concentra to a replacement trustee and administrator. As part of this transition, the cash and short-term investments held by DIL will be transferred, net of holdbacks outlines in the DIL plan, to the replacement fund manager. The mortgages held by Concentra and administered by DIL will be converted to cash over time and paid to the fund manager.

39 Pursuant to previous order, DIL was authorized to distribute up to $15 million to the DIL Investors. For those DIL Investors who held registered retirement savings plan, tax free savings accounts or locked-in retirement accounts with DIL, their pro-rate share of the first DIL Distribution was transferred into accounts that had been established with the replacement fund manager. For those DIL Investors who held RRIFs or LIFs, their pro-rate share of the first DIL distribution was transferred upon their request, to an alternate registered account of their choosing. A second distribution of up to $7.5 million was made in April, 2016.

40 In addition to this these interim distribution, statutory annual minimum payment to RRIF holders were made for 2015. Selected DIL Investors also received payments pursuant to the emergency fund. Taking into account these payments, pre-filing distributions to DIL Investors totalled approximately $15.6 million, 41% of their original investment without taking into account any estimated write-downs on the value of the assets held by DIL.

41 The DIL plan contains substantially the same provisions with respect to limited releases and a Representative Action process as the District plan.

42 The Monitor estimates that, prior to any recovery under the Representation Action, DIL Investors will recover between 77% and 83% of their original investment as of the filing date.

E. The DIL Meeting

43 The DIL meeting of creditors was held on January 23, 2016.

44 There were 87 attendees at the DIL meeting. The Monitor received a total of 472 votes from DIL Investors with claims totalling approximately $14.5 million. In total, 53% of DIL Investors

voted and the claims of those DIL Investors who voted represented 65% of the total proven claims of DIL Investors.

45 Of the 472 DIL Investors who voted, 434, or approximately 92%, voted in favour of the DIL plan and 38 DIL Investors, or approximately 8%, voted against the DIL plan. Those DIL Investors who voted in favour of the DIL plan had claims totalling approximately $12.7 million, or approximately 87% of the claims, and those DIL Investors who voted against the DIL plan had claims totalling approximately $1.8 million, or approximately 13% of the claims and a majority in number of voting DIL Investors. Therefore, the DIL plan was approved by the required double majority.

III. The Applications

A. Application to Remove the Monitor

46 The Depositors who commenced the British Columbia class action proceedings, Elvira Kroeger and Randall Kellen, apply:

> a) to remove the Monitor and replace it with Ernst & Young LLP; or alternatively
>
> b) to appoint Ernst & Young as a "Limited Purpose Monitor" to review the Representative Action provisions of the District plan and render its opinion to the Court with respect to whether the plan is fair and reasonable to the District Depositors;
>
> c) to authorize Ernst & Young to retain legal counsel to assist it in rendering its opinion to the Court if it considers it reasonable and necessary to do so; and
>
> d) to secure Ernst & Young's fees and those of its counsel to a maximum amount of $150,000.00 plus applicable taxes under the current Administration Charge or under a second Administration Charge to rank *pari passu* with the current Administration Charge.

47 They are supported in their application by the Alberta class action plaintiffs, collectively the "opposing Depositors". The opposing Depositors submit that the Monitor is unable by reason of conflict of interest to provide the Court with a neutral and objective opinion with respect to the Representative Action provisions of the District plan. They also submit that the Monitor has breached its fiduciary duty to the Court and to the District creditors by failing to disclose certain municipal planning documents relating to the Prince of Peace Development.

1. Overview

48 It is trite law that the Monitor in *CCAA* proceedings is an officer of the Court and that its duty is to act in the best interests of all stakeholders. Monitors are required to act honestly and fairly and to provide independent observation and oversight of the debtor company.

49 The Monitor is expected and required to report regularly to the Court, creditors and other stakeholders, and has a statutory obligation to advise the Court on the reasonableness and fairness of any plan of arrangement proposed between the debtor and its creditors: section 23(1) of the *CCAA*. Courts accord a high level of deference to decisions and opinions of the Monitor.

50 The opposing Depositors submit that the Monitor is acting as an advocate of the debtor, without a sufficient degree of neutrality. They submit, by implication, that I should give the Monitor's recommendations on the plans little or no deference for that reason.

51 An attack on the Monitor is an attack on the integrity of the *CCAA* process, and must be taken seriously.

2. Conflict of Interest

52 The opposing Depositors allege that the Monitor has a conflict of interest on the following bases:

> a) In its Pre-Filing Report to the Court, the Monitor disclosed that it had provided consulting services to the District between February 6, 2014 and the date of the initial order, including:
>
> > (i) on February 6, 2014; to provide an independent evaluation of the potential options relating to the Prince of Peace Development and to create a plan for executing the option that was ultimately chosen;
> >
> > (ii) on June 30, 2014; to provide an evaluation of the debt structure of the CEF as it related to the District, the members of the District, ECHS, EMSS and the Prince of Peace Development; and
> >
> > (iii) on July 25, 2014; to act as a consultant regarding the informal or formal restructuring of the District Group.
>
> b) In its Fourth Report dated June 24, 2015, the Monitor advised that it had recently determined that a related professional accounting firm, Deloitte & Touche (now Deloitte LLP) had acted as auditor for the District from 1990 to 1998 or 1999. While the Monitor had performed a conflicts check prior to agreeing to act as Monitor, this check failed to flag the previous audit engagement. The Monitor further stated that, while its former role as auditor to District did not preclude it from acting as Monitor in these proceedings, it might be precluded from conducting a preliminary review of the District's expenditures in relation to the Prince of Peace development for the period during which it had acted as auditor. However, as the District had been unable to produce supporting documentation with respect to funds expended on the Prince of Peace development prior to 2006, and Deloitte did not act as auditor

subsequent to 1999, the Monitor took the position that "it was not conflicted from completing the Review to the extent that they can for the period for which documentation is available".

c) On March 8, 2016, the Monitor advised the Court and the parties that Deloitte & Touche had completed the DIL audit for the years ended January 31, 1998 and January 31, 1999, the first two years during which DIL operated the registered fund. Again, the reason for the late disclosure appears to be that the engagements were recorded under different names those now used by the District.

53 These previous services do not, on their face, disqualify the Monitor from acting as Monitor. With respect to the audit services, it is not a conflict of interest for the auditor of a debtor company to act as Monitor in *CCAA* proceedings. In this case, the sister company of the Monitor has not been the auditor of either the District or DIL for over 16 years, The Monitor does not suffer from any of the restrictions placed on who may be a Monitor by Section 11.7(2) of the *Act*. While the late disclosure of the historical audits was unfortunate, audits performed more than 16 years ago by a sister corporation raise no reasonable apprehension of bias, either real or perceived.

