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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD, LTS RESOURCES PARTNERSHIP, 1863360 ALBERTA LTD AND BAKKEN RESOURCES PARTNERSHIP

DOCUMENT

BENCH BRIEF OF MUDRICK CAPITAL MANAGEMENT, FRONTFOUR CAPITAL CORP, AND FRONTFOUR CAPITAL GROUP LLC

HEARING

September 26, 2016

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. This Bench Brief is submitted on behalf of Mudrick Capital Management, FrontFour Capital Corp., and FrontFour Capital Group LLC (collectively, the "**Oppression Claimants**") (i) in opposition to certain of the relief set out in the draft Initial Order scheduled to the Applicants' Originating Application pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**"), and (ii) in support of the Oppression Claimants' application to have their oppression actions be determined prior to any determination in the Applicants' CCAA proceeding that would affect or prejudice their existing claims to status as secured noteholders.

2. The purpose of this Bench Brief is to outline for this Court certain of the legislation and jurisprudence that is relevant to the relief being sought and the positions being taken by the Oppression Claimants.

3. For the sake of clarity, the Oppression Claimants do not dispute that Lightstream is insolvent and accordingly do not oppose a fair and balanced Initial Order under the CCAA that sets a framework for the Applicants' to maximize value for all of the Applicants' stakeholders in accordance with their legal rights and priorities. However, the Oppression Claimants do oppose the prejudicial proposed form of Initial Order that was filed without any consultation or discussion with the Oppression Claimants, a very significant stakeholder of Lightstream. For certainty, the Oppression Claimants believe that there is value in Lightstream beyond the Secured Debt.

4. Capitalized terms not otherwise defined herein have the meanings ascribed to such terms in the Affidavit of Peter D. Scott sworn on September 21, 2016 (the "**Scott Affidavit**").

II. LAW AND ARGUMENT

A. The Effect of the Initial Order and the Comeback Hearing

5. The Oppression Claimants submit that there is no urgency to this application (other than urgency self-imposed by the Applicants and the other parties that are supporting this application and have been working with Lightstream on the CCAA path and related materials for weeks, if not longer).

6. Unlike most CCAA first day applications, Lightstream already has the benefit of a stay of proceedings that was granted in the CBCA proceeding. The Oppression Claimants acknowledge that the existing CBCA stay is less broad than the standard CCAA stay being sought by the Applicants, but there is no suggestion in any of the Applicants' materials that any person has taken any step whatsoever against the Applicants which necessitates a broader stay on an urgent basis. In fact, the Applicants did not immediately file for CCAA protection following the September 16, 2016 deadline to reach a settlement with the Oppression Claimants in the CBCA proceeding, presumably because there was no urgency at that time either.

7. Yet, despite the fact that there is no urgency, the Oppression Claimants received the materials for this application with very little, and frankly inadequate, notice, particularly given the material deviations from the "Model Order" being sought by the Applicants in their proposed Initial Order.

(a) The Applicants' originating application and the Scott Affidavit were not served until 11:39 p.m. on Wednesday (which was effectively Thursday morning).

(b) The Monitor's Report (the body of which is actually longer than the Scott Affidavit) was not served until Friday at 6:12 p.m..

(c) The Applicants served a supplemental affidavit at 6:41 p.m. on Friday.

(d) As of the time this Bench Brief is being finalized on the date the application is to be heard, the Applicants have just served their Bench Brief, which the Oppression Claimants have not had a chance to read, let alone consider.

8. As a result, the Oppression Claimants have not had an opportunity to fully consider and respond to the application.

9. If the Oppression Claimants had received the materials with the notice required under the Alberta rules, the Oppression Claimants would have (i) cross-examined Mr. Scott on his two affidavits, (ii) submitted questions to the Monitor with respect its pre-filing report, and (iii) requested productions from the Applicants and other parties with respect to matters relevant to this application and CCAA proceeding.

10. Instead, the Oppression Claimants have had to scramble to respond to the Applicants' application as best they can in limited time, and without the benefit of the regular litigation steps contemplated above.

11. Accordingly, the Oppression Claimants wish to fully reserve their rights in that regard (including to cross-examine on the affidavits filed by the Applicants and to examine one or more of the Secured Noteholders), and submit that the "comeback hearing" should be a true comeback hearing where the onus remains on the Applicants to justify why all of the relief ultimately granted in the Initial Order is appropriate. Courts have recognized that there is an inherent disadvantage to stakeholders who are provided short or no notice of the commencement of CCAA proceedings, so the purpose of the comeback hearing is to provide those stakeholders with the opportunity to seek that the court vary or rescind the initial order.

12. Further, the Applicants are seeking to have this Court make an Initial Order that is overreaching and would have the effect of accelerating these proceedings unnecessarily and without justification, towards a pre-ordained result: the acceptance of a credit bid that is not even before this Court for consideration. The primary flaw in the Applicants' approach is that they want this Court to approve a Sale Process that is truncated and narrowly focused only on sale transactions. However, such a process cannot be launched until the status of the Oppression Claimants is determined. The Applicants' singular focus on advancing a premature sale process also drives the Applicants' requests for other arbitrary and premature relief (very large charges for the benefit of numerous financial advisors, and an Administration Charge benefitting some groups but not others who may have the same status and priority).

