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COURT	Court of Queen's Bench of Alberta	
JUDICIAL CENTRE	Calgary	

Applicant	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, 186330 ALBERTA LTD AND BAKKEN RESOURCES PARTNERSHIP
DOCUMENT	**RECORD FOR HEARING OF APOLLO MANAGEMENT, L.P. AND GSO CAPITAL PARTNERS**

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Date: November 15 and 16, 2016
Time: 10:00am

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Action No.: 1601-12571
E-File No.: CVQ16LIGHTSTREAM1
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

IN THE MATTER OF THE COMPANIES' CREDITORS
RRANGEMENT 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

P R O C E E D I N G S

Calgary, Alberta
October 11, 2016

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M. Barreck	For the Applicants
K. Bell	For the Applicants
T. Pinos	For the Respondents FrontFour and Mudrick
C.D. Simard	For the Respondents FrontFour and Mudrick
S. Zweig (by telephone)	For the Respondents FrontFour and Mudrick
K.J. Zych	For the Respondents FrontFour and Mudrick
D. Bish	For the Respondent First Lien Lenders
E. Paplawski	For TD Securities
A. R. Anderson, Q.C. (by telephone)	For TD Securities
W.W. Macleod	For the Monitor FTI Consulting Ltd.
S. F. Collins	For the Monitor FTI Consulting Ltd.
M. Khedri	Court Clerk

Discussion

THE COURT CLERK: Order in court, all rise.

THE COURT: Good morning, please be seated. Ms. Bourassa?

Submissions by Ms. Bourassa

MS. BOURASSA: Good morning, My Lord. I would like to just take minute to make some introductions. We do have a phone line open and a couple of people on the phone and I do see that you have quite a few volumes in front of you.

THE COURT: Thanks -- thanks everyone.

MS. BOURASSA: So we will go through that and make sure that you've got everything. For the record, Bourassa, first initial K. With me for the applicants are Mr. Barreck and Mr. Bell.

To my left is Mr. Simard who represents the Mudrick FrontFour group, who are called the oppression claimants and the plaintiffs in different cases. Also with him is Mr. Pinos and in the back we have Mr. Zych from the Toronto office of Bennett Jones and on the phone we have Mr. Zweig.

THE COURT: Good morning.

MS. BOURASSA: Behind me, starting my right to left, is Mr. O'Neill who acts for the Ad Hoc Committee of Secure Noteholders, Mr. Bish who represents the First Lien lenders and then we have Mr. Collins and Mr. MacLeod, who represent the Monitor in this. And Ms. Paplawski is here from the Osler Firm, Mr. Anderson is on the phone and they represent TD Securities.

Also in the courtroom is Ms. Hunter, who represents the Directors and Officers of Lightstream. She doesn't anticipate that she will be speaking today. There are also representatives of Lightstream, representatives of the Monitor and some other observers in the courtroom.

By way of materials, you should have for the initial application, there will be two affidavits of Mr. Scott, a September 21st and a September 23rd. There was also a September 23rd affidavit of Mr. Kirsch filed by the plaintiffs and there were bench briefs filed on September 26 by the Lightstream Group and also the plaintiffs.

With respect to the comeback hearing, there is a further application for a stay extension and an October 5th affidavit of Mr. Scott. There is a comeback brief that our office filed on Wednesday of last week, a reply from the plaintiffs on Thursday and then our reply to their brief on Friday and also a very short affidavit of Emily Van De Pol of our office, just attaching the bios of the officers and directors of the Lightstream Group.

There is finally a pre-filing report of the proposed Monitor that was filed on September 23rd and also the first report of the Monitor filed October 7th, both of which speak to initial order matters, as well as the stay extension and the comeback.

So, My Lord, was there anything in that list that you hadn't -- oh yes, sorry, My Lord, I guess there are two further things. There is a transcript of Mr. Scott from the questioning and there was also a brief that was filed last Wednesday by the Torys firm on behalf of TD Bank, Toronto Dominion Bank, the agent under the credit agreement.

THE COURT: Yes I have -- I'm fine with everything you've mentioned. The only thing I have not looked at with any -- is your reply brief, which I did not receive until this morning.

MS. BOURASSA: Okay. Okay. That's fine, My Lord. I will go through that. What I would propose to do, there are really three -- three matters on the agenda for this morning. There is -- there are the comeback issues, there is the fact that the threshold issue was not able to be determine and we will be seeking some assistance with making a determination and setting a schedule on that and there's also the stay extension. What I would propose to do is deal with the stay extension first, simply because it is not opposed by any part and I think we could deal with that quickly, then move to the comeback and then the threshold issue; if that is acceptable.

THE COURT: The threshold issue being what?

MS. BOURASSA: You had directed at the initial order hearing that there be a determination of the threshold issue in the oppression action.

THE COURT: Right.

MS. BOURASSA: We were not able to come to agreement as to what that threshold issue is, the framing of the threshold issue.

THE COURT: Right.

MS. BOURASSA: And so we will be looking for some assistance from the Court on that this morning, as well as, scheduling for the hearing of that application.

THE COURT: Okay. I did -- just before I came down here, I glanced at your reply brief and if I understand you to tell me that the granting of the initial order operates to preclude the relief being sought by the fresh group, that's something I should've been told at the time of granting the order.

MS. BOURASSA: My Lord, I think that piece is something that is ultimately for the argument and determination of the threshold issue.

THE COURT: Okay. I'm just going to signal to you that I'm not very happy with that argument, okay.

MS. BOURASSA: Okay. Well, thank you and perhaps we can speak to that when we get to the threshold issue piece. But, is that acceptable if I start with the stay extension which is not opposed?

THE COURT: If there's no issue on stay extension, why even bother with it? If everyone's on side with it --

MS. BOURASSA: If Your Lordship is content, having read the materials, that the circumstances exist to grant the order I can tell you that the affidavit --

THE COURT: Well, there seems to be a lot of stuff that is not agreed upon, but if that's the one issue we can all agree on, then let's all give thanks and carry on.

MS. BOURASSA: My Lord, I'm happy to -- happy to leave it at that and I will -- I can either pass that order up now or I can hold onto it.

THE COURT: Well, let's deal with it, let's get it done.

MS. BOURASSA: Okay.

Order

THE COURT: I gather nobody wants to speak to this issue? Thank you.

MS. BOURASSA: Okay. So My Lord, if I can move now to the comeback matters. There have been some -- since we were here on the 26th, there were some information requests that were made by the plaintiff group of the Monitor. The Monitor worked with the company and provided a confidential memorandum and also there was a follow-up response to some of their questions that was prepared by TD Securities as sale advisor.

As a result, while there are still a lot of issues on the table, some of the issues have been narrowed and they remain the sale procedures and the selection of the sale advisor and then under what I call the 'other' category there are four items, the inclusion of plaintiffs' counsel in the administration charge. They've requested that interest be halted to the first lien lenders. They are seeking a direction that the support agreement can be disclaimed and they also -- while it's not in their materials, I have confirmed that they do continue to take issue with the financial advisor charge.

So, My Lord, starting with the sale procedures, it does appear that the position of the plaintiffs is now somewhat contradictory to Mr. Pinos position at the application on the 26th and I've circulated the transcript to the parties this morning, but in that transcript he specifically says the company should go out and seek all the selling it wants. It can have

a sale process. He said: "We don't object to the company trying to sell itself, in fact, we think it should take more time to try and sell itself than it is baking into the schedule proposed to you."

So My Lord, that was our starting point. We were of the view of the fact of a sale procedure was not objected to, but it was really the timing and the credit bid which were the big issues. But, I will speak to the more broader point and My Lord, if you haven't had an opportunity to review our reply brief, what we really focus on in our reply brief on the comeback issues are two things. The first is the case law is clear that particularly in *CCAA* where the officers and directors of companies have consulted and retained experts, business judgment rule should be deferred to by the Courts. It is not the Courts place to substitute its determination for the business judgment of the officers and directors of the company. Also --

THE COURT: And the fact that the business director and the fact that it goes way back to when the -- not way back -- but when the arrangement application was made and commitments were made under that regime foreseeing if they couldn't resolve issue with the fresh claimants they would be a *CCAA* thing. The fact that the discretion was exercised, contemplating perhaps a different regime under the arrangement provisions, shouldn't matter.

MS. BOURASSA: My Lord, in fact, I think that speaks to the fact that the officers and directors truly have considered all options and have taken all of the steps to try to accomplish those actions, which has left us with, what I refer to as *CCAA* backstop.

THE COURT: So, you know, when the fresh claimants complained that while it's a rigged deal because now that we're in a *CCAA*, all these commitments that have been made are really hamstringing the company; you're saying well, that was the (INDISCERNIBLE) that was exercised by the Board and by the executives knowing all they knew when they signed those agreements. And that's totally fine.