54 It is also not a conflict of interest, nor is it unusual, for a proposed Monitor to be involved with the debtor companies for a period of time prior to a *CCAA* filing. The Monitor made full disclosure of that involvement prior to being appointed, more than a year before this application was brought.

55 This is not a case where a Monitor was involved in or required to give advice to the Court on the essential issue before it, such as a pre-filing sales process. The issues with respect to the plans before the Court arise from details of the plans that have been the subject of negotiation and consultation among the District Group, the Creditors' Committees and the Monitor post-filing.

56 The opposing Depositors, however, point to certain representations that were made by the District in letters to some of Depositors in the months prior to the *CCAA* filing, which they say were untrue and misleading. They submit that the Monitor must have known about these letters, and thus condoned, if not participated in, misrepresentations made to the Depositors.

57 The Monitor responds that it did not act in a management capacity with respect to the District nor did it prepare or issue communications pre-filing. It did not control the District Group.

58 There is no realistic indication of conflict arising from these allegations. The attempt to taint the Monitor with knowledge of letters sent by the District to the Depositors is speculation unsupported by any evidence.

59 The opposing Depositors also submit that the prior audit engagements create a potential conflict for the Monitor in the event that the Subcommittees of the Creditors' Committees decide to bring a claim against Deloitte & Touche as former auditor of the District or DIL. In that respect, Ms. Kroeger and Mr. Kellen have by letter dated March 4, 2016 demanded that the District commence

legal proceedings against the District's auditors, including Deloitte & Touche. Given the stay, the District took no action, and the opposing Depositors concede that they did not expect the District to act during the *CCAA* proceedings.

60 It is not appropriate for this Court to determine or to speculate on whether the Depositors have a realistic cause of action against an auditor sixteen years after the final audit engagement, but assuming that the Representative Action provisions of the plans could result in an action against a sister corporation of the Monitor, the proposed ongoing role of the Monitor in those proceedings should be examined to determine whether such role could give rise to a real or perceived conflict of interest.

61 As the Monitor points out, its role with respect to the Representative Action is limited to assisting in the formation of the Subcommittees (although it has no role in deciding who will serve on the Subcommittees), facilitating the review of qualifications of legal counsel who wish to act in the Representative Action (although the Monitor will not participate in the selection of the representative counsel), and communicating with Depositors based on instructions given by the Subcommittees with respect to the names of the members of the Subcommittees, 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 Depositors choose to do so. The Monitor's involvement will be directed by the Subcommittees and is anticipated to be limited to these tasks. The Monitor notes that, should it or the Subcommittees determine that the Monitor has a conflict of interest in respect of completing any of these tasks, the Monitor would recuse itself. It submits however, that it is appropriate that it be involved in order to ensure that the Subcommittees are able to undertake these duties in a manner that complies with the requirements of the plans and does not prejudice the rights of Depositors under the plans.

62 The Monitor will aid in making distributions under the plans, including with respect to the release of any unused portion of the Representative Action Holdback, which it anticipates will be determined on a global basis and communicated by the Subcommittees to the Monitor on a global basis. The Monitor will have no knowledge of the considerations or calculations that so into establishing the Representative Action Holdback. Further, the Monitor does not need to be, and will not under any circumstances be, privy to any information regarding the strategy that the representative counsel chooses to communicate to Depositors, including the parties to be named in the Representative Action.

63 In the circumstances, the Monitor is the most appropriate party to be involved in communication with Depositors in the early stages of the Representative Action process, as it has the information and experience necessary to ensure that such communication is done quickly, effectively, and at the lowest possible expense.

64 The mere possibility of a decision to proceed against the Monitor's sister corporation does not justify the expense and disruption of bringing in a new Monitor to perform these administrative tasks. If the Subcommittees determine that an action can be commenced against the historical auditors that is not barred by limitations considerations, the issue of a real, rather than a speculative conflict, can be raised before the Court for advice and direction in accordance with the plans. The possibility that the Subcommittees may decide not to proceed against the historical auditors does not imply undue influence from the Monitor. The members of the Subcommittees will be fiduciaries, bound to act in the best interests of the remaining creditors.

65 There is no persuasive argument nor any evidence that they would act other than in those best interests.

66 The opposing Depositors' submission that the Monitor cannot with any degree of neutrality or objectivity advise the Court on the reasonableness and fairness of the Representative Action provisions of the plans ignores the fact that the Monitor is not released from liability for any damages arising from its pre-CCAA conduct as auditor to the District by the plans.

67 The opposing Depositors submit that there are "substantive and procedural benefits" from its continuing position that the Monitor may take advantage of. On closer examination, those alleged advantages are insignificant.

68 In summary, I find that there is no actual or perceived conflict of interest that would warrant the replacement of the Monitor, particularly at this late state of the *CCAA* proceedings. The Monitor made full disclosure of the historical audit relationship of its sister corporation to the District and DIL and its own pre-filing relationship to the District Group. Neither the Monitor nor Deloitte & Touche benefit from any releases as part of the plans. The Monitors' continuing involvement in the Representative Action process is limited, administrative in nature, and would take place pre-litigation.

3. Breach of Fiduciary Duty

69 A more serious charge against the Monitor than conflict of interest is the opposing Depositors' allegation that the Monitor breached its fiduciary duty to the Court and to District Depositors by failing to disclose certain municipal planning documents.

70 The documents at issue are:

> a) a master-site development plan (the "MSDP") that was prepared for the District by an architectural firm in December, 2012 and was subsequently approved by the Municipal District of Rocky View County. This plan includes site information, layout and analysis of

activities, facilities, maintenance and operations and a context for land use and the associated population density; and

b) an approved area structure plan for the Hamlet of Conrich (the "Conrich ASP"), which was put forward by the MD of Rocky View and which includes reference to the Prince of Peace properties.

71 The MSDP identifies several prerequisites to development of the Prince of Peace properties, including a connection to the municipal water supply, the upgrading of the sanitary sewer lift station and work on a storm water management infrastructure. The Monitor notes the MSDP was prepared specifically for the development contemplated by EHSS in 2012, being medium density residential and additional assisted living capacity, ground floor retail and a parkade structure. As such, it is likely outdated and may not align with future development. A more recent appraisal of the properties in 2015 assumed low density development. The 2015 appraisal of the properties takes into account the work that would need to be undertaken by any third party who wished to further develop the Prince of Peace properties.