13. There is no justification for this far-reaching relief. The Applicants are in a very strong cash position (with sufficient cashflow to take them to the end of the year and beyond with no need for any interim or debtor-in-possession financing whatsoever). In other words, the Applicants have the time to seek a more customary CCAA initial order that grants only the relief that is necessary, and to then determine what potential restructuring options are available for the benefit of all their stakeholders and to implement such a strategy.

14. In addition, it is well settled law that at the beginning of a CCAA proceeding the status quo is to be preserved and a level playing field is to be maintained so that the debtor is given "breathing room" to develop a plan of reorganization, both for the benefit of the company and its

stakeholders. An initial order that permits a fair and balanced process at the outset of CCAA proceedings is in keeping with the objectives of the CCAA, and the Initial Order should therefore be limited to only what is reasonably necessary for the debtor to keep the "lights on" during the restructuring period. This is particularly true in this case where the Applicants already have the benefit of a stay of proceedings and the Oppression Claimants were not given proper notice of this application.

- ***Re Ted Leroy Trucking [Century Services] Ltd.***, 2010 SCC 60 at para. 60 **[TAB 1]**
- ***Re Crystallex International Corp.***, 2011 ONSC 7701 at paras. 20 and 29 **[TAB 2]**
- ***Re Boutiques San Francisco Inc.***, 2003 CarswellQue 13882 at para. 32 (Que. Sup. Ct.) **[TAB 3]**
- ***ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.***, 2008 CarswellOnt 2652 at para. 16 (Ont. Sup. Ct. J. [Commercial List]) **[TAB 4]**

15. In *Re Royal Oak Mines*, Blair J. described the purpose of the initial order as follows:

> [W]hat the Initial Order should seek to accomplish, in my view, is to put in place the necessary stay provisions and such further operating, financing and restructuring terms as are reasonably necessary for the continued operation of the debtor company during a brief but realistic period of time, on an urgent basis. During such a period, the ongoing operations of the company will be assured, while at the same time the major affected stakeholders are able to consider their respective positions and prepare to respond.

- ***Re Royal Oak Mines Inc.*** (1999), 6 C.B.R. (4th) 314 at para. 21 (Ont. Gen. Div. [Commercial List]) [*Royal Oak Mines*] **[TAB 5]**

16. In addition, CCAA courts have held that they should be cautious about granting broad relief without providing interested stakeholders the opportunity to review and comment favourably, neutrally or unfavourably on such relief.

- ***Royal Oak Mines*** at paras. 12-14 **[TAB 5]**

B. The Oppression Claims, the Need for a Hearing and the proposed Stays of Proceedings

1. The Oppression Claims and Remedy

17. In 2012, Lightstream issued the Unsecured Notes pursuant to an indenture dated January 30, 2012 by and among PetroBakken (now Lightstream) as Issuer, PetroBakken Capital Ltd and PBN Partnership as Guarantors, US Bank National Association as Trustee, and Computershare Trust Company of Canada as Canadian Trustee (the "**Indenture**"). The holders of those Unsecured Notes ranked equally in their positions as creditors of Lightstream.

18. The Oppression Claimants continue to hold a substantial quantity of Unsecured Notes issued pursuant to the Indenture for their clients.

19. In July 2015, Lightstream announced a transaction whereby it agreed to exchange $465 million of the Unsecured Notes for $395 million of Secured Notes, and issued a further $200 million of Secured Notes ("**the Secured Notes Transaction**" or the "**Transaction**"). The Secured Notes Transaction was entered into with some (the "**Secured Transaction Parties**"), but not all, of the holders of the Unsecured Notes. Lightstream did not offer the Transaction to the Oppression Claimants, despite prior assurances that it would, and refused to extend such offer when requested to do so.

20. The Secured Notes Transaction had the effect of promoting the Secured Transaction Parties into secured creditors, thereby placing them in a superior security position to the remaining holders of Unsecured Notes who were excluded from the Secured Notes Transaction, including the Oppression Claimants and their clients. It also adversely affected the market price of the remaining Unsecured Notes.

21. The Oppression Claimants commenced their respective actions on the basis that Lightstream's conduct with respect to the Transaction was oppressive pursuant to section 242 of the *Alberta Business Corporations Act*, RSA 2000, c B-9 (the "**ABCA**") and in breach of the Indenture. The primary remedy sought by the Oppression Claimants is a declaration that they are entitled to participate in the Transaction, and an order requiring Lightstream to issue securities (i.e. additional Secured Notes) under s. 242(3)(e) of the ABCA to remedy the oppressive conduct.