MS. BOURASSA: Yes, My Lord, and also I don't want to jump around, but what you seem to be alluding to and I do want to address it head-on --

THE COURT: Well, we do jump around because that's the way I read stuff.

MS. BOURASSA: No and that's fine, My Lord, I think part of the issue here is plaintiffs seem to be saying that circumstances have changed and so the

company should be on a different path.

THE COURT: Right.

MS. BOURASSA: And what I'm saying to you is, circumstances have changed, the officers and the directors of the company are still of the view that this is the right path.

THE COURT: And they foresaw these changes, I mean they were -- it was part of the plan.

MS. BOURASSA: The concept of the backstop was to avoid a freefall.

THE COURT: Right.

MS. BOURASSA: If the company -- and to be clear, while the company filed arrangement proceedings in July, it started working strategic alternatives, potentially personally financing, as early as December 2014. This is not something that has just come to pass in the last four months or five months. This is something the company has been working on for some time. In July when it signed the support agreement it was of the view that the *CBCA* arrangement was the best alternative for the company. It worked diligently to attempt to achieve that goal but was unable to because it was unable to reach a settlement with the plaintiffs and they have sufficient carriage of the unsecured noteholder class that they would block any vote.

The company was of the view and remains of the view, that what is their alternative if that did not go through? They are in default under every major agreement that they have and something was necessary which was a *CCAA*. A *CCAA* has the ability to grant a broad stay and allow for a restructuring, which is what they're doing now and that is better done with a backstop that provides certainty for all of the various stakeholders with respect to the future of the Lightstream Group, than without any backstop where it would be a freefall which we see much more seldom these days.

But, I think what you see in the materials before you, My Lord, is that there is a disconnect as to the value of this company. What is very clear on the materials and you asked this question when we were before you on the 26th, what is very clear, is there are people in this courtroom and I think it would be everybody except the plaintiffs, who are of the view that the value of this company may not be greater than the secured debt and a sale process would tell us that.

My friends seem to believe that there is residual value that is being left on the table and that it is not being -- the company is not taking all steps to try and seek all value. That is not true. That is what the company was doing in the arrangement proceedings. The information that the company provided to the Monitor in response to some of the information requests form my friends were that it would consider any and all proposals in the ongoing sale procedures and that would include an investment proposal. If my friends would like to make an investment proposal and they've indicated that they would like to bid and be bidders in this process, if they would like to make an investment proposal, we would love to see it. There are no doors that are being closed. The only fact is that there's nothing further that the company can do without the *CCAA* and without the testing of the market to determine where the value truly lies.

So, My Lord, with respect to the approval of a sale procedure, the law was set out in our initial order brief and we referenced both the *Nortel* decision, which sets out the test for approval being, is a sale transaction warranted at this time? Will the sale benefit the whole economic community? Do any of the debtors/creditors have a bonafide reason to object to a sale of the business? And is there a better viable alternative? And My Lord, our submission is that the company has done everything to satisfy each of those tests. There is nothing further than can be done other than to attempt the sale of these assets to see what the value is, if we are so lucky as to receive an investment proposal that can be transacted, then that's available. No doors are being closed at this stage.

If you look, My Lord, at the *Sanjel* decision of this Court, which is at tab 7 of our initial order brief, in that case the Court talks about being required to balance the numerous constituents and myriad interests that are in front of them. And specifically notes that with the amendments in 2009 and section 36 of the *CCAA*, there is no jurisdictional impediment to a sale of assets where the sale meets the requisite test being the *Nortel* test that I just outlined; even in the absence of a plan. My Lord, I'm at paragraph 60, 61, 65 and 66 of *Sanjel*.

And in this decision, the Court specifically notes that a Court approved -- a *CCAA* court approved sale process allow the company to maintain its liquidity, without having to worry about set-off from its first lien lenders who have security over all of its assets, including its bank accounts and being able to hold the enterprise together to achieve the most value for all of the parties, particularly, in the current commodities downturn that is being experienced by many, many oil and gas companies in Canada.

THE COURT: I'm not sure anybody disagrees with that. As I understand it, the issue here is the fresh claimants say look, this is not a process which will attract the best offers and that really what's going on is that this whole thing has been, not fixed, but skewed so that there is enough time for people to get their act

together to put in a bid that will exceed that of the credit bid.

MS. BOURASSA: My Lord, that is, in fact, what I thought they were saying in the initial application. Now, they seem to be saying that there shouldn't be a sale process and so I wanted to respond to that and say there's no basis upon which to avoid a sale process. We cannot -- there's law that we've included in our materials, including the *Stelco* decision and the decision of Justice Topolniski in the *Kerr Interiors* case, as well as the *Nelson* case that say you can't just wait and see.

They seem to be saying we should get an $80 million DIP loan from who, I don't know, so that the company can run a drilling program in the hope that the drilling program will be successful. And so this is where I say, this is -- these are all attacks on the business judgment of the company. They have spent a lot of time thinking about how to move forward and as far as the sale process, My Lord, the issue here is that the company has determined this is the appropriate path to go on. The company has determined the sale process is the appropriate path. They have consulted with their secured lenders who have security over the collateral, they have consulted with independent advisors.

One of the documents, My Lord, that is included in our reply brief is the fairness opinion that was provided by RBC Capital Markets to the Board of Directors with respect to the *CBCA* restructuring. And in that fairness opinion, RBC Capital having reviewed the company and its assets and liabilities and capital structure, determined that each of the secured noteholders, the unsecured noteholders and the shareholders, would be in a better financial position under the *CBCA* plan than if the company were liquidated.

So my friends will say that there was some value being given to shareholders in the *CBCA* plan and of course, by nature of the *CBCA* plan, there was. But, My Lord, the company did everything it could to attempt a settlement of the unsecured noteholder, the oppression claim at litigation in advance of the meeting, and was not able to get there and still determined that moving forward with a *CCAA* and with a sale process was the right path to follow.

So they consulted various experts. They consulted RBC, the Board of Directors did, they consulted TD Securities. They consulted the Monitor and everybody in that group said, yes, this is a proper sale process. This is a proper sale advisor and this sale process will engender the best results in the circumstances, recognizing that the company has been marketing some of its assets since 2014, started the sale and investors solicitation process in July when it kicked off the *CBCA*.

And so, My Lord, if I can just point you to a few of the cases that speak to -- speak to the business judgment rule and the fact that the law is very clear and *CCAA* courts defer

to the business judgment of officers and directors in insolvent companies. The *Peoples* case, the *BCA* case, all stand for the principle that the Court should be loath to interfere with the good faith exercise of business judgment of officers and directors of a corporation.

And then there are further cases and this is in our reply brief at tab 2, My Lord, where the Court goes on at paragraph 60 and says, you know: (as read)

> The Director's actions are not to be judged against the perfect vision of hindsight, they should be measured against the facts as they existed at the time the impugned decision was made. The Court should be reluctant to substitute its own opinion where the business decision was made in reasonable and informed reliance on the advice of financial and legal advisors appropriate retained and consulted in the circumstances.

And My Lord, I say this is exactly that case. If you look at the *Pente* decision at tab 1 of our reply brief, paragraph 36, My Lord: (as read)

> The decision need not be perfect, but need be reasonable.

In different circumstances, I'm sure the company would be quite happy not to be in *CCAA*. However, it is insolvent, it is default of not only it's first lien credit agreement, but, also its secured note agreement, indenture and its unsecured note indenture. It has failed to make interest payments under any of the indentures. It has declared insolvency which is a default under many agreements.

Particularly, at the bottom of paragraph 36, it says:

> The fact that alternative transactions were rejected by the Directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction.

The fact, is My Lord, the company has attempted to complete a different transaction that was the *CBCA* transaction. And they have been unable to do so because they could not reach agreement with the unsecured noteholders, which is why this sales process is even more important because it is difficult to bring parties together when there are differing views of value. And the sale process will show us, who is in the money and who is out of the money.

And we hope that that will bring people together to something that can be some sort of consensual resolution, but it may simply show that the unsecured noteholders like many unsecured creditors in many files ongoing in Alberta right now, are out of the money. It would not be surprising.

So in short, My Lord, with respect to the test in *Nortel* and the sale process, the company has met the test, it has determined in the good faith exercise of business judgment and with the advice of experts that have been retained for this purpose, that this is the correct path and that decision is entitled to deference. The plaintiffs, who are litigants and have not accepted the proposal that was put forward to them in the *CBCA* or the in subsequent discussions, shouldn't be allowed to derail these proceedings.

The proceedings are being undertaken for the benefit of all of the stakeholders and after a long list of failed attempts, which have been set out in the materials and as I said, this has been an ongoing process for many years. The senior creditors are supportive and the consultants and experts who have been consulted in this matter, including the court officer, the Monitor, who is an independent party; are all supportive of the sale procedures as set out and as attached to the initial order that was granted on September 26.