72 The opposing Depositors submit that the infrastructure projects identified by the MSDP would be costly and would likely pose barriers to development. They presented hearsay evidence of a conversation Mr. Kellen had with a Rocky View official that is of limited relevance apart from its hearsay nature, because future development would likely be different from what was contemplated in 2012.

73 The Conrich ASP stipulates that no development may occur within the Hamlet of Conrich until the kinds of infrastructure requirements identified in the MSDP are met. The ASP is being appealed by the City of Chestermere.

74 The Monitor became aware of these documents during its pre-filing services to the District Group. When a Depositor raised a question about these reports on April 28, 2016 at an information meeting, the Monitor prepared a QFA document dated April 29, 2016 regarding the future subdivision and development of the Prince of Peace properties and referencing the documents. This QFA was posted on the Monitor's website on April 29, 2016 and mailed to all affected creditors with claims over $5,000 on May 3, 2016, more than a month before the meeting at which the District plan was approved.

75 The issue is whether the Monitor breached its duty to the Court and creditors by failing to disclose these reports earlier. The answer to this question must take into account the context of the District plan and the nature of the Monitor's recommendations.

76 The District plan does not contemplate that any further development of the Prince of Peace properties would occur pursuant to the *CCAA* proceedings. The possibility that NewCo shareholders would pursue further development is one of the options available to NewCo or to a

third party purchaser of the Prince of Peace properties if NewCo shareholders decide to sell the properties, as recognized in the plan materials. The plan gives NewCo shareholders the opportunity to consider their options.

77 As the Monitor notes, a vote on the District plan is not a vote in favour of any particular mandate for NewCo. The District plan contemplates that a 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's management team ahead of the NewCo shareholders' meeting.

78 It was in this context that the Monitor considered the content of its reports to Depositors on the District plan and did not disclose the two plans, which in any event may be dated and of little relevance to a future development. I do not accept the opposing Depositors' allegation that the Monitor "concealed" this information.

79 In that regard, I note that, although Mr. Kellen in a sworn affidavit deposed that he became aware of the MSDP and Conrich ASP on or about April, 2016, he appears to have posted a link to the Conrich ASP in the CEF Forum website on February 24, 2015. It also appears that the MSDP document was discussed in the CEF Forum in January, 2016, with a link posted for participants in the forum. Mr. Kellen filed a supplementary affidavit after the Monitor noted these facts in its Twenty-First Report. He says that he now recalls reviewing the Conrich ASP, which references the MSDP, in February, 2015, but does not recall reading it in any great detail, that he did not appreciate the significance of the documents and simply forgot about them. This is hard to reconcile with Mr. Kellen's present insistence that the documents are highly relevant.

80 A further issue is whether the Monitor's recommendation of the District plan gave rise to a duty to disclose these documents. The opposing Depositors submit that the Monitor endorsed the plan on the basis of potential upside opportunities available through development. This submission appears to refer to a sentence in the Monitor's March 28, 2016 report to creditors, as follows:

> The issuance of NewCo Shares pursuant to the District Plan allows District Depositors to benefit from the ability to liquidate the Prince of Peace Properties at a time when market conditions are more favourable or the ability to benefit from potential upside opportunities that may be available such as through the further expansion of the Harbour and Manor seniors' care facilities, through a joint venture to further develop the Prince of Peace Properties or through other options
>
> (emphasis added).

81 Clearly, the Monitor in its report referenced further development as only one of the options available to NewCo shareholders at the time of their first shareholders' meeting. It is incorrect to say that the Monitor's endorsement of the District plan was based solely on the option of development by NewCo acting alone. The Monitor did not recommend any particular mandate for NewCo in its various reports.

82 The Monitor decided that disclosure of the two documents at issue was not necessary in the context of a plan that put decisions with respect to the various options available to the new corporate owner of the property in the hands of the shareholders at a future date.

83 The opposing Depositors submit, however, that the District Depositors had the right to this information relating the pros and cons of development before deciding whether to become NewCo shareholders in the first place.

84 As it happened, they did have such access through the Monitor's April 29, 2016 QFA document, and also, it appears, through information posted on the CEF Forum and from information communicated during the information meetings for Depositors. There is no evidence that any Depositor failed to receive the Monitor's QFA document prior to the June 10, 2016 District meeting date.

85 The opposing Depositors are critical of the Monitor's QFA disclosure. The problem appears to be that the Monitor does not agree that the issues disclosed in the MSDP and the Conrich ASP are as dire as the opposing Depositors describe.

86 The opposing Depositors also fault the Monitor for not referencing a website where the documents could be found, but I note that the QFA provides a telephone numbers and email address for any inquiries.

87 They fault the Monitor for not discussing in the QFA the requirement to upgrade the sanitary sewer lift station and to provide for the disposal of storm water. As noted by the Monitor, those issues are typical of what would be encountered by any developer in considering a new development. The QFA refers to the development risks as follows:

> All development activities have risk associated with them, however, the Monitor is not aware of any known issues related to the PoP Development which would suggest that the future subdivision or development of Prince of Peace Properties would not be feasible other than the risks that are typically associated with real estate development generally.

88 A difference of opinion between the opposing Depositors and the Monitor with respect to the significance of these development requirements does not constitute concealment, bad faith or breach of duty by the Monitor.

89 The opposing Depositors also fault the Monitor for failing to provide Depositors with new election letters and forms of proxy in its May 20, 2016 notice of adjournment of the District meeting. The notice clearly sets out the procedure to be followed if a Depositor wishes to change his or her vote or proxy. It invites Depositors to contact the Monitor by telephone or email if they have any additional questions. The Monitor notes that it sent out three election forms with its initial mail-out to Depositors, and received no requests for a new election form. It received at least one change of vote after sending out this notice.

90 One of the Alberta class action plaintiffs alleges that the Monitor impeded them from distributing material at the information meetings. The Monitor reports that the Alberta plaintiffs were present at the Sherwood Park meeting, handing out material and requesting contact information from other attendees. Some of the attendees expressed confusion as to who had authored the material being handed out by the two Alberta plaintiffs and who was requesting their contact information. The Monitor requested that the Alberta plaintiffs hand-out material at a reasonable distance from the meeting room entrance 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.

91 The Monitor wrote to class action counsel 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.

92 The Monitor had a table established for the use of the class action representatives within reasonable proximity to the entrance to the room in which the meetings were held. The class action representatives were entitled to circulate written information to attendees within the reasonable vicinity of that table, but not permitted to disseminate any written material within the room or in the doorway entering the room in which the meetings were held.