22. The Oppression Claimants require prompt adjudication of their oppression claims because their current unsecured status significantly impedes their rights in this CCAA application. It is clear from the Scott Affidavit that the proposed Sale Process will result in the

sale of Lightstream's assets. If the proposed Sale Process do not result in a superior sale offer, the Secured Noteholders will apparently purchase the assets by way of a credit bid. Had the Oppression Claimants been given the opportunity to participate in the Secured Notes Transaction, the Oppression Claimants' would be included in the credit bid. Without a change in status, however, the Oppression Claimants' will be unable to participate in the credit bid, thereby further devaluing (and likely wiping out for no consideration while the Secured Notes trade at more than $0.75 on the dollar) their position in Lightstream, and vis-a-vis the Secured Noteholders.

23. The difference in creditor rights under the CCAA, in this case, is problematic because the litigation advanced by the Oppression Claimants is prima facie reasonable and is neither frivolous nor vexatious. The existence of differential treatment amongst noteholders who initially had the same status (unsecured) strongly supports the Oppression Claimants' arguments and requested relief. Representations made by a company to security holders is essential in identifying whether the conduct complained of is oppressive. The uncontradicted evidence obtained in the oppression actions demonstrates that Lightstream specifically represented to the Oppression Claimants that they would not be excluded from an exchange transaction. Notwithstanding these representations, Lightstream forged ahead with an exchange transaction that excluded all but two of the Unsecured (now Secured) Noteholders. Furthermore, the Indenture provides no safe haven for Lightstream to justify its conduct. To the contrary, in the Secured Notes Transaction Lightstream breaches specific protections for the Unsecured Noteholders contained in the Indenture.

- ***BCE Inc. v 1976 Debenture Holders***, 2008 SCC 69. See also *Alharayeri v Black*, 2014 QCCS 180, by a shareholder, some of which he was successful on. One of the claims that he was not successful on was a claim that a private placement of the company diluted his common shares. The trial court emphasized that the private placement was open to all shareholders, and was required for the company's survival – therefore it was not oppressive. This finding was not appealed but the Quebec Court of Appeal approved the trial judge's finding on this point (*Black v Alharayeri*, 2015 QCCA 1350); See also *Paul v 1433295 Ontario Limited,* 2013 ONSC 7002, where the court found oppression where a share offering was used to squeeze out a minority shareholder. Although the court emphasized the improper purpose

> of the transaction, a key element was the differential treatment of the shareholder.

[TAB 6]

24. Lightstream's actions fall squarely within the definition of oppressive conduct (or unfair prejudice and unfair disregard) and justify granting relief to the Oppression Claimants. Under the oppression remedy, the court's remedial powers are broad and flexible. While the relief under section 242(3)(e) has not been applied often in Canada, courts have recognized that it can be applied where there is a pre-existing right to such securities.

- David S. Morritt et al., *The Oppression Remedy*, (Carswell 2015) (loose-leaf) Ch. 6 at 6-26 – 6-27. *Schembri v Way*, 2012 ONCA 620 paras 47-48. See also *O'Neill v Sirois* [1997] QJ No. 634, 1997 Canlii 9304 (QC CS) where the court ordered a corporation to issue 125,000 common shares in its capital stock to an employee pursuant to an employee contract, which provided the employee with an entitlement to purchase shares at an applicable subscription price; and *Working Vestures Canadian Fund v Angoss Software Corp.*, [2000] OJ No. 4357, 2000 CarswellOnt 4554 **[TAB 7]**

25. When discussing the appropriate relief for the oppression remedy, courts have recognized that:

> The court has a very broad discretionary power under the oppression remedy legislation to select a remedy appropriate to the situation at hand. Its mandate is to "make any interim or final order it thinks fit". This discretion must be exercised in accordance with judicial principles, of course, and within the overall parameters of corporate law. Nonetheless, the remedy has been described by one early commentator as '... beyond question, the broadest, most comprehensive and most open-ended shareholder remedy in the common law world ... unprecedented in its scope.'... Courts are prepared to be creative and flexible in fashioning remedies to fit the case when called upon to apply this broad remedy.

- ***Deluce Holdings v Air Canada***, [1992] CarswellOnt 154 **[TAB 8]**

26. The courts are often focused on exercising this broad discretion while ensuring that the relief granted is focused and appropriate. The remedy sought by the Oppression Claimants is one which falls squarely within the claimants' reasonable expectations as to what their status ought to have been (secured noteholders) had Lightstream's conduct been appropriate.

27. It is also important to note that this is not the a case where the Oppression Claimants are simply trying to create any possible claim once the debtor files for CCAA protection in order to

protect their interests. The Oppression Claimants initiated their oppression actions forthwith following the Transaction, and even told Lightstream not to complete the Transaction following the announcement of the Transaction but before it closed.

2. The Need For Trial

28. The Oppression Claimants are ready to have their claims tried. The oppression actions have been subject to case management before Justice Campbell, and until the filing of the CBCA Application, were proceeding on a series of schedules approved by the Court.

29. Affidavits of records were exchanged between December 2015 and February 2016, and discovery by way of questioning proceeded in March 2016. Answers to undertakings were exchanged in June 2016, and motions to deal with outstanding discovery issues, along with motions by Lightstream for security for costs, were to have been heard on August 30, 2016. On August 8, 2016 the Court adjourned those motions *sine die* in view of Lightstream's CBCA filing. On September 9, 2016, Lightstream voluntarily produced a number of documents (but not all) which had been the subject of the discovery motion.