With respect to the credit bid, My Lord, my friends argue that that chills the process. This is not a stocking horse bid, My Lord, there are no -- there are no -- there's no topping bid that will be made. That is clearly set out in the sales procedures. There's no break fee, there is no minimum incremental bid. This is simply what my friend, Mr. O'Neill said on the 26th, a secured creditor exercising its inalienable right to take the collateral in forgiveness of its debt. And what they're saying is, if the bid does not come in above the secured debt, we would rather take the collateral than suffer a shortfall. And that is every creditor's right, whether it was in the initial order and sale procedures, or not, that right would be there.

THE COURT: So the only issue is whether there is some other reason why the interested bidder wouldn't surface before the end of the year -- or by November 21st, I guess, is mentioned here.

MS. BOURASSA: And, My Lord, let's remember the Phase I deadline is for non-binding indicative offers, indications of interest, are what are being asked for. Both the sale advisor and the Monitor, are of the view, that given the assets and given the period of time they've been marketed that that's sufficient time for parties to put in an indication of interest, a non-binding indication of interest.

And, My Lord, I would like to add on a couple of points, particularly one of the objections related to the fact that a security review had not been completed. You will see

in the Monitor's first report, that the Monitor reports its independent counsel has completed a security review with respect to the B.C. and Alberta assets. Independent counsel has been retained in Saskatchewan and they are expecting to have their opinion, I think as early as today, but in their preliminary review there were no issues. So I think that whole issue can be put to the side.

There is also an issue raised with respect to the make whole payment. And My Lord, we touch upon this in our brief from last Wednesday, where we say, the amount of the make whole payment being claimed, it is a contractual right, of the second lien, it's contained in their note indenture. Last year in the *GasFrac* proceedings Justice Strekaf looked at a make whole provision in a credit agreement there and was of the view that it should be paid out.

It we really want to get into a dispute --

THE COURT: Just in the -- (INDISCERNIBLE) -- what are we talking about -- what is the make whole agreement? What is the purpose of it?

MS. BOURASSA: Well, so My Lord, in the materials, it is a moving target, it does increase depending on when the payout occurs. But, in the materials, it's listed at $48.2 million US, which is approximately -- call it $60 million Canadian, but in short, it is less than 5 percent of the illustrated value of the credit bid, as set out by the Monitor.

THE COURT: No, what's the purpose of it? What is it?

MS. BOURASSA: Oh essentially, My Lord, it is essentially, call it a cost of funds. The indenture goes out to 2018 or 2019, and if the indenture holders are paid early, then there is a make whole which, you know, we would say is their genuine pre-estimate of damages for not getting their incremental interest over the further period.

Mr. (INDISCERNIBLE) can probably speak more to that, but in short, I'm raising it merely to say, it's a red herring in this whole picture. Either they're entitled to it, or they're not entitled to it. If they are entitled to it, they will either get it from the distribution or proceeds or they will get it as part of their credit bid, but it is such a small piece of the total illustrated value of that credit bid that we would argue, it doesn't make any difference to bidders.

If we have somebody coming in with a bid that is within $60 million dollars of the illustrated value, then we can come back and argue this point. If there's a question as to who the successful bidder is, because we don't know what the value of the credit bid is,

that can be determined. But, it's a contractual right that the 2-L's have and it's in a document government by New York law, so if we start going down the path of whether or not it's payable, we're going to have to go into expert evidence on that.

But, I'm just going -- it doesn't -- it doesn't impact the process and as was set out in the confidential supplemental to the Monitor's first report, it's not an issue that the sale advisor sees as impacting the sale process or the integrity of the process in any fashion.

So My Lord, on that point I'd like to turn to the company's selection of a sale advisor. And the plaintiffs have raised the spectre of conflict on the basis of no evidence. The only evidence's before you is that TD Securities, in fact, it's not in evidence but I think we all accept it; TD Securities is an affiliate of the Toronto Dominion Bank. Just like CIBC Capital Markets is an affiliate of Canadian Imperial Bank of Commerce et cetera.

They have no objection to the qualifications of the sale advisor and if I can turn your attention to confidential Exhibit A of the Monitor's Report, TD Securities in response to some questions from the plaintiffs, had an opportunity to provide some further information with respect to both their qualifications and the sale process and their view of the sale process.

And, My Lord, they are currently considered one of Canada's leading MNA advisors and over the past ten years, with respect to both public and private energy companies, they rank as the second most active MNA advisor by deal volume. Everybody knows that TD Securities in Calgary, has a speciality in oil and gas. The Monitor is of the view that given the nature and quality of these assets, that TD is particularly well suited to be the sale advisor.

This is really just a delay tactic, My Lord, and we note in our brief and I don't want to spend too much time on it, but as I said, TD Securities is an affiliate of the Toronto Dominion Bank. They're separate corporate entities, but they're affiliated. Who else would my friends have us use? Every other major Canadian bank is either in the existing financing or in the exit financing. And in fact, the five major Canadian banks being, TD, CIBC, Bank of Nova Scotia, Royal Bank and Bank of Montreal; are all in the exit financing.

So My Lord, the company has again exercised its business judgment to select an expert at marketing this size and quality of assets and my friends criticize that selection for no reason, other than the fact that it is an affiliate of one of the banks who's in the credit agreement. But, as I said, if that were the test, who would be left?

THE COURT: Well, when was TD Securities retained?

MS. BOURASSA: They were retained in late May, My Lord, with a view of commencing the SISP which commenced in July and that's in the initial order affidavit.

THE COURT: And when did the -- when did the argument surface as to there being in a conflict?

MS. BOURASSA: My Lord, to my knowledge, it surfaced last week on the 26th when we were before you. There had been some objection -- I do want to be clear there had been some objections to the fact that the company had commenced a SISP in July, that the plaintiffs had brought forward and I don't know if that is in evidence before you. But, there was that objection but we were not aware of an objection with respect to the selection of the sale advisor until last week.

So My Lord, my view is that this is just an attempt to poke holes in the process. My friends rely on various cases, these are included in their from a September 26 hearing, there's the *Winalta* decision, which is a decision of Justice Topolniski and there is the *Nelson* decision which is an Ontario Court decision. There's also *GuessLogix*; all three of those cases, My Lord, relate to objections with respect to independence of the Monitor or the proposed Monitor, where the Monitor has had some other role. So in *Winalta* the objection dealt with the Monitor providing reports to the senior secured lender. In *Nelson* the objection related to the fact that the proposed Monitor in that case had been advising the company on a disposition strategy for a good two years before the *CCAA* commenced. In the *GuessLogix* case it dealt with the proposed Monitor having looked at some valuations and been specifically involved for that expert purpose prior.

These cases are not the case before you. I agree that bias or perception of bias of the court officer, is of utmost importance to *CCAA* proceedings. This is the sale advisor that we're talking about who comes from a limited pool that we can choose from. We've chosen someone who is an expert with respect to these particular assets and this size and quality of assets, we have our court officer, who is independent and whose independence has not been questioned, who will be overseeing this process, who has reviewed by the retention of the sale advisor and also the sale process being put forward and is of the view that they're reasonable in the circumstances.

My Lord, if I can move now into the category of what I call "other" and I might -- I would deal with them in a different order, just because they're a couple that I can knock off fairly quickly recognizing the time and everything we need to accomplish today. One of the issues that my friends raise is that there should be some sort of direct recognition that the support agreement is an agreement that can be disclaimed. My Lord, nobody is

saying to you that the support agreement is not an agreement that could be disclaimed. If the company were to breach the support agreement, it would be merely one more agreement that it has breached in a long string of them. As I noted, we are currently in breach of the credit agreement, the 2-L indenture, the unsecured indenture.

But this is really just another attack on the company's business judgment. The support agreement provides the company with a backstop and that is what the Directors and Officers of the company determined was appropriate in the circumstances. They did not want to do a freefall into a *CCAA*. They have a backstop, it provides certainty to their employees, certainty to contractual counterparties with respect to the future of the Lightstream Group and that there is a plan and that the plan will be carried out and carried out in fairly short order. Either the assets will be sold to a third party in packages or together, or they will go to the secured lender who has security over all of the assets. That is the backstop. It avoids the freefall and avoids the uncertainty that would come with it and the company was of the view that that was a better alternative than simply filing for *CCAA* protection and saying to the world, we don't have a plan, we need some time to formulate a plan.

The company has a plan. It's already exhausted all of the other options available to it including a debt for equity exchange which my friends say in their materials is what we should be considering. We did consider that. That was our *CBCA* plan.