93 The rules provided that any written communication circulated by the class action representatives was to include a prominently displayed disclaimer that such materials were not authored, endorsed or being circulated by the Monitor. A sign identifying the class action representatives was to be prepared by them and displayed at the table established for their use.

94 These are reasonable rules, designed to avoid confusion, and they did not impede the class action plaintiffs from voicing their views.

95 The opposing Depositors submit that the Monitor instructed attendees at information meetings to cast their votes immediately, without waiting for the District meeting. The Monitor denies encouraging creditors one way or the other with respect to when to vote. It communicated to attendees the options available to creditors for voting on the District plan and the deadlines associated with each option. It also communicated at meetings that creditors who wished to do so could provide the Monitor with any paperwork they had brought with them. It is a stretch to impute any kind of bad faith to the Monitor in conveying this information.

96 The class action plaintiffs and their counsel had the ability to attend all of the information meetings. They were in attendance and actively participated in the information meeting in Langley, BC, at the Sherwood Park Meeting, the Red Deer Meeting and the District Meeting. Both counsel were in attendance and participated in the District Meeting. The Monitor notes that it is aware of at least two emails that were widely circulated by a relative of one of the class action plaintiffs outlining the views of the class action plaintiffs on the District Plan. I am satisfied that the opposing Depositors had a more than adequate opportunity to communicate their views to other Depositors and to attempt to garner support for their opposition, and that they were not impeded by the Monitor.

97 I must address one more disturbing allegation. Two opposing Depositors submit that the Monitor's non-disclosure of the MSDP and the Conrich ASP in the context of what they allege is the Depositor's false and misleading communications with CEF Depositors might lead a reasonable and informed person to believe that "the Monitor is prepared to condone and facilitate the District's dishonest conduct". This is a disingenuous attack on the Monitor's professional reputation, made without evidence or any reasonable foundation. There is no air of reality to this allegation. There is no evidence that the Monitor was aware of misleading statements, if any, made by the District or its employees or agents before or during the *CCAA* proceedings.

98 The Monitor has prepared 22 regular reports during the approximately 18 months of these proceedings, plus five confidential supplements and three special reports providing creditors with specific information relating to their respective plans of compromise and arrangement. The Monitor also prepared hand-outs tailored to provided information to specific groups of creditors, and five QFAs with information on multiple topics, including NewCo, the potential outcomes of the *CCAA* proceedings, estates, trust accounts, the assignment of NewCo shares by creditors and the potential future subdivision of the Prince of Peace properties.

99 The Monitor attended five regional information meetings in Alberta and British Columbia between April 19 and April 28, 2016 to review the contents of the District plan and respond to any inquiries by District Depositors related to the plan. The Information Meetings were each between

approximately two and a half and four hours long. It is clear that the information provided to creditors during these CCAA proceedings was far more extensive than that which would normally be provided.

100 Monitors, being under a duty to the Court as the Court officer and to the parties involved in a *CCAA* proceeding under statute, must sometimes make recommendations that are unpopular with some creditors. The Court expects a Monitor's honest and candid advice, and relies on it. The Monitor in this case went to great lengths to inform the great number of Depositors of ongoing proceedings, and to give its well-reasoned and measured opinion on the myriad of issues in this complex proceeding. In retrospect, it may have been prudent for the Monitor to reference the MSDP and Conrich ASP earlier, in substantially the way it was later referenced in the Monitor's QFA on development, but that is a hindsight observation, and unlikely to resolve other than one of the opposing Depositors' many complaints in support of their application.

4. Cost and Delay

101 The Monitor and the District Group submit that the timing of this application to remove the Monitor is suspect: that the alleged conflicts complained of have been disclosed for months. The opposing Depositors say that they were awaiting the outcome of the District vote, and that it was not until the May 14, 2016 District meeting that they knew that the Monitor knew about and had failed to disclose the MSDP and the Cornich ASP.

102 It is clear that the timing of the application is strategic: a clear majority of the DIL and District creditors have voted in favour of the plans despite the efforts of the relatively few opposing Depositors to convince others to join in their opposition. They must now rely on other grounds to frustrate, delay or defeat the Court's sanction of the plans. That is their prerogative as creditors who oppose the plan, and the Court must, and does, consider their objections seriously, whatever the underlying motivation. However, relief on a motion of this kind should only be granted where the evidence indicates "a genuine concern with respect to the merits of the alleged conflict": *Moffat v. Wetstein*, [1996] O.J. No. 1966 (Ont. Gen. Div.) at para 131.

103 While the timing of this application to replace the Monitor does not preclude the opposing Depositors from bringing the application, the Court must balance the potential risk to creditors and the District Group arising from the alleged potential conflict of interest against the prejudice to creditors and the District Group arising from the inevitable delay, duplication of effort and high costs involved with replacing the Monitor at this very late stage of the proceedings.

104 I have found that the Monitor does not have any legitimate conflict of interest, real or perceived, and that it has not breached any fiduciary duty. Even if I am wrong in this determination, the damage caused by such conflict or breach of duty has been mitigated by full disclosure of potential conflicts and disclosure of the information that the opposing Depositors submit should have been disclosed prior to the vote on the District Plan.

105 Compared to this, appointing a replacement Monitor would involve costs in excess of $150,000, taking into account that the replacement Monitor would need to retain counsel. The process would cause substantial delay in already lengthy proceedings while the replacement Monitor reviews the events of the last eighteen months.

106 I also take into account that the key issue that the opposing Depositors want a replacement Monitor to review is whether the Representative Action provisions of the plans are within the jurisdiction of a *CCAA* court to sanction. This is a question of law, on which a replacement Monitor would have to rely on counsel.

107 At this point in the proceedings, in addition to being reviewed by the Monitor's legal counsel, the provisions of the plans related to the Representative Action have been 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. The jurisdictional issue related to the Representative Action provisions is a legal matter rather than a business issue. As such, this Court is qualified to opine on it independently, without the assistance of a new Monitor.

108 I note that the creditors' committees who represent the majority of Depositors are strongly opposed to a replacement Monitor. They pointed out that the plans have been approved by the requisite majorities, and delay and additional cost does not serve the interests of the general body of creditors, particularly without what they consider to be any justifiable reason.

109 The assistance of a further limited purpose Monitor would likely be of little to no further assistance to the Court and would result in increased professional costs to the detriment of creditors as a whole. This is the tail-end of a lengthy process. The introduction of another Monitor without any clear, ascertainable benefit to the body of creditors, leading to uncertainty, costs and delay, is unwarranted.

5. Conclusion

110 The anger and frustration expressed in these proceedings by a small minority of Depositors, while perhaps understandable given their losses and the trust they placed in their Church, is misplaced when it is directed against the Monitor.