30. The Oppression Claimants anticipate that a trial would require three to six days (depending on whether evidence in chief is pre-filed). In light of the remedies sought in the oppression actions, the Court hearing this CCAA Application ought to hear and decide such claims. Otherwise, the Oppression Claimants' ability to participate in the Secured Notes Transaction, and to have secured status in these CCAA proceedings, will be fatally prejudiced.

2. Exclusion from the Stays of Proceeding

31. In determining the proper scope of a stay, there is no formal test that the court ought to apply. Instead, the court must focus on whether there are "sound reasons" for carving ongoing litigation out of the stay, keeping in mind the merits of the claims, the balance of convenience, the relative prejudice of the parties, and the good faith and due diligence of the debtor company. These factors tip the balance in favour of the Oppression Claimants and justify lifting the stay.

- ***ICR Commercial Real Estate (Regina) Ltd. v Bricore Land Group Ltd***, 2007 SKCA 72, para 67 **[TAB 9]**
- ***Re Canadian Airlines Corp.***, [2000] AWLD 666, para. 20 **[TAB 10]**

32. The meritorious nature of the Oppression Claimants' actions provides a strong basis for excluding such claims from the scope of the stay. In addition, the relative prejudice and balance of convenience adds to this position. The Transaction significantly increased the amount of secured debt ahead of the remaining Unsecured Notes and caused the Unsecured Notes to decrease in value. The trading price of the Unsecured Notes following the Transaction confirms how the Secured Notes Transaction has left the excluded holders in a much worse position:

(a) The market price for the Unsecured Notes peaked at $0.7900 on the dollar in the middle of May. As rumours began circulating that Lightstream was contemplating an exchange, the Unsecured Notes dropped to $0.6400 on the dollar. Immediately following the announcement of the Transaction, the notes further dropped to $0.5000 on the dollar and, at present, the Unsecured Notes are being offered at five cents on the dollar, well below the value of the Unsecured Notes at the time the Oppression Claimants made their acquisitions.

(b) Prior to the Transaction, Lightstream had CDN$638 million in debt senior to the Unsecured Notes. After the Transaction, the amount of debt ahead of the Unsecured Notes increased by CDN$480 million such that there is now CDN$1.121 billion in debt senior to the Unsecured Notes.

(c) Notwithstanding that the Oppression Claimants have plead that they are entitled to rank equally with the Secured Noteholders, the Credit Bid will contemplate no recovery for the Oppression Claimants while the Secured Notes are trading at in excess of $0.75 on the dollar.

33. As discussed above, in the Applicants' proposed Initial Order, the Oppression Claimants are unable to participate in the Credit Bid and do not have any consultation rights in the proposed Sale Process. Again, here, the Oppression Claimants are excluded from realizing the benefit and value afforded to the Secured Noteholders who only obtained this status as a result of Lightstream's unfair and oppressive conduct.

34. By contrast, Lightstream will suffer no prejudice if the stay is lifted to allow the oppression actions to be heard. There is no liquidity crisis or urgency that justifies Lightstream's CCAA Application - the proposed Monitor's pre-filing report shows sufficient liquidity through

the end of the calendar year. If the Oppression Claimants are not permitted to pursue their claims, the relief sought by the Oppression Claimants' will be moot as the value and benefits of the secured status will be realized only by the current Secured Noteholders.

35. Furthermore, as mentioned above, the Oppression Claimants are ready to have their claims adjudicated promptly and without further delay. Given the lack of urgency in Lightstream's CCAA Application, and the preparedness of the Oppression Claimants, an efficient and fair resolution is one which excludes the oppression actions from the scope of the stays and adjudicates the merits of these claims before any further step is taken in this CCAA proceeding.

C. The Priority Charges

36. The Applicants seek six (6) priority charges as part of the proposed Initial Order, many of which the Oppression Claimants take issue with, at least in part.

1. The Administration Charge

37. The Applicants seek an Administration Charge in an amount not to exceed $2 million to secure the pre- and post-filing professional fees and disbursements of the Monitor, counsel to the Monitor, counsel to the Lightstream Group, independent counsel to the Applicants' directors and officers, counsel to the First Lien Lenders, the financial advisor to the First Lien Lenders, and counsel to the *Ad Hoc* Committee of Secured Noteholders.

38. The Oppression Claimants do not object the quantum of the proposed Administration Charge, but the Oppression Claimants do object to legal counsel to the Oppression Claimants being excluded from the proposed Administration Charge.

39. Accordingly, the Oppression Claimants seek to have their legal counsel's fees and disbursements included in the proposed Administration Charge (and a direction that the Applicants pay the fees and expenses of the Oppression Claimants' legal counsel just like each of the proposed beneficiaries of the Administration Charge) as well. This Court has broad discretion pursuant to section 11.52 of the CCAA to grant the fees and expenses of legal counsel engaged by any interested party where the charge is necessary for their effective participation in the proceedings.