Another short issue is the payment of interest to the first lien. My Lord, there is nobody attacking the requirement that interest be paid on the first lien debt. The company has sufficient cash to make those payments. If the company doesn't make those payments, than as with every other credit agreement that I've ever read, interest will just start to accrue on the unpaid interest, which will have the effect of making the claim of the one L's, bigger than it would if we just pay their interest in the normal course. To me, that argument is actually contrary to the interests of the plaintiffs in that they get nothing unless the secured creditors are paid in full and whether they can make out their case for this re-characterization such that they should be in the secured class, they're still behind the banks. And so any way you slice or dice it, it should be indifferent to them that we pay it and the company has made an agreement and is of the view that paying it, as opposed to letting the 1-L claim grow larger over the course of these proceedings is the right course of action.

So My Lord, the two -- two matters that are -- take a bit more time are the issues with respect to my friends asking that their fees be covered in the administrative charge. And we deal with this at paragraph 45 of our reply brief filed last Wednesday, where we list various reason why the company is the view that it is not appropriate and not reasonable in the circumstances to pay the legal and -- I guess it's just the legal fees are being asked,

the legal fees and disbursements of the plaintiffs.

THE COURT: Sorry what paragraph?

MS. BOURASSA: It's 45, My Lord. So first of all, My Lord, they are two of the unsecured noteholders. We agree that they represent a large portion of the unsecured noteholder class, but they are not an ad hoc committee, they are not seeking to represent the interests of all of the unsecured noteholders. What they are doing is seeking to advance their litigation and advance the argument that they, in fact, are part of the secured class.

And My Lord, without going too deep into the litigation aspect because my colleagues and friends are dealing with that much more -- much more knowledgeably than I am, but the crux -- the crux of the misrepresentation that is alleged in the plaintiffs' claim is that there were -- there were representations made to them. They allege there were representations made to them, they were not public representations.

And so, My Lord, to the extent that these alleged representations were made, they're the only parties that heard them. It would only impact their reasonable expectations. They do not represent a class. The actions are seeking a remedy only for the plaintiffs and not for the entire class.

They've indicated both in their materials filed and in Mr. Simard's submissions on the 26th that they may submit a bid in the sale procedures. No other bidders are having their fees paid and it would, in fact, give them some sort of undue advantage. Further, other pari-passu creditors, other unsecured creditors are not being paid.

So My Lord, we will take the point in their brief with respect to section 11.5(2) and the ability of the others who are -- who are proposed to have their fees paid in the admin charge being the first lien lenders and the second lien lenders and counsels to the Directors and Officers; those parties have not necessarily shown that there is some inability to participate in the proceedings. That was the gist of some of the questioning that my friend did of Mr. Scott on his affidavit. But, there are two key differences here.

With respect to the Directors and Officers, I would say they are the same as the company effectively and there is a reason that the company's counsel is paid and it's to allow these proceedings to advance. With respect to the first and second lien lenders, however, there is both a contractual requirement to pay them and there's the fact that they're secured creditors, My Lord. They are entitled to be paid in full prior to any distributions to unsecured creditors.

So, even if there were some merit to my friends' arguments with respect to being included in the class and with respect to working within these proceedings or they refer to the *Argent* case where the Court held that there was a value being given by the unsecured creditor group in that proceeding; even if they could -- they can't meet that threshold is our argument and even if they could, we have a simple priority issue here.

They have proposed that only the restructuring related fees be paid to a CAF and the Monitor has considered this and has spent some time in its first report, reporting on both the request and its consideration. And if you look to paragraph 30 of the Monitor's report, the Monitor there says that, you know, it would consider supporting a charge if and there are five "if's" that need to be dealt with. And the first is, that it be separate from the admin. The second that it be ranking behind the first lien lenders. The third is that the amount is limited to a reasonable and defined amount. The fourth is that the plaintiffs' counsel provide additional information with respect to its overall representation of the unsecured noteholder class. And the fifth is that and this is -- this is key, the fifth is that the fees are limited specifically to restructuring related matters and exclude any fees associated with submitting a bid or the oppression litigation, including the determination of the threshold issue.

So that was at 30, My Lord, which is on page 11.

THE COURT: Yes, I see it.

MS. BOURASSA: And then the Monitor goes on to say that additional consideration would need to be given to whether the oppression litigation efforts and related costs could practically be separated and My Lord, we say they cannot. It is very clear from the materials that the plaintiffs have filed that it is that litigation that is driving their actions in these proceedings and if you look at the briefs they've filed, at least half of every brief deals with the oppression litigation. If you add onto the fact that they intend to make a bid or that they're contemplating making a bid, how you can possibly carve out this little box that deals with restructuring related efforts from everything else, is -- is just not possible.

My Lord, that leaves me with the last major heading that I wanted to touch upon, which I wasn't clear when we received the brief on Thursday what the position on this was, but I have had it clarified for me and that relates to the financial advisor's charge. My friends continue to object to the financial advisor's charge, which is the sixth charge for $19.4 million and My Lord, they rely on various cases and particularly the *Walter Energy* case, which I will turn you to when I put my hands on it. So they refer to the *Walter Energy* case and this is at tab 17 of their September 26th brief, I think it's also attached to their October brief. But, I will go there in a minute. I first want to take you to some of the

facts on this.

The Monitor's pre-filing report considered the financial advisor charge that was being sought and what they said was that the total charge being sought equates to approximately 1.5 percent of the total transaction value of the secured noteholder credit bid. And they were of the view that the fees were approximately the mid-point of the data that they reviewed in respect of other similar cases and accordingly, the Monitor was of the view that the proposed charge was reasonable in the circumstances.

This was one of the information requests that came to the company -- came to the Monitor and was relayed to the company and this -- there was a memo prepared by FTI in its capacity as Monitor and it was put to Mr. Scott on his questioning and was entered as a confidential exhibit. And so this is -- this is a memo dated September 30th and I think the evidence is, it was delivered on October 1st. But, in this memo, the plaintiffs' counsel had requested additional information with respect to the financial advisor charge and in particular, a breakdown by institution and information on the role. Now, My Lord, the --

THE COURT: Is this the tab number -- what is this tab 8, the confidential exhibits?

MS. BOURASSA: Yes, My Lord, that's right tab 8. So if you turn to the third page at paragraph 10 and first of all, I would note, the actual amount of each -- the amount attributable to each of the four financial advisors, that information was included in Mr. Scott's first affidavit by virtue of the fact that the engagement letters were attached. But, we did go and put together how the charge was made up.

But, what you will see here, My Lord, is the company's provided a description both pre-filing and post-filing of what each of these financial advisors is intended to do. So TD Securities is obviously the sale advisor. They are lead FA on the sale process. Evercore was retained with respect to the *CBCA* proceedings and was fully engaged right up until mid-September with negotiating with plaintiffs, in fact, trying to find a way to bring forward a successful *CBCA* restructuring and to the extent there is an investment proposal, such that there is the ability to do a plan in these *CCAA* they will be involved in that.

RBC is the independent financial advisor to the Board of Directors. As noted earlier, they provided the -- they provided the fairness opinions with respect to the *CBCA* plan and they will provide advice to the Board. This is still a public company, My Lord, with a Board of Directors who must, during these proceedings, continue to act in the best interests of the corporation and require advisors in order to ensure that they're properly

fulfilling their duty. BMO then is the last one and BMO is engaged by the second liens. So My Lord, this is just our understanding of what they do, but in short, they're the financial advisors to the second liens and their fees would be part of the enforcement costs of the second liens and secured by the security.

So, My Lord, if I can take you to the *Walter Energy* case then that my friends have provided to you and that is a case of the B.C. Court, in that case there was both a -- there were two financial advisors whose fees were sought to be approved and a charge created. One was PJT Partners who was acting as sale advisor, the other was a chief restructuring officer who would be assisting the company and moving forward its restructuring efforts. In that case with the two financial advisors, the charge sought was about $10 million. And if you turn to paragraphs 43 through 47 of that case, My Lord --

THE COURT: And that again was tab what?

MS. BOURASSA: It's is -- it's in the September 26 bench brief at tab 17 and that's the brief of my friends.

THE COURT: Yes. Okay.

MS. BOURASSA: So the law that Justice Fitzpatrick sets out is the same law that had been cited in all of our materials with respect to approval of the fees. It goes back to the *Canwest* decision, but in this case specifically dealing with two financial advisors being retained and their fees being approved; she says at 43 that she: (as read)

> . . . is satisfied that the . . . assets and operations are significantly complex so as to justify both these appointments and the proposed compensation.

And My Lord, we would say the same is true here, there is a complicated capital structure and each of these financial advisors has a different role. But paragraph 44 is an important paragraph and it's the paragraph that my friends cite in their materials and she says: (as read)

> The factors relating to the proposed role . . . and whether there is unwarranted duplication can be addressed at the same time. [she says] . . . there will undoubtedly be some duplication with the involvement of the Monitor, PJT and the CRO. However, the issue is whether there is unwarranted duplication of effort. [she then goes onto fine that she's] . . . satisfied that the process has been

> crafted in a fashion that recognizes the respective roles of these professionals but also allows for a coordinated effort that will assist each of them in achieving their specific goals.