111 There is no reason arising from conflict of interest or breach of fiduciary duty to replace the Monitor.

112 I therefore dismiss the application.

B. Sanctioning of the DIL and District Plans

1. Overview

113 As provided in section 6(1) of the *CCAA*, the Court has the discretion to sanction a plan of compromise or arrangement where, as here, the requisite double majority of creditors has approved the plan. The effect of the Court's approval is to bind the debtor company and its creditors.

114 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 that 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 C.B.R. (3d) 1 (Ont. Gen. Div.) at para 17; *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.) at para 60, leave to appeal refused 2000 ABCA 238 (Alta. C.A. [In Chambers]), affirmed 2001 ABCA 9 (Alta. C.A.), leave to appeal refused [2001] S.C.C.A. No. 60 (S.C.C.); *Canwest Global Communications Corp., Re*, 2010 ONSC 4209 (Ont. S.C.J. [Commercial List]) at para 14.

115 It is clear that there has been strict compliance with all statutory requirements with respect to both the DIL and the District plans, assuming jurisdiction as a different issue. The opposing Depositors attack the plans on the basis of the second and third requirements.

116 They submit:

> (a) the plans contain provisions that are not within the scheme and purpose of the *CCAA*;
>
> (b) the plans compromise third party claims;
>
> (c) the plans provide no benefit to Depositors within the purpose of the CCAA;
>
> (d) the plans contravene section 5.1(2) of the *CCAA*;
>
> (e) the plans have not been advanced in good faith, with due diligence and full disclosure; and
>
> (f) the plans are not fair and reasonable.

1. Do the plans contain provisions that are not within the scheme and purpose of the CCAA?

117 The opposing Depositors submit that the Representative Action provisions of the plans do not advance the District Group's restructuring goals.

118 The District and the Creditors' Committees respond that the Representative Action provisions follow the "one proceeding" model that underpins the *CCAA* and will prevent maneuvering among Depositors for better positions in subsequent litigation, which, they say, has already commenced with the stayed class action proceedings. They submit that the provisions provide certainty to Depositors and allow the District to continue its core function without the distraction of a myriad of claims, consuming its limited resources and having the potential to compromise its insurance coverage.

119 The opposing Depositors submit that procedural rules can be used to limit proceedings in the absence of the Representative Action provisions, and that if more than one class proceeding is brought within a jurisdiction, carriage motions can be brought to determine which action can proceed to certification. Thus, they argue, there is little likelihood that the District will be overwhelmed by litigation in the event that the plans are not approved. Rather, there will be one class proceeding in each of British Columbia and Alberta, and potentially a number of independent claims advanced by those who choose to opt out of those actions or whose claims are of an individual nature not suited to determination in a class proceeding. It is open to the District to apply to have those individual claims consolidated if is appropriate to do so.

120 This argument contains its own contradictions. It anticipates multiple actions that may have to resolved through court application and carriage motions, the very multiplicity of actions that the Representative Action provisions are proposed to alleviate.

121 The opposing Depositors cite *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 240 O.A.C. 245, 2008 ONCA 587 (Ont. C.A.) (CanLii); leave dismissed [2008] SCC No. 32765 [2008 CarswellOnt 5432 (S.C.C.)] for the proposition that the Court does not have the jurisdiction to approve a plan that contains terms that fall outside the purpose, objects and scheme of the *CCAA*. The *Metcalfe* decision dealt with a unique situation involving the Court's jurisdiction to approve a plan that involved wide-ranging releases. In the result, the Court approved the plan including the releases. The DIL and District plans do not involve third-party releases except in a limited sense that is not at issue. It is true that Blair, J.A. noted in the *Metcalfe* decision that there must a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of a third party release. However, he also noted at para 51 that, since its enactment:

> Courts have recognized that the [*CCAA*] has a broader dimension than simply the direct relations between the debtor company and creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected.

122 The opposing creditors in *Metcalfe* raised many of the same arguments that the opposing Depositors raise in this case, and the Court noted that they "reflect a view of the purpose and objects of the *CCAA* that is too narrow": para 55.

123 The opposing Depositors also argue that any provision of a plan that may benefit the District is improper. They submit that the District's arguments "anticipate that it will be the beneficiary of [the Subcommittee's] goodwill", and that this betrays the District's improper motive. There is nothing improper or contrary to the scheme and purpose of the *CCAA* for a debtor company to attempt to be able to continue its business more efficiently and effectively post-*CCAA*. That is the very core and purpose of the *Act*. This argument assumes that the Subcommittees would betray their fiduciary duty to act in the best interests of the creditors they will represent by favouring DIL or the District. There is no evidence that this would happen; on the contrary, the Creditors' Committees have ably represented the interests of creditors as a whole in this restructuring, and there is no reason that the Subcommittees would do otherwise.

124 Finally, the opposing Depositors submit, referencing the results of a survey conducted by the Lutheran Church — Canada, that there is little likelihood of the District remaining in operation in the future without being subsumed into a single administrative structure. At this point, this is only a possibility that would not be implemented for more than a year, if it is implemented at all.

125 There is a nexus between the Representative Action provisions of the plans and the restructuring in that these provisions are designed to allow the District to continue in the operation of its core function without the distraction of multiple litigation, while preserving the rights of Depositors to assert actions against third parties involved in the events that led to this insolvency. This Court does not lack jurisdiction to sanction the plans for this reason.

2. Do the Representative Action provisions of the plans compromise third party claims?

126 The basis for this submission is that the Subcommittees will have absolute discretion to commence and compromise third party claims (including derivative claims), to instruct counsel, and to determine the litigation budget to be shouldered by the Depositors. Under the terms of the plans, a Depositor whose third-party claim is denied by the Subcommittee has no right to proceed independently.

127 The plans impose fiduciary duties on the Subcommittee members to act in the best interest of Depositors who do not opt-out. No claims are *prima facie* released, other than the partial releases that are unopposed. Thus, it must be assumed that a claim against a third party will not be advanced by a Subcommittee only if not doing so is consistent with its fiduciary duties for whatever reason (for example, advice from representative counsel that a claim has no basis for success).

128 The opposing Depositors put forward a hypothetical situation in which an individual may have a meritorious claim that he or she wishes to pursue, but the Subcommittee doesn't wish to proceed due to lack of funding. The District and the Monitor point out, and I accept, that the definition of Representative Action permits more than one action. There is no provision of the plans that prevents this hypothetical individual from funding the Subcommittee to pursue such

an action on his or her behalf as a Representative Plaintiff. The individual would become part of the Subcommittee and the action would be advanced by the Subcommittee using representative counsel. The hypothetical action would be treated like any other representative action claim under the plans. The Subcommittee would have carriage and control of such litigation, subject to its fiduciary obligations.