40. Section 11.52 of the CCAA expressly provides this Court with the power to grant a charge in respect of professional fees and disbursements.

- **CCAA**, ss 11.52(1) and (2) **[TAB 11]**

41. Courts have held that, unless professional advisor fees are protected by way of a charge the objectives of the CCAA would be frustrated as professionals would be unlikely to risk offering services without any assurance of ultimately being paid.

- ***Timminco Ltd, Re***, 2012 ONSC 506 [*Timminco*], at para 66 **[TAB 12]**

42. In *Argent Energy*, the Court granted a super-priority charge to an *Ad Hoc* committee of subordinated unsecured debentureholders over the objection of the debtors and the secured creditor on the basis that until the sale process is completed there is no determination that the subordinated unsecured debentureholders were "out of the money" and the subordinated unsecured debentureholders were important stakeholders who added value simply by virtue of their participation in the process.

- ***Re Argent Energy Trust, et al***, Amended and Restated CCAA Initial Order dated March 9, 2016 [*Argent Energy*] **[TAB 13]**

43. In the present case, the Oppression Claimants submit they are more entitled to have their fees paid than the subordinated unsecured debentureholders were in *Argent Energy* given that in this case the Secured Noteholders' advisors' fees are being paid and the Oppression Claimants have ongoing litigation against the Applicants where the Oppression Claimants are seeking a remedy where they would be secured noteholders as well (as described above).

2. The Directors' Charge

44. The Applicants seek a Directors' Charge to the maximum amount of $2.5 million to secure the indemnity of the Applicants' directors and officers provided for in the proposed Initial Order.

45. This Court has jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis pursuant to s. 11.51 of the CCAA. However, in order to do so, this Court must be satisfied with the amount of the charge and that adequate insurance at a reasonable cost could be obtained.

- **CCAA**, s 11.51 **[TAB 11]**
- ***Re Canwest Global Communications Corp***, [2009] OJ No 4286 (SCJ) [*Canwest Global*], at para 46 **[TAB 14]**
- ***Re Canwest Publishing Inc***, 2010 ONSC 222 [*Canwest Publishing*], at paras 56-57 **[TAB 15]**

46. In the present case, the Applicants have provided no back-up for the quantum of the proposed Directors' Charge. The proposed Monitor has said it has reviewed the calculation and is satisfied, but the actual information is not before this Court. Accordingly, the Oppression Claimants, and more importantly, this Court, are in no position to determine whether the amount of the charge is reasonable.

47. In addition, the Applicants have provided no evidence that adequate insurance could not be obtained (or has not already been obtained) at a reasonable cost. The Scott Affidavit states that there *could* be insufficient coverage in respect of potential claims, but the current policy is not attached to the Scott Affidavit, which makes it impossible for this Court to determine whether there already *is* adequate insurance for the claims sought to be covered by the charge. There is no doubt that the current policy has various exclusions, but those exclusions may not be relevant with respect to the limited scope of liabilities the proposed Monitor's pre-filing report says that the proposed Directors' Charge is intended to cover. It is entirely possible that the directors currently have adequate coverage, and no Directors' Charge ought to be granted unless and until this Court has determined otherwise.

3. The KERP, KEIP, KERP Charge and KEIP Charge

48. The Applicants request this Court's approval of (i) a key employee retention plan (or KERP) and a related KERP Charge up to the aggregate amount of approximately $4.1 million as security for payment under the KERP, and (ii) a key employee incentive plan (or KEIP) and a related KEIP Charge up to the aggregate amount of approximately $5.0 million as security for payment under the KEIP.

49. The materials filed by the Applicants contain very little information about the KERP and KEIP, including basic information such as the date(s) the plans were implemented, under what circumstances and/or on what dates payments are required to be made thereunder, and what amounts are payable at various transaction values. The proposed Monitor's pre-filing report

suggests that the confidential appendix details what amounts are payable under the KEIP in what circumstances, but that may not be the case for the KERP. And in any event, given the short service of the materials, the Oppression Claimants have not had an opportunity to enter into satisfactory arrangements with the Applicants to obtain a copy of the confidential appendix and simply do not have sufficient information to properly analyze the plans.

50. The materials do disclose, however, that the KERP – a *key* employee retention plan – applies to 193 of the less than 300 employees of the Applicants, which is at least 64% of the employee population.

51. The following factors have been identified as considerations in determining whether to approve a key employee retention plan and related charge:

(a) whether the Monitor supports the key employee incentive plan and related charge;

(b) whether the beneficiaries of the key employee retention plan are likely to consider other employment opportunities if the plan is not approved;

(c) whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;

(d) the employees' history with and knowledge of the debtor;

(e) the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;

(f) whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;

(g) whether the KERP agreement and charge are supported or consented to by the secured creditors of the debtor; and

(h) whether the KERP payments are payable upon the completion of the restructuring process.