She then goes onto note that she was not referred to any material that indicated that the proposed -- this is at 45: (as read)

> . . . that the proposed compensation was inconsistent with compensation structures and protections approved in other similarly complex insolvency proceedings.

And My Lord, I would say that the Monitor has reviewed that and in fact, has said that these would be in line with other cases. She relies on the fact that the secured creditor is likely to be affected by the charges, have been given notice and do not oppose. That is the case with the second lien, these charges will rank in priority to their claims.

And finally, she refers to the fact that the Monitor is of the view that the agreed compensation and the charge is appropriate. And so My Lord, I would say that we have met all of those tests and it is appropriate in the circumstances for the financial advisor charge to be approved.

So My Lord, subject to any questions, I have no further submissions on the matters I understand to be at issue on the comeback. I thought it may make the most sense to allow other parties to respond to that and then we'll deal with the threshold issue after?

THE COURT: Yes. So does anyone else want to be heard on these issues, before I call on Mr. Simard?

MR. ANDERSON: My Lord, it's Robert Anderson.

THE COURT: Mr. Anderson, yes. I've got Mr. Bish -- is that?

MR. BISH: Yes, Bish.

THE COURT: Yes, Mr. Bish is that -- do you want to be heard on this issue, Mr. Anderson.

MR. ANDERSON: Absolutely, I just wanted to just at some point before the (INDISCERNIBLE) -- parties --

THE COURT: Okay, we'll keep that in mind, we'll get back to you. Thanks.

MR. ANDERSON: Thank you very much.

Submissions by Mr. Bish

MR. BISH: Thank you My Lord, good morning. David Bish, from Torys on behalf of 16 lenders comprising the first lien bank syndicate led by Toronto Dominion Bank as agent.

THE COURT: Right.

MR. BISH: We do support and adopt the submissions of Ms. Bourassa, in a position set out by the company in their brief. A couple of points that we would like to hit on that are of particular relevant to the lending syndicate.

I want to first just address the dynamic of this hearing and the nature of the issues that have been thrown up. I take no issue and I'm not at all critical of Mr. Simard's submissions or positions; it's entirely understandable that they are doing what they are doing. It's what I would do if I was in their position also. If you act for someone who is out of the money and in their brief, they submit that in this process, with this credit bid, they do not expect to be in the money. You do one of two things, you throw out the lot of issues and you see if some of those gain traction so that you can gain leverage in the hopes that you will be able to leverage some consideration being thrown your way so that you will no longer have a zero recovery.

And you do that by fundamentally threatening the economic wellbeing of those who are in the money, so that they will feel sufficiently threatened as to provide you with compensation. So you threaten the company, you threaten the banks interests, you threaten the secured noteholders interests and they, in turn, if you do succeed in gaining that leverage pay you something.

The other thing you do, is you try to kick the can down the road because you have nothing to lose by kicking the can down the road. Let's just wait six months, nine months, because maybe things will have improved, maybe we'll be in the money then.

Both of those are fundamentally problematic for stakeholders in the money, such as the lenders and the lenders do, of course, have issue with that. There's never been a court in Canada that has treated industry wide distress with a viewpoint that the way to handle it is to just suspend insolvency and wait for the industry to recover. Steel right now is in

terrible position, we see US steel selling its assets, even though steel is at a terrible price. We see Algoma currently selling their assets even though steel is at a terrible price. We've been forestry go through the decline and we've seen lots of sale there. Nobody puts off of sales. We've seen mining recently in B.C. and Alberta and Quebec, nobody puts off those sales. That's not the solution to the distress, to simply -- to somehow try to suspend and stay everything until the market comes back.

What's fundamentally problematic about that approach, My Lord, is that it mismatches risk and reward. If -- and I don't want to get into an argument about numbers and relative merit, so let me just call it 50/50, just for the sake of argument, if we waited nine months and it was 50/50, that oil would be better and value might increase for these assets nine months from now; that's a risk that my clients don't wish to take. That's a risk that the unsecured noteholders currently being out of the money face no downside in taking.

And so they're here, asking the Court, to put out the sale process in some way or form, either stop the sale process or change the dates, but put it out. Force the creditors who are above us in affecting order and the company, to take a risk. If nine months from now there's no further value in the company, oil has declined, this is of course a wasting asset as oil comes out of the ground it's not being replenished, they lose nothing. They have zero now, they have zero nine months from now. But, we stand to, of course, be in a worse position and that's a risk we're prepared to take and it's not a risk that a subordinate creditor should be permitted to force on a company or on its senior creditors.

Both these unsecured noteholders are clearly very sophisticated parties. They understand capital structures and they understand where they are in the capital structure. They agreed to take an unsecured position in this company and they knew and agreed that there would be secured debt ahead of them in this company and they're presumably compensated for that. They take the risk that they will be out of the money, as an unsecured creditor, and the economics of their deal reflect that risk and they've taken that risk and they know where they are in the capital structure. They cannot now upset those who are higher up in the capital structure simply because they do not like the fact that this particular investment has gone wrong for them.

So you mentioned earlier that there was a lot in the briefs. We too found that it jumped around in the briefs and I think that's understandable, it's something of a kitchen sink approach, throw up a number of issues, as I say, see what sticks. There's a suggestion throughout that there are threads that you can pull at and there'll be no consequences if you just change this, change this, cut off interest, make this change, make that change. One of the undercurrents to my submissions throughout is that all of those threads are very much part of a whole, in that there is a very much a risk that as those threads get

pulled, there is significant unravelling of what has been a tremendous amount of hard work and what is a tremendously promising position for the company that it finds itself in, given that these are dire circumstances, no question, that it is insolvent. But the restructuring that the company has been able to put together prospectively is a tremendously positive outcome and it has been hard fought.

Allow me to speak to the five issues or threads that were thrown out that are of direct interest to the lenders. The first and one of the most important, maybe the most important is the suggestion that the sale process ought to be, in some way, stopped or suspended or altered. That is of tremendous concern to the lenders. The lenders have, from the outset, wanted to see a sale process that will dissolve itself on a reasonable basis with a meaningful timeline.

In our brief, we go through some of the background and history of the dealings between the company and the lenders. In paragraph 15, we talk about the first forbearance agreement that was entered into in July, mid-July of this year. And in that first forbearance agreement, it was fundamentally --

THE COURT: Sorry, you said what paragraph?

MR. BISH: It's paragraph 15 of our brief, My Lord.

THE COURT: Okay.

MR. BISH: And it was critical, this is again July -- and just to back-up, there was a borrowing base shortfall, I'm sure you read that, but just to flag it. There was a borrowing base shortfall back in April. As of April, the borrowing base was re-determined to be $250 million. There was $371 million outstanding at the time and so, of course, $121 million was due and payable to the lenders as of April.

THE COURT: That was a right given to the lenders in the agreement?

MR. BISH: That's correct and the company had 90 days in which to make that payment and they did not make that payment and that was an event of default, but the lenders have been owed since April that payment amount of $121 million.

And so when we had these discussions about a first forbearance in July, because we had hit the point where the 90 days was coming due and it was not going to be paid, we agreed to enter into this forbearance agreement and fundamental was that there be a sale process. And schedule A to the first forbearance agreement, you'll see it paragraph 16,

set out milestones to met by the company with respect to advancing a sale and you'll see that the closing of transaction had to happen by December 31, 2016. That was a critical date for the lenders and this is long before there was exit financing, this was an early on date right from the outset the lenders were focussed on this.

And we had a lot of discussion about what a reasonable sale process was and you'll see in paragraph 17, we were live to the issue, we did not want someone to come back later and say, as I think my friends at Bennett Jones are now saying, that the company never like this sale process, didn't want to run this sale process, but had a gun put to its head and had this sale process forced on it. We had an acknowledgement in the first forbearance agreement, again from July, that the company and its advisors had very carefully considered and determined that this was a reasonable process. This was not something that we again forced on them by the lenders against their wishes and will.

And then you'll see in paragraphs 24 to 25, there was a subsequent second forbearance agreement that was entered into. The second forbearance agreement was entered into in September and it again indicated that there had to be a continuation of the sale process, you'll see again in paragraph 25, the schedule that was attached to the second forbearance agreement referring to the timeline again. Again that December 31st all important date.

We are very concerned with missing the December 31st date. That is critical to this restructuring. It has always been critical for the lenders; it has been the quid pro quo for their supporting the company throughout this process. The second forbearance agreement, of course, remains in effect currently.