129 If any issues arose from such a hypothetical situation, the advice and direction of the Court is available.

130 It is important to note that the Representative Action provisions of the plans do not deprive any Depositors of the right to pursue claims as described against third-parties. They merely funnel the process through independent Subcommittees of creditors chosen from among the Depositors who have claims remaining after the Convenience Payments and who will have the fiduciary duty to act in the best interests of the body of such creditors to maximize recovery of their investments.

131 While third-party claims could be pursued in another fashion, through uncoordinated action by individual Depositors, that does not mean that the Representative Action provisions constitute a compromise of such claims. There is no jurisdictional impediment to sanction arising from this inaccurate characterization of the plan provisions.

3. Do the Representative Action provisions provide any benefit to Depositors within the purpose of the CCAA?

132 The Monitor identified the benefits of the Representative Action provisions in its reports to Depositors as follows:

> (a) they provide a streamlined process for the establishment of the Representative Action class and the funding of the Representative Action;
>
> (b) they prevent a situation where Depositors are being contacted by multiple groups seeking to represent them in a class action or otherwise;
>
> (c) they may result in increased recoveries through settlement of the Representative Action claims on a group basis; and
>
> (d) as certain Depositors have indicated that they view any involvement in litigation as inconsistent with their personal religious beliefs, the Representative Action process allows them to opt-out before litigation is even commenced, should that be their preference.

133 The opposing Depositors suggest that none of these benefits fall within the "express purposes" of the *CCAA*. As noted by the Supreme Court in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) [hereinafter Century Services], the *CCAA* has a broad remedial purpose, and permits a company to continue its business through various methods, with a view to becoming viable once

again, including compromises or arrangements between an insolvent company and its creditors, and a going-forward strategy.

134 The *Act* is aimed at avoiding, where possible, the devastating social and economic consequences of the cessation of business operations, and at allowing the debtor to carry on business in a manner that causes the least possible harm to employees and the communities in which it operates. I accept that this is what the District Group is attempting to do with the plans, including the Representative Action provisions. While these provisions are of benefit to the District in allowing it to deal with claims affecting its officers, directors and employees from a single source, they also have a rationale and reasonable purpose in protecting the community of mostly older Depositors that the District will continue to serve in a religious capacity, and in attempting to maximize recovery through the possibility of focused negotiations with a limited number of parties. This does not mean that these types of provisions will always be an appropriate way to deal with third party claims, but, in the circumstances of this rather unique restructuring, the benefits are reasonable, rationale and connected with the overall restructuring.

135 The DIL and District plans are part of a four component conceptual plan of arrangement and compromise that is designed to permit the District to continue to carry out its core operations as a church entity without the CEF and DIL functions that it has previously carried out and without the senior's care ministry component it had carried out through ECHS and EMSS. The opposing Depositors take an overly narrow view of the *CCAA's* purpose, and ignore the real benefits identified by the Monitor to the large group of Depositors who are interested in recovering as much of their investment as possible. This Court does not lack jurisdiction to sanction the plans on this ground.

4. Do the plans contravene section 5.1(2) of the CCAA?

136 Claims that may be included in the Representative Action provisions include claims that cannot be compromised pursuant to section 5.1(2) of the *CCAA* as they are claims against directors that relate to a contractual right of one or more creditors or are based on allegations of misrepresentations made by directors to creditors or wrongful or oppressive conduct by a director.

137 As noted previously, the plans do not release or compromise any claims that can be pursued in the Representative Action. Accordingly, the plans permit the directors to be pursued in a Representative Action in accordance with s. 5.1(2) of the *CCAA*.

5. Have the plans been advanced in good faith, with diligence and full disclosure?

138 As noted with respect to the application to replace the Monitor, it was not necessary for the District to disclose the MSDP and the Conrich ASP in the context of the District plan. However, these documents were disclosed to Depositors before the reconvened District meeting,

and Depositors had the ability to change their vote on the District plan with this information in hand. The District was not guilty of bad faith arising from these circumstances.

139 The opposing Depositors also submit that counsel for the District Group, by acting as counsel and advancing the plans, has "intentionally sought to misuse the *CCAA* proceedings to shield himself and his law firm from liability". First, neither counsel nor his firm is released by the plans from any liability, other than the limited release provisions that are not contentious. The opposing creditors have made a number of allegations against counsel and his firm; none of these allegations have been tested or established and undoubtedly the Subcommittees will have to consider whether to bring proceedings against these parties for advice that may have been provided to the District Group prior to the *CCAA* filing. This situation does not give rise to bad faith by the District Group.

140 The opposing Depositors also allege that counsel for the District Group has been unjustly enriched as a result of the legal fees they have been paid while acting as counsel in these proceedings. Counsel has not been able to respond to this allegation of dubious merit. Again, this is irrelevant to the issue of the District Group's good faith.

141 Similar allegations have been made about the Monitor, which have been addressed in the decision relating to the replacement of Monitor.

6. Are the Plans Fair and Reasonable?

a. Overview

142 Farley, J. in *Sammi Atlas Inc., Re*, [1998] O.J. No. 1089 (Ont. Gen. Div. [Commercial List]) at para 4 provided a useful description of the Court's duty in determining whether a proposed plan is fair and reasonable:

> ... is the Plan fair and reasonable? A Plan under the *CCAA* is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One 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 (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights. It is recognized that the *CCAA* contemplates that a minority of creditors is bound by the Plan which a majority have approved — subject only to the court determining that the Plan is fair and reasonable: see *Northland Properties Ltd.* at p.201; *Olympia & York Developments Ltd.* at p.509.

In an earlier case, he commented:

> In the give and take of a *CCAA* plan negotiation, it is clear that equitable treatment need not necessarily involve equal treatment. There is some give and some get in trying to come up with an overall plan which Blair J. in *Olympia & York* likened to a sharing of the pain. Simply put, any *CCAA* arrangement will involve pain — if for nothing else than the realization that one has made a bad investment/loan: *Re: Central Guarantee Trust Ltd.*, [1993] O.J. No. 1479.