- ***Cinram International Inc, (Re)***, 2012 ONSC 3767, at para 91, citing *Grant Forest Products Inc, (Re)* (2009), 57 CBR (5th) 128, at paras 8-24, *Canwest Publishing, supra*, at para 59, *Canwest Global, supra*, at para 49 and *Timminco, supra*, at paras 72-25 **[TAB 16]**

52. Based on the information contained in the Applicants' materials and the proposed Monitor's pre-filing report, the proposed KERP and KEIP are not justified and reasonable based on these factors.

(a) it is difficult to imagine that 193 of the Applicants' less than 300 employee are truly *key* to the Applicants' business, and if that is somehow in fact the case, the Applicants should be required to fully justify that to this Court;

(b) given the current employment market conditions in Alberta, and in particular in the oil and gas sector, it is unlikely that a significant number of the Applicants' employees will consider other employment opportunities in the absence of the plans being approved;

(c) the Applicants have provided insufficient information with respect to the two plans; and

(d) it is not relevant whether or not the secured creditors support the KERP Charge and KEIP Charge because they are not affected by them. The KERP and KEIP were structured so that no amounts are payable unless the Secured Noteholders are paid in full, which the Oppression Claimants infer to mean that the secured creditors refused to permit any amount of the KERP or KEIP prime their security.

4. The Financial Advisors' Charge

53. The Applicants are seeking a Financial Advisors' Charge up to the maximum amount of $19.41 million in respect of the fees and disbursements of its three (3) financial advisors and the *Ad Hoc* Committee of Secured Noteholders' financial advisor.

54. The Oppression Claimants acknowledge that s. 11.52 of the *CCAA* gives this Court jurisdiction to grant the Financial Advisors' Charge. The factors to be considered in determining whether to approve the Financial Advisors' Charge include:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

- ***Canwest Publishing***, *supra*, at para 54 **[TAB 15]**

55. The application of these factors in the present case does not support the granting of the proposed Financial Advisors' Charge.

56. Although the Applicants' business is of a reasonable size and complexity, the aggregate amount of fees being paid to the various financial advisors – including three for the Applicants alone – are unreasonable.

57. The quantum of the fees is particularly offensive given that they do not appear to require any measure of success to become payable. The Applicants' restructuring efforts to date have failed, and even if the SISP is a total failure and results in no bids (other than the Credit Bid), it appears that all three of the Applicants' financial advisors and the *Ad Hoc* Committee of Secured Noteholders' financial advisor will be entitled to very significant "success" fees.

58. In addition, there appears to be a significant amount of duplication (or even triplication) among the Applicants' three financial advisors. The Oppression Claimants acknowledge that the appointment of multiple advisors has been recognized as appropriate in certain circumstances (e.g. where the sale process recognizes their respective roles, but also allows for a coordinated effort that will assist them in achieving their goals, and where the joint enterprise is expected to produce a better result overall), but this is not such a case. In the present circumstances, TD Securities Inc. is the sole "Sale Advisor", and it is unclear from the materials filed by the Applicants what ongoing role, if any, the Applicants' other two financial advisors are expected to have in this CCAA proceeding. If they are assisting TD Securities Inc., there appears to be total

overlap in roles, and if they will be performing a different function, that has not been described to this Court by the Applicants.

- ***Walter Energy Canada Holdings Inc, Re***, 2016 BCSC 107 [*Walter Energy*], at para 44 **[TAB 17]**

59. The Oppression Claimants need the opportunity to ask questions of the Applicants and the Monitor with respect to the respective roles and fees of the various financial advisors. There is no evidence to suggest that various financial advisors would stop working if the charge is not granted immediately.

D. The Sale Process

60. The Applicants seek this Court's approval of the Sale Process in the proposed Initial Order, which the Applicants say is the continuation of a sale process that has been ongoing for the past two months.

61. However, as Lightstream was advised in a letter from the Oppression Claimants' counsel on July 15, 2016, the Oppression Claimants believe it was highly inappropriate for Lightstream to have initiated a sale process two months ago in a blatant attempt to create a record and direct an outcome that an immediate sale process is necessary or appropriate. Lightstream was put on notice in the July 15 letter that if Lightstream ultimately filed for CCAA protection, the Oppression Claimants expected to seek an Order requiring Lightstream to immediately cease the sale process and to instead consider all restructuring alternatives.

62. Based on the cash flow estimate appended to the proposed Monitor's pre-filing report - which shows sufficient liquidity through the end of the calendar year - Lightstream should have sufficient liquidity in this CCAA proceeding (where all payments to Secured Noteholders and Unsecured Noteholders are stayed) to consider a wide range of restructuring alternatives and not just an immediate sale in a depressed market.

63. Notwithstanding that, the Applicants are choosing to pursue what will obviously be a contentious and heavily litigated credit bid from the Secured Noteholders. As described above, and as the Applicants well know, the Oppression Claimants are in ongoing litigation against Lightstream with respect to the very transactions that created the purportedly secured debt that is proposed to be used to credit bid for all of Lightstream's assets.

64. The Oppression Claimants submit that the Applicants should be using the CCAA proceeding and the stay afford by it to pursue all restructuring alternatives, including a potential debt-for-equity exchange of the Secured Notes and Unsecured Notes. Although that alternative failed in CBCA, the landscape is different in CCAA, including that the distribution to existing equity that was contemplated in the CBCA restructuring would not be permissible in the CCAA.