And that December 31st date is also an important date in the exit financing. And I want to be clear, the exit financing is being provided by five lenders that I do not act for. I do not speak for the exit lenders; I did not negotiate that commitment letter. There has been a separation of the existing credit facilities and the exit credit facilities.

But that exit financing was fundamentally important. And just to highlight the reason for that importance, the credit bid doesn't take care of the first secured debt. So it's only a partial solution. The credit bid will provide for dealing with the assets in business and the debt of the second lien secured noteholders, but it doesn't provide cash to repay the existing first lien bank lenders. The restructuring only works with the new money being provided by new lenders. Otherwise the credit bid is only a partial solution. They would acquire a company that immediately owes $371 million to lenders that's in default. And so they, as well as we, needed a solution that dealt with the bank financing and the credit bid by itself didn't do that. The exit financing provides $400 million of cash to the company and $371 approximately of that, will be used to repay the existing debt.

Without that exit financing this restructuring doesn't work and it's critical. And it is quite an accomplishment, frankly something of a minor miracle, that the company was successful in obtaining that financing. You'll see it in our chronology in paragraph 18, 19, 20 as we went through the forbearance, what was critical in all of that -- maybe I'll take you to 21, you'll see, they have that exit financing, there's 16 institutions in the existing credit facility, there are 5 institutions in the new facility, 4 of those are as Ms. Bourassa made reference to, in the existing facility, 1 of those lenders is a new lender.

And it was critical in the first forbearance agreement that there be exit financing because we needed a solution that would repay us and we weren't interested in pursuing a path that didn't provide for that. And so, one of the fundamental milestones in the first forbearance agreement was that the company needed to have exit financing obtained. And on July 27th, the company entered into a first amendment to the forbearance agreement because they did not have the exit financing, despite great effort to try to get it, they didn't have it. So on July 27th, there was an extension of time to give them more time to try to get it. And we came back again on August 5th and we did a second amendment to the first forbearance agreement, because the company still had not been able to find any lenders willing to provide the kind of money necessary to make this work.

And on August 9th, the first forbearance agreement terminated because the company was not able to provide exit financing. It still had not secured it, despite great effort by the company to obtain it. And so we actually had a period where there was no long a forbearance because there was no exit financing and it was pivotal to the continued forbearance and cooperation of the lenders.

August 26th, is when the company came up with that exit financing commitment letter and as I say, it was a tremendous effort. There is huge risk to this company and to the restructuring if that exit financing is lost. And that exit financing requires that there be a cleaned up company and a cleaned up balance sheet by December 31st. Those lenders are only prepared to lend to a company that has a very different balance sheet, than the balance sheet the company currently has.

And I point out a last important fact about that exit financing and it goes to the point, which is really my second point, about disclaimer of the support agreement and issues about the support agreement. Why does the support agreement matter to the lenders? It matters to the lenders because it provides a backstop, it provides a transaction that will see the lenders repaid in full, but importantly one aspect of that is that it provides additional money to the company.

And if I may explain that statement. The company was able to obtain a commitment letter for $400 million of financing and I mentioned $371 million of that would be used to

pay out the existing lenders. That doesn't leave the company with very much remaining in cash. In fact, it doesn't leave the company with enough cash, but the lenders have said, we're not giving you more than $400 million and so you have to come up with and it's a condition of the exit financing, you have to come up with additional capital, subordinate to those new lenders to properly capitalize this company.

And the secured noteholders have agreed to do that. They've agreed to provide an additional $50 million of capital and that financing commitment from the new lenders is conditional on that $50 million of new money being put up by the noteholders. So that there will, if you will, the company is going to -- on closing of a transaction, if it proceeds to be the credit bid that closes, they would have $450 million of new money, $400 from new bank lenders, $50 million are from the secured noteholders and they'd use $371 million to pay off the bank debt and they would then have a sufficiently -- an adequately capitalized company to go forward.

And so the importance of the support agreement to the lenders is that we do not want to see that commitment to provide the additional $50 million lost because that would cause the commitment letter financing to be lost. As you can see, all very heavily integrated, you start pulling at threads, you change this over to here, we'll take this away from the secured noteholders, the support agreement might fall apart, who cares? It all starts to unravel, that's the danger of it.

The third point that was raised in my friend's brief in objection to the initial order, was to interest payments being made. And I want to just address the interest payments being made to the bank debt. It's extremely important to the banks, they negotiated that from the outset and there's a number of reasons for that, from the bank's perspective. Ms. Bourassa spoke to the value the company gets by not having to pay interest on top of interest, but there's also a value to the banks. If -- in very simplistic terms, if the loans continue to have interest paid, they continue to be performing loans. If interest is not paid on those loans, they become non-performing loans and that has a significant impact on the lending institution, including for regulatory capital purposes and so there's real value to lending institutions maintaining that payment of interest payment.

Importantly, what happened back in July, was that the company and the banks negotiated about, whether or not, to leave the company with cash. And my friends make a great deal out of the fact that the company has cash presently and they suggest because the company has cash, it should be allowed to run for a lot longer period of time. We, the lenders, intentionally left the company with cash and there was, a Ms. Bourassa knows, tremendous amount of discussion about whether that cash would be swept. I mentioned $121 million was owed to the company as a borrowing base shortfall, the lenders were within their rights to take all of the company's cash. They could've had zero cash and

the company's concern with that was, it would need a DIP, it would be value destructive, it would force them into a premature filing, it might even interfere with the *CBCA* path, it would be expensive, there would be additional costs and charge to DIP financing, there would be additional complexity before the Court.

And so, there was a negotiated resolution in which the lenders said, we will leave you with this cash, but we're not leaving you with this cash so that you can indiscriminately spend it on whatever you want, we will leave you with the cash, you will not need a DIP from us and then we will go forward with this restructuring plan. And one of the things you're going to do with that cash, is you're going to pay us interested, we're leaving you cash and you'll use some of that cash to pay us interest payments going forward. All part of a package of negotiated resolutions to these problems going forward.

If I can take you to paragraph 26 of our brief, which quotes from the second forbearance agreement.

THE COURT: Right.

MR. BISH: And it was in the first forbearance agreement, but I'm taking you to the one that's currently in effect. And you'll see, 1, 2, 3, 4, 5, 6 lines down a sentence that begins: "If the *CBCA* restructuring cannot be affected".

THE COURT: Right.

MR. BISH: We agreed with the company, what the *CCAA* would look like and we would support the *CCAA* and this forbearance would continue into the *CCAA* and you'll see there's a very high level agreement between the parties as to what the *CCAA* would look like and specifically the order.

The order would be satisfactory to the lenders, including -- they would include approval of a sale process, which we've talked about. II: The lenders would be unaffected. III: It would provide for the payment of interest as and when required under the credit agreement. It's an express term of our forbearance agreement.

You'll also see while I have you there, the court ordered charges, to the extent that they would be in priority or pari passu with the existing debt would be satisfactory to us and importantly, there would be approval of a cash flow forecast that was satisfactory to us.

I will take you to one more place and that is, if I can take you to tab 4 of our brief, this is the actual second forbearance agreement itself.

THE COURT: Okay.

MR. BISH: At page 18 of that forbearance agreement --

THE COURT: Yes?

MR. BISH: -- you'll see at the bottom of the page, IV: Spending restrictions. Very important. We're going to leave you with cash, we're not going to sweep it, but you don't get to just take the cash and use it on anything you want, it has to be used prudently.

And effectively, the cash will be used in a manner that advances the business during a restructuring proceeding, but does not pay unnecessary things. And you'll see the list of unnecessary things; you won't make new material acquisitions or investments, new hedging activities, you won't consensually create further liens. And so there's a whole list of spending restrictions. And I want to flag the last one there, VII: You will not make any payment to or in respect of secured note indenture or unsecured note indenture, or the holders of the secured notes or the unsecured notes, including any payment of fees or expenses.

That was very important. We were not leaving money in the company so that it could then use that money to pay subordinate creditors who are out of the money. That's our cash collateral and the cash collateral being left with the company was not to be used for that purpose.

And that takes me to the fourth point that's been raised and that is the request that there be a charge to secure payment of fees of the unsecured noteholders. We expressly contemplated that and said, no, we're not leaving you with money to be used for that purpose. They are a subordinate creditor, they are unsecured, unless and until we are paid in full, they should not be paid.

Now, you'll see in the last sentence there, we did agree and this was heavily, heavily negotiated, we did agree that the secured noteholders would get paid their fees. And ultimately what we agreed there was that because they had an economic interest that was in the money and because they had a contractual entitlement to be paid their fees, it was a question of timing. They were going to get paid their fees, it was just a question of when, not if.

With respect for the unsecured noteholders, who may be out of the money, their submission is that in this process, they are out of the money. It's not a question of, they're going to get paid and it's just a timing issue. First, I'm not aware that there's any

contractual agreement unlike the banks and the secured noteholders, I'm not aware of any contractual agreement to receive their fees. But in any event, they wouldn't be getting paid their fees at any time, not now, not a month from now, not six months from now.