143 The objection of the opposing Depositors to these plans focus mainly on whether the different treatment of some creditors results in inequitable treatment, whether the plans are flawed is any respect and how much weight I should accord to the approval of the majority.

b. Deference to the Majority

144 Dealing with the important factor of the approval of the plans by the requisite double majority of creditors, the Court in *Muscletech Research & Development Inc., Re*, [2007] O.J. No. 695 (Ont. S.C.J. [Commercial List]) at para 18 commented:

> It has been held that in determining whether to sanction a plan, the court must exercise its equitable jurisdiction and consider the prejudice to the various parties that would flow from granting or refusing to grant approval of the plan and must consider alternatives available to the Applicants if the plan is not approved. An important factor to be considered by the court in determining whether the plan is fair and reasonable is the degree of approval given to the plan by the creditors. It has also been held that, in determining whether to approve the plan, a court should not second-guess the business aspects of the plan or substitute its views for that of the stakeholders who have approved the plan.

145 The opposing Depositors, however, invite me to do just that. They refer to a remark by McLachlen, J. (as she then was), in *Gold Texas Resources Ltd., Re*, [1989] B.C.J. No. 167 (B.C. S.C. [In Chambers]) at page 4, to the effect that the court should determine whether "there is not within an apparent majority some undisclosed or unwarranted coercion of the minority.... (i)t must be satisfied that the majority is acting *bona fide* and in good faith".

146 The opposing Depositors submit that, in considering the voting results, I should keep in mind that the many of the Depositors "are not businessmen" and that 60% of them are senior citizens over 60 years of age. I note that some of the opposing creditors are also "not businessmen" and are over 60, but the Court is not asked to discount their opposing votes for that reason.

147 I have read the considerable disclosure about the plans prepared and distributed by the Monitor, and note the extraordinary efforts of the Monitor and the District Group to ensure that Depositors had the opportunity to ask questions at the information meetings. The Depositors have had months to inform themselves of the plans. Even if the disputed development disclosure had been necessary, there were roughly $1\ ^1/_2$ months from the Monitor's disclosure of the documents

to the vote on the District Plan. It would be patronizing for the Court to assume anything other than the Depositors were capable of reading the materials, asking relevant questions and exercising judgment in their own best interest. Business sophistication is not a necessity in making an informed choice.

148 The opposing Depositors also submit that there is evidence of efforts by Church officials to influence the outcome of the vote in favour of the plans. This evidence consists of affidavits from the opposing Depositors or their supporters that accuse various Church pastors of efforts to intimidate or silence those who oppose the plans. These allegations have been made against individuals who are not direct parties in these proceedings, at such a time and in such circumstances that it was not possible for them to respond.

149 As seen from the allegations against the Monitor, to which the Monitor had an opportunity to respond, there may be very different perceptions about what actually occurred during the incidents described in the allegations. I appreciate that it must be uncomfortable to be at odds with your religious community on an important issue. However, these allegations would bear greater weight if the terms of the plans were prejudicial to the Depositors as a whole, or the allegations were supported by the Creditor's Committees but they are not. It is not unreasonable or irrational for Depositors to have voted in favour of the plans.

150 I am unable to accept on the evidence before me that the Depositors who voted in favour of the plans did so because they were coerced by church officials. This does a disservice to those who exercised their right to vote and to have an opinion on the plans, no matter what their level of sophistication, their age or their religious persuasion.

c. The Convenience Payments

151 The opposing Depositors also submit that the votes in favour of the District plan were unfairly skewed by the fact that creditors with claims of less than $5,000 are to be paid in full (the "Convenience Creditors"). The Monitor reports that, of the 1,616 Convenience Creditors, 500 or 31% in number holding 54% in value of total claims under $5,000 voted on the District plan.

152 Of the 500 Convenience Creditors who voted on the District plan, 450 or 90% voted in favour of the District plan and 50 or 10% voted against the District plan. The Convenience Creditors who voted in favour of the District plan had claims of approximately $641,300 (91% of the total claims of voting Convenience Creditors), and the Convenience Creditors who voted against the District plan had claims of approximately $66,500 (9% of the total claims of voting Convenience Creditors).

153 Approximately 1,294 Eligible Affected Creditors with total claims of approximately $85.1 million voted on the District plan. The Convenience Creditors therefore represented approximately 39% in number and approximately 1% in dollar value of the total eligible affected creditors. In

order for the District plan to be approved, both a majority in number and two-thirds in dollar value of voting creditors must have voted in favour of the plan. As such, while the Convenience Payments increased the likelihood that a majority in number of Creditors would vote in favour of the plan, they had little impact on the likelihood that two-thirds in dollar value of voting creditors would vote in favour of the plan.

154 Excluding the Convenience Creditors, a total of 794 creditors voted on the District plan, of which 626, or approximately 79% voted in favour and 168 voted against. Therefore the plan still would have passed by a majority in number of voting creditors had the Convenience Creditors not voted.

155 The District Group and the Monitor note that the Convenience Creditor payments have the effect of limiting the number of NewCo shareholders to about 1,000, rather than 2,600, thus creating a more manageable corporate governance structure for NewCo and ensuring that only Depositors with a significant financial interest in NewCo will be shareholders. This is a reasonable and persuasive rationale for paying out the Convenience Creditors. While each case must be reviewed in its unique circumstances, this type of payout of creditors with smaller claims is not uncommon in *CCAA* restructurings: *Contech Enterprises Inc., Re*, 2015 BCSC 129 (B.C. S.C.); *Target Canada Co., Re*, 2016 CarswellOnt 8815 (Ont. S.C.J. [Commercial List]); *Nelson Financial Group Ltd., Re*, 2011 ONSC 2750 (Ont. S.C.J.).

156 As noted previously, equitable treatment is not necessary equal treatment, and the elimination of potential shareholders with little financial interest from NewCo is a benefit to remaining Depositors in the context of the District plan. They may not have had any significant financial influence in the corporation, but their interests would have had to be taken into account in deciding on the future of NewCo.

d. The NewCo provisions

157 The opposing Depositors submit that, as the future of the Prince of Peace properties cannot be known until after the first meeting of NewCo shareholders six months after the effective date of the plan, the plan deprives the Court of the ability to ensure the plan is fair and reasonable and therefore appropriate to impose on the minority.

158 This is incorrect. What is relevant to the Court in reviewing the plan is the value of the shares of NewCo that are part of the consideration that will be distributed to some of the District Depositors. As noted in *Century Services* at para 77:

> Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation.

159 The Monitor notes that the value of the NewCo shares is intended to be based principally on the independent appraisals, which reflect a range of forced sale values. The Monitor has consulted with the Deloitte' Valuations Group, which has indicated that in valuing shares such as those of NewCo, it would be more common to value assets such as the Prince of Peace properties based on appraised market values as opposed to forced sale values. The Monitor reports that it has attempted to balance this consideration against other practical considerations, such as that fact that, depending on the mandate that is chosen for NewCo, the Prince of Peace properties may still be liquidated in the near-term, and that therefore, there is the need to accurately reflect the shortfall to some of the Depositors, which will represent the amount they would ultimately be able to pursue in the Representative Action. I accept the Monitor's opinion that it is unlikely that the values attributed to the Prince of Peace properties in calculating the value of the NewCo shares will reflect the lowest forced sale values reflected in the appraisals.