65. This is not a situation like many other cases (such as *Argent Energy* and many others) where the Applicants are out of liquidity, and the only source of capital - an interim debtor-in-possession loan - requires that a sale process be approved and run as a condition precedent to the capital being provided. The Applicants' liquidity, combined with the stay provided in the CCAA, afford the Applicants the opportunity to pursue all value maximizing paths, and not just a sale in a depressed market.

66. The Oppression Claimants acknowledge that the secured creditors have insisted that a sale process be granted in the Initial Order, but it is not clear that there would be any adverse consequences to the Applicants if the sale process was not ordered at this initial stage. The Secured Noteholders would have the right to terminate their support agreement, but it is difficult to see how doing so would be in the best interests of those secured creditors.

67. In the alternative, if despite the foregoing this Court determines that a sale process should proceed at this time, the Oppression Claimants have a number of specific issues with the proposed Sale Process, including:

> *The deadline for completion of Phase I (October 21, 2016) is too soon.* As the proposed Monitor noted in its pre-filing report, the Phase I process is more condensed than is typical, but the proposed Monitor is prepared to support the condensed time period given the pre-CCAA marketing process that was conducted.
>
> With all due respect to the proposed Monitor, the Oppression Claimants are not satisfied based on the materials filed that the 25 day process is sufficient and the Oppression Claimants should be afforded the opportunity to ask questions of Lightstream, the proposed Monitor and the proposed Sale Advisor in that regard. By way of example only, the Oppression Claimants have concerns that at least

some potential bidders did not take the pre-CCAA sale process seriously enough given that Lightstream was still pursuing an alternative transaction - the CBCA recapitalization - at that time. In the Oppression Claimants' experience, potential bidders are not likely to spend significant time and resources on an acquisition where the target does not appear ready and willing to transact.

In addition, if the proposed Sale Process is approved, the Oppression Claimants expect that they will submit a bid, but do not expect to be able to do so within the unreasonably condensed 25 day time frame contemplated.

(a) *The proposed Sale Process is entirely structured around a credit bid that does not yet even exist.* There are various references in the Applicants' and the proposed Monitor's materials to the "latest draft of the credit bid", but there still is no credit bid before this Court, and this Court and the Oppression Claimants have not seen any drafts of it. Notwithstanding that, paragraph 25 of the proposed sale procedures declares that the non-existent Credit Bid shall be deemed to be a Qualified Bid, and that any Qualified Bid needs to contemplate the payment in full of the Secured Noteholders.

Moreover, not only is there no credit bid at this time, but the proposed Monitor has not yet even completed its security review to confirm that the Secured Noteholders' security is valid and enforceable. If the Applicants want to return to this Court on proper notice to all parties in order to seek approval of a sale process with a credit bid after the Monitor has opined on the Secured Noteholders' security and the credit bid has been submitted by the Secured Noteholders, it is free to do so. However, there is no liquidity crisis or other urgency that justifies approving this deeply flawed sale process on short notice at this time.

(b) *The proposed Sale Process pre-supposes the amounts owing to the Secured Noteholders.* According to the proposed Monitor's pre-filing report, a Qualified Bid must include payment of the make-whole to the Secured Noteholders. The Oppression Claimants object to any sale process requiring payment to the Secured Noteholders in full for the reasons described above, but it is particularly problematic to require the make-whole to be paid. There has been no

determination by this or any other Court that any make-whole would be payable, and the Oppression Claimants reserve all of their rights to argue that no make-whole would in fact be payable.

(c) *The Secured Noteholders have consultation rights in the proposed Sale Process.* Even though it is quite clear that the Secured Noteholders wish to own the Applicants' assets and will apparently act as a credit bidder in the proposed Sale Process, the proposed Sale Process still provides the Secured Noteholders with various information and consultation rights. Those rights are likely to discourage parties from participating in the process as the process is, or at least might be seen to be, rigged in favour of the Secured Noteholders. As described below, "[b]ias, whether perceived or actual, undermines the public's faith in the system."

E. The Sale Advisor

68. As referred to above, the Applicants propose to have TD Securities Inc. play a very integral role in the proposed Sale Process as the sole "Sale Advisor".

69. It is noteworthy, however, that TD (which term is being used to include affiliates of TD Securities Inc.) has various other roles with respect to Lightstream. TD is also the agent and a lender under the first lien Credit Facility, and is intending to provide exit financing to Lightstream. Accordingly, TD has significant other interests and motivations in the outcome of this proceeding, including the outcome of the proposed Sale Process. By way of example only, if the Credit Bid is implemented, the Oppression Claimants understand that TD will be providing exit financing to the Applicants; however, if there is a superior third party bid, that third party may not require TD's financing. TD may have other conflicts with respect to Lightstream, which the Oppression Claimants intend to dig into with the benefit of examinations and discovery.