The last point that I would speak to, My Lord, and I know Robert is on the line and Robert is going to speak to it, actually I'd make one more observation about the fees. We had sort of flagged this, I guess, at paragraph 46 of our brief. Every creditor, let me just say this, every creditor would love not to have to pay their legal fees. There has to be a reason why the debtor company should pay those fees. You can't just it because that would be great. There has to be some reason for it.

In any of the cases where it has happened, it's happened because either it's a very vulnerable stakeholder like employees or pensioners and they're very vulnerable and there's a perceived need by the Court to protect a vulnerable party and to provide them with counsel that they might not be able to afford by themselves. These litigants are not vulnerable parties. They're quite capable of protecting their own interests.

In other cases it's been done, because as I say, people who are clearly in the money and it's just a question of timing, when they're going to get paid, not if they're going to get paid, the Courts are agreeable. There's a business judgment by the company as to who to pay and not pay and the Courts are respectful of that. And that happens in multiple instances and another example of that would be critical suppliers. The company can decide to pay some suppliers and not others, on the basis of the company's discretion as to what best advances its restructuring and the Court is respectful of the debtors' decision to pay some and not to pay others, because that's their -- that's their informed business judgment as to how best to advance their restructuring.

What doesn't happen is contingent litigation creditors getting paid to litigate. Bidders don't get paid to bid in the bidding process. Some unsecured creditors don't get paid while other unsecured creditors don't. I don't know how you draw the line between which unsecured creditors should get their fees paid and which don't.

And most importantly, we say, people who are contributing to the restructuring may get fees paid because they're adding value and because the company is -- the restructuring is being assisted and facilitated and advanced in some way. But, where they sole purpose of a party's submissions are to stop the restructuring, to derail the restructuring, you don't then pay them to do that. Not only do they have no risk because they believe that they're out of the money presently, if they don't even pay legal fees, they have absolutely no downside to trying to do everything within their power to, as I mentioned, either get leverage or kick the can down the road.

As you can see, there are two law firms represented, there's three partners in the court today, one from Toronto, there's another Toronto partner on the phone; these litigants have no trouble participating in these proceedings. Their fees are not being paid and it is not in any way restraining the significance of their participation in these proceedings.

So then the last point and I'm just going to touch on it very briefly and this is the point about replacing TDSI, as I mentioned, Robert is on the phone and he's going to speak to it. I don't act for TDSI and I'm not speaking for TDS1, the lenders, all 16 of them though, do have a concern with any disruption to the sale process. I've mentioned the importance of the sale process, I'll flag again the advisors that we have, as I understand it, the sale process has been developed with FTI, before its appointment as the Monitor, it was very involved. Extensive discussions with Price Waterhouse Coopers, who is the financial advisor advising the banks. Extensive discussions with the company, being advised by Evercore and TDSI. The secured noteholders participating with BMO Nesbitt Burns. I note that RBC has a role for the Board of Directors. We could not ask for a better more talented group of people to develop a sale process.

If the Court is to find that all of those people have got it wrong, that what they've designed and have said is a reasonable sale process is, in fact, not; there needs certainly to be some meaningful evidence as opposed to simply a bald assertion by the unsecured noteholders, that this process isn't fair. There's a tremendous wealth of informed judgment that says this is a properly designed, properly run process.

We would be concerned with switching horses in the middle of the process, both in terms of disruption of timeline and also if you were an existing bidder, bidding in the process, we think it's disruptive that suddenly you're no longer dealing with TDSI, suddenly your calls and emails to TDSI are no longer being returned or being directed to a different party. We're midstream and we don't see anything on the record that suggests that they really need to switch tracks because of a real or perceived problem.

Unless My Lord has any questions, those are the submissions of the first lien bank lenders.

THE COURT: Thank you Mr. Bish.

MR. BISH: Thank you.

MR. O'NEILL: I can speak, My Lord, or if Mr. Anderson wants to speak?

THE COURT: No Mr. O'Neill, go right ahead.

Submissions by Mr. O'Neill

MR. O'NEILL: Good morning, O'Neill, initial B. from law firm of Goodmans, on behalf of the Ad Hoc committee of secured noteholders. As you know, our committee is comprised of two noteholders who hold 92 percent approximately of the principal amount of the secured debt.

You have heard a lot of submissions, My Lord, from Ms. Bourassa and Mr. Bish, so I'm going to try to keep this very short and just give you a couple of additional points for your consideration and I'll try not to repeat.

Basically, our friends here were leaving aside the threshold notion for later. I will have things to say on that, but that's for later. Right now, we're dealing with the initial order which is back before you and the five or six ways in which our friends say that you should change that order because it would be more fair to do so. So I'd just like to walk through very, very quickly what they are asking you to do and why you shouldn't do it.

So the first thing that they are asking you to do, is to in fact stop the sales process. And so that there is no doubt about that, if you care to, you can see in paragraph 4 of their reply brief, there is another fundamental issue that calls out for the cessation of the sale process, we're not talking about --

THE COURT: Where are you?

MR. O'NEILL: In their brief, the plaintiffs' comeback brief.

THE COURT: Yes.

MR. O'NEILL: Paragraph 4, just for example, at the very beginning.

THE COURT: Yes.

MR. O'NEILL: There's another fundamental issue that calls out for the cessation of the sales process. They are actually asking you to stop the sales process. I won't take you to the references, but I will take you to the -- through the reasons why they say, you should stop the sales process. They say, for example, that you should stop the sales process because there is lots of money. That is actually not correct.

If you look at the Monitor's Report and the cash balances in the Monitor's Report, you

will see that, for example, at the end of the period, the company has approximately $24 million. We've discussed the fact that FA charges alone are approximately $19 million. So the company does not have a lot of money. There is not a lot of cushion.

They say to you, My Lord, that you should stop the sales process because the company should be negotiating a plan with the creditors instead. They say, for example, at paragraph 21, if you look at couple of pages over, I apologize, paragraph 18 on page 7 of their brief, at the bottom.

THE COURT: Where?

MR. O'NEILL: Page 7 of their brief.

THE COURT: All right. Paragraph 18 starts on page 6 of mine.

MR. O'NEILL: Yeah, sorry Sir, just over the page, Sir.

THE COURT: Yes.

MR. O'NEILL: The last sentence there, this is kind of their view of the world: (as read)

> With the shareholders out of the picture as a relevant stakeholder group there is no reason to conclude that the company could not reach a consensual resolution with its creditors.

Let me tell you what that means. In the *CBCA* the company put forward a plan that provided value for all stakeholders. The first lien lenders got refinanced, then there was an allocation to us and then there was allocation to unsecureds and an allocation to shareholders; and they shot that down. They refused that plan.

And they said, you know what, let's go to *CCAA* because in *CCAA* we don't need to deal with those pesky shareholders. That's what paragraph 21 says. This is their approach. Well, I'm sorry, that's not the way it's going to work in *CCAA*. In *CCAA* what should happen is that there should be a sale process run, so that the company can determine who is in the money and who is out of the money. Because even, Sir, if were later to negotiate a plan, first of all, if the sales process demonstrates that they are out of the money, then we know that. If the sales process brings in a topping bid, then we can have a discussion as to whether or not, we should allocate the -- split those proceeds up amongst us or maybe we could even negotiate a plan?

But, what you need to a negotiated plan is a sales process that shows value. So they say, stop the sales process because you should negotiate a plan. It's actually the exact opposite. Run the sales process so that you have some information about who you should negotiate a plan with. So I submit to you, they are dead wrong on that.

They tell you that you should stop the sales process because their oppression claims haven't been determined yet. No bidder cares about their oppression claims. No bidder cares how the value is going to get whacked up, if any is received. They care about the value of the assets. So the process should be run, so we can see where those -- where that value breaks and who is in the money and who is out of the money.

They say you should stop the sale process because the market is down. We have appeared in this court on behalf of the unsecured noteholders in *Argent*, lost that argument. We appeared on behalf of the shareholders in *Laricina* and we lost that argument. Once a company defaults, it is where it is and you cannot show up from the out of the money position and argue that things should happen later.

As Justice LoVecchio said to me many times when I showed up on behalf of the shareholders in *Laricina*; welcome Mr. O'Neill, have you brought your cheque book. You can protect yourself and there's no harm, particularly when they say they are interested in bidding. They say you should stop the sales process, My Lord, because there is no credit bid yet. That is not true. The credit bid, you have actual credit bid, the form of APA is being negotiated between the company and ourselves. It's being negotiated rightfully at arm's-length which is why it's taking some time.

For example, one of the issues that's come up in the negotiation of the credit bid, is that there is not enough money and that in addition to the $50 million that our clients are going to have to put into this company after having put in $200 million into this company; we're actually going to have to put more money in, under the concept of a deficiency payment amount because there's not going to be enough at closing.