160 The District Plan contemplates a debt-to equity conversion, which is common in *CCAA* proceedings. The Court does not have to make a determination of the value of the equity offered, as long as it is satisfied, as I am, that the value of the package to be distributed to the Depositors will likely exceed a current forced-sale liquidation recovery in this depressed real estate market, which is the alternative proposed by the opposing Depositors. The plan provides the NewCo shareholders with flexibility to optimize recovery at the time of the first shareholder's meeting, with the advantage of recommendations from an experienced management team. While there is no guarantee that the market will improve, it is a realistic possibility. At any rate, the sale of the Prince of Peace properties will not be the only option available to NewCo shareholders. Again, I must take into account that this appears to be the view of the Depositors who voted in favour of the plan.

161 The opposing Depositors submit that the NewCo shares are not a suitable investment for District Depositors over the age of 70. 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 creditor's personal situation. The NewCo articles attempt to address the concerns of those who don't want to hold shares by building in provisions that would allow the possibility that shareholders are able to sell to other shareholders or have their shares redeemed.

162 This is not a perfect solution, but plans do not have to be perfect to be found to be fair and reasonable. I find that the NewCo provisions of the District plan, in the context of the plan, as a whole, are fair and reasonable.

e. The Representative Action provisions

163 In addition to submissions previously discussed with respect to these provisions, the opposing Depositors submit that "(n)o honest and intelligent District Depositors acting in their own best interests would give up these fundamental rights of [full and unfettered access to the courts]

where the law already provides perfectly satisfactory processes for advancing legal claims against third parties on a class basis. These provisions are neither fair nor reasonable, and accordingly must not receive the sanction of this Court".

164 The short answer to this is that a majority of the honest and intelligent Depositors have voted in favour of the plans, including the Representative Action provisions. It is not the place of this Court to second guess their decision without good and persuasive reasons: *Central Guaranty Trustco Ltd., Re* [1993 CarswellOnt 228 (Ont. Gen. Div. [Commercial List])] at paras 3&4; *Muscletech* at para 18.

165 The opposing Depositors also submit that the Representative Action provisions of the plans are flawed in that they do not provide for information about causes of action the Subcommittee intends to advance, and against whom prior to the opt-out deadline.

166 However, Depositors are able to opt-out at any time prior to the last business day preceeding the date of commencement of the Representative Action. It is not unreasonable to anticipate that Depositors will have further information with respect to the proposed Representative Actions prior to their commencement.

167 It is also true that participating Depositors will not know their own proportionate share of the Representative Action Holdback until after the opt-out deadline has passed and the size of the Representative Action class is known. However, the Monitor has committed to provide a range of what individual shares may be.

168 The opposing Depositors submit that in the absence of reliable information about the extent of their financial commitment to the Representative Action, it can reasonably be expected that many District Depositors will be content to receive their distribution under the plan and forgo the balance of their claims by electing to opt out the Representative Action. This is not a reasonable assumption. Representative counsel will likely be retained on a contingency fee basis, and therefore Depositors will be unlikely to be at risk for a substantial retainer to advance the Representative Action.

169 Finally, on this issue, the opposing Depositors submit there is an irreconcilable conflict of interest between the Subcommittee and a Representative Plaintiff that can be expected to mar the Representative Action. Unlike the Subcommittee tasked with instructing counsel, the Representative Plaintiff bears the sole financial responsibility for paying an adverse costs award. The opposing Depositors submit that it is reasonable to expect that there may be a divergence of views between the Subcommittee and the Representative Plaintiff as to the conduct of the Representative Action.

170 As would be the case in class action proceedings when the interests of representative plaintiffs come into conflicts with the interests of the class, advice and direction can be sought from the Court in the event that this situation materializes.

171 The opposing Depositors submit that the Representative Action provisions interfere with a citizen's constitutional right of access to the courts. These provisions do not deprive the Depositors from their right to take action against third parties; they are able to do so through a Subcommittee chosen from their members with fiduciary duties to the whole. This issue was considered in the context of third-party releases, which do eliminate the right to pursue an action against third parties, in *Metcalfe*, and Blair, J.A. commented at para 104 as follows:

> The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the *CCAA*. The fact that this may interfere with a claimant's right to pursue a civil action — normally a matter of provincial concern — or trump Quebec rules of public order is constitutionally immaterial. The *CCAA* is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the *CCAA* governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount.

7. Conclusion

172 As noted at para 18 of *Metcalfe*:

> Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the *CCAA* supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

173 In this case, the requisite double majority, after significant disclosure and opportunities to review and question the plans, have voted in favour of the plans. The Creditors' Committees of DIL and the District, who have the duty to act in the best interests of the body of creditors, support the plans.

174 The Monitor supports the plans, and there is no reason in this case to give the Monitor's opinion less than the usual deference and weight.

175 Measuring the plans against available commercial alternatives leads me to the conclusion that they provide greater benefits to Depositors and other creditors than a forced liquidation in a depressed real estate market.

176 The plans preserve the District's core operations. I accept that the Representative Action provisions are appropriate and reasonable in the circumstances of this restructuring, that, in addition to the benefits identified by the Monitor of stream-lined proceedings, the avoidance of multiple communications and the potential of increased recovery, Depositors will benefit from the oversight of the Subcommittees and the Representative Action process will be able to incorporate cause of action, such as derivative actions, that are normally outside the scope of class actions.

177 The insolvency of the District Group has caused heartbreak and hardship for many people, as is the case in any insolvency. In the end, the majority of affected creditors have accepted plans that resolve their collective problems to the extent possible in difficult circumstances. As noted in *Metcalfe* "in insolvency restructuring proceedings almost everyone loses something": para 117. That is certainly the case here, and the best that can be done is to try to ensure that the plans are a reasonable "balancing of prejudices". It is not possible to please all stakeholders.

178 The balance of interests clearly favours approval. I am satisfied that the DIL and District plans are fair and reasonable and should be sanctioned.

Application dismissed.

IN THE MATTER OF THE PROPOSAL OF O.B. WIIK CANADA LTD., OF THE TOWN OF SIMCOE IN THE PROVINCE OF ONTARIO

Estate No. 32-2714829

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

Proceeding commenced TORONTO

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