70. This Court has previously held that public confidence in any insolvency proceeding "is dependent on it being fair, just and accessible." Therefore, "[b]ias, whether perceived or actual, undermines the public's faith in the system." These principles must also be considered when assessing a proposed sale process and the party proposed to be the "Sale Advisor".

- ***Re Winalta Inc.***, 2011 ABQB 399 at paras. 81-82 **[TAB 18]**

71. In recognition of the need for public confidence and faith in an insolvency proceeding, courts have become increasingly critical of the neutrality and potential bias, actual or perceived, of Monitors in CCAA proceedings. These same considerations must apply to a proposed sale process where "[f]airness to all the creditors is a prerequisite to a satisfactory sales process...the sales process must be seen to be fair. That is, there must be transparency." There must be a person overseeing the sale process that is an "independent party who must understand all the various bids and weigh each against the possibility of a stand-alone restructuring. He must ultimately make recommendations that engender confidence as being advanced on the best information and advice possible."

- ***Re Nelson Education Ltd.***, 2015 ONSC 3580 **[TAB 19]**
- ***Re GuestLogix Inc.***, 2016 ONSC 1047 at para. 33 **[TAB 20]**
- ***Re Ivaco Inc.***, [2004] OJ No 2483 at paras. 15 & 17 **[TAB 21]**

72. One of the main considerations when considering whether a proposed sale process should be approved is "the fairness, transparency and integrity of the proposed process". That factor must also be considered when determining who is an appropriate party to run any proposed sale process. The court must be satisfied that a "fair, transparent and commercially efficacious process" will result from the proposed sale process and that the sale process will be "an open and transparent process", including how the proposed sale advisor will impact on the fairness and transparency of that process.

- ***Walter Energy***, *supra,* at para. 20 **[TAB 17]**
- ***Re PCAS Patient Care Automation Services Inc.***, 2012 ONSC 2840 at para. 19 **[TAB 22]**
- ***Re Danier Leather Inc.***, 2016 ONSC 1044 at para. 32 **[TAB 23]**

73. In particular in the present circumstances where the Oppression Claimants allege prior oppressive conduct by Lightstream and its directors, the existence of a truly independent and unconflicted party to run the sale process is of utmost importance.

III. CONCLUSION AND RELIEF SOUGHT

74. The Oppression Claimants seek (i) an Order that their oppression actions be determined prior to any determination in the Applicants' CCAA proceeding that would affect or prejudice their existing claims to status as secured noteholders, and (ii) revisions to the Applicants' proposed Initial Order to address the issues raised herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of September, 2016.

BENNETT JONES LLP Per: _____ Chris Simard & Sean Zweig Solicitors for the Oppression Claimants	**CASSELS BROCK & BLACKWELL LLP** Per: _____ Tim Pinos & Stephanie Voudouris Solicitors for the Oppression Claimants

LIST OF AUTHORITIES

1. *Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60

2. *Re Crystallex International Corp.*, 2011 ONSC 7701

3. *Re Boutiques San Francisco Inc.*, 2003 CarswellQue 13882

4. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CarswellOnt 2652

5. *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th)

6. *BCE Inc. v 1976 Debenture Holders*, 2008 SCC 69. See also *Alharayeri v Black*, 2014 QCCS 180. See also *Black v Alharayeri*, 2015 QCCA 1350. See also *Paul v 1433295 Ontario Limited*, 2013 ONSC 7002

7. David S. Morritt et al., *The Oppression Remedy*, (Carswell 2015) (loose-leaf) Ch. 6. *Schembri v Way*, 2012 ONCA 620. See also *O'Neill v Sirois* [1997] QJ No. 634, 1997 Canlii 9304 (QC CS) and *Working Vestures Canadian Fund v Angoss Software Corp.*, [2000] OJ No. 4357, 2000 CarswellOnt 4554

8. *Deluce Holdings v Air Canada*, [1992] CarswellOnt 154

9. *ICR Commercial Real Estate (Regina) Ltd. v Bricore Land Group Ltd*, 2007 SKCA 72

10. *Re Canadian Airlines Corp.*, [2000] AWLD 666

11. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss 11.52(1) and (2)

12. *Timminco Ltd, Re*, 2012 ONSC 506

13. *Re Argent Energy Trust, et al*, Amended and Restated CCAA Initial Order dated March 9, 2016

14. *Re Canwest Global Communications Corp*, [2009] OJ No 4286 (SCJ)

15. *Re Canwest Publishing Inc*, 2010 ONSC 222

16. *Cinram International Inc, (Re)*, 2012 ONSC 3767 citing *Grant Forest Products Inc, (Re)* (2009), 57 CBR (5th) 128

17. *Walter Energy Canada Holdings Inc, Re*, 2016 BCSC 107

18. *Re Winalta Inc.*, 2011 ABQB 399

19. *Re Nelson Education Ltd.*, 2015 ONSC 3580

20. *Re GuestLogix Inc.*, 2016 ONSC 1047

21. *Re Ivaco Inc.*, [2004] OJ No 2483

22. *Re PCAS Patient Care Automation Services Inc.*, 2012 ONSC 2840

23. *Re Danier Leather Inc.*, 2016 ONSC 1044