So these are the kinds of issues that are being negotiated. In any event, like every other bidder, we will have our form of credit bid APA submitted by the Phase I deadline. In fact, by the Phase I deadline, other people just get to put in non-binding letters of interest. We are actually going to put in the APA.

A couple of other issues. If you're not going to stop the sales process, their next point is, you should amend it because it's skewed to the credit bid. That is not proper either. First of all, we have confirmed that we are not bidders. If there is a bid that comes in one dime above the amount of our debt so bet it. It's over to the company at that point. So it

can't be skewed to the credit bid, when the credit bid is merely a floor that anybody can bid above and the entire world is welcome to bid above us.

If you look, I'll just take you to two other documents, the Monitor's pre-filing report and the Monitor's Report.

THE COURT: Okay.

MR. O'NEILL: If you look at the Monitor's pre-filing report, which is the one dated September 23rd.

THE COURT: Right.

MR. O'NEILL: You have from your court appointed officer, from paragraph 63 through to paragraph 80, a very detailed analysis of the sales process that has been conducted to date and a process going forward. If I can, My Lord, 'cause I'll be quick and you can look at those paragraphs later if you choose, just look at paragraph 80, on page 32 of the Monitor's pre-filing report. Here are the conclusions: (as read)

> In the circumstances, Sale Procedures:
>
> (i) Provides for a broad, open fair and transparent process for seeking interested buyers of the property, assets and operations of the *CCAA* Parties;
>
> (ii) It has an appropriate level of independent oversight;
>
> (iii) It should encourage and facilitate bidding by interested parties; and
>
> (iv) Should not discourage parties from submitting bids.

Those are your Monitors conclusions on the sales process that's before you. And by the way, that analysis includes the credit bid which is extensively analyzed by the Monitor at paragraph 69. So those are the Monitor's conclusions on the sale process and I think that's of relevance to you.

There's a bit of discussion, My Lord, on a make whole payment. Every modern indenture contains a make whole payment, the notion is, is that if you're going to repay my loan early, you have to pay some amount of the interest that was due over time. They all

contain make wholes. Their point is, we don't like that make whole, we'd like to contest that make whole. 'Cause let's say I'm owed -- just pick a round number -- let's say I'm owed $1 billion and there's $50 million in make whole, they say, well if a bid comes in at $1 billion and $25 million, they I want that make whole. That's their point on the make whole, right, principal, interest, make whole. They want it stop principal and interest so that they -- fine -- if we have a topping bid, maybe we'll deal with that issue then. We don't need to deal with that issue now. Let's first of all see if we have a topping bid. But, the floor price should include principal and interest and make whole, because my contract says, I'm entitled to make whole, even in the event of a bankruptcy.

And by the way, the Monitor's Report confirms that point, as well. If you look at paragraph 69 of the Monitor's Report where he discusses in the one you were just in, My Lord --

THE COURT: Yes --

MR. O'NEILL: -- the pre-filing, if you look where he discusses the floor bid, you will note that it includes the make whole. In 69(b) the Monitor includes the make whole. The make whole is not necessarily -- the Monitor's not necessarily saying there that the make whole should be paid or shouldn't be paid. But, he's noting that the floor price includes the make whole and that is fair.

It makes sense that parties should at least be required to bid, the principal, the interest and the make whole that I say I'm entitled to. To order otherwise would be to give them the benefit of their argument without having proven it. That would be unfair to me and our clients.

They would like to replace TD -- have you replace TD as the sale advisor. I will simply say this. We, as I've already explained, don't want to own the company. We would like to be repaid. We would like somebody to find a bid that tops our debt and gets more money so that we can be repaid. The person in charge of that is TD. If we had a problem with TD's ability to deliver that result for us, to get us repaid, we would've said so and we do not have a problem with TD and it's most likely that the first lien lenders are going to be repaid because of -- they're only owed 371 and so the person that TD is really acting for, in terms of getting someone repaid, is at the fulcrum is ourselves. And so we care deeply about whose doing that job and whether or not they're doing it well and we support TD.

They want you to stop paying interest to the 1-L's, to the first lien lenders. I would love that. I'm in the second position, except I live in the real world and I know that in *CCAA* when someone is over secured, as they are $371 million, you pay their interest.

Their whole argument is actually that there's more money than -- more value than people say. Well, if that's true, then they're more over secured than they say they are and they're even more so entitled to the 1-L interest. They are entitled to interest. I am not getting post (INDISCERNIBLE) interest because people say I'm the fulcrum and I'm not necessarily over secured.

They want you to tear up the support agreement and the forbearance agreements with the banks, to set them aside. First of all, with all due respect, you have no jurisdiction to do that. That only happens on a motion by the company, which you could then consider. There is no motion by the company. Moreover, that would leave the company completely naked.

They also say that you should tear up the support agreement because the support agreement is a single track geared towards the credit bid, completely wrong. The support agreement was signed prior to the *CBCA*. It contemplates the whole *CBCA* proceeding that we spent two months with these people in, for which by the way we gave them $100,000 in fees. And then if that process was not successful by a deadline, September 16th, we move into the *CCAA*, with a process that is designed very carefully, as Mr. Bish walked you through, to get this done by December -- by the end of the year, when that exit financing facility expires.

They'd like you to pay their fees. You've heard a lot on this, the only thing I'll say on this, is I believe they are here as plaintiffs, pushing their oppression claims. To the extent that we end up with a topping bid and they are in the money, that's something you can always consider and order later. But, at this point, with the kind of submissions that they are making to you at this stage, I don't believe they're adding value. I don't believe they need to be protected. We can always consider it later if down the road.

They like to point to the *Argent* case where the ad hoc committee of unsecured noteholders represented by our firm, was allowed into the administration charge. They leave out one very important fact. In *Argent*, there was a real third party offer on the table that put us in the money. That's not present here. If that happens later, let's talk about *Argent* later in the context of an over bid. But, at this stage in the game, they are pursuing an agenda based on the claims and they can do that ably on their own.

They would like you to amend the FA charge. There is a -- I only have two points on this and then I'm done. There is a multiplicity of advisors. In fact, that's their complaint, there's a multiplicity of advisors. There's a multiplicity of advisors because there's a multiplicity of paths being explored by the company. There's an advisor for the sale. There's an advisor for the *CBCA* plan. That's exactly what companies should be doing in

CCAA's, they should be pursing parallel paths. They say to you stop with the sale process, no; advance the sale process and do it in parallel with the litigation. That requires multiplicity of advisors.

Moreover, if you look at the Monitor's pre-filing report and this is my last reference at paragraph 58, of the Monitor's pre-filing report, you'll see the Monitor's conclusion after having reviewed the financial advisors charge: (as read)

> The amount of fees included in the Financial Advisors' Charge are approximately in the mid-point of the data reviewed by the Proposed Monitor and accordingly, the Monitor is of the view that the Financial Advisors' Charge is reasonable and in the circumstances.

There are a lot of advisors, it's 'cause the company is pursuing a lot of different options, as it should. Those options may be narrowing, but they are in any event in the midpoint. Those are submissions. Thank you.

THE COURT: Thank you, Mr. O'Neill. Anyone else before I call on Mr. Anderson?

MR. COLLINS: My Lord, the Monitor is somewhat in your hands would you --

THE COURT: Just a minute, yes?

MR. COLLINS: Would you care to hear from the Monitor now, or in terms of clean-up after all the submissions have been made?

THE COURT: I'll hear you in terms of clean-up, okay?

MR. COLLINS: All right. Thank you, My Lord.

THE COURT: Okay. Mr. Anderson? Mr. Anderson?

MR. ANDERSON: Yes, I'm here can you hear me?

THE COURT: I can hear you, all right, we can all hear you.

Submissions by Mr. Anderson

MR. ANDERSON: All right. Thank you, My Lord. For the record, Robert Anderson and Emily Paplawski appearing for TD Securities. Ms. Paplawski is in the courtroom, I'm stranded in -- I think it's Idaho Falls, trying to get back to Montana because of the weather yesterday. But, I appreciate the accommodation of letting me go in by telephone.

My submissions will be very brief and they are these. We are appearing for TD Securities today, statistically because in paragraphs 83 to 89 of the Ad Hoc Group of Unsecured Noteholders in the brief that was filed last Thursday; they claimed as alternative relief the placement of TD Securities as sell advisors to Lightstream regarding this *CCAA* SISP which pursuant to the initial order is continuing under *CCAA* proceedings as the sale procedure.

Now, TD Securities is not a litigant in these proceedings and hopefully that will not change. Our appearance today is only in respect of the alternative relief claimed by the interested noteholders to replace TD Securities as sale advisors. We're here simply to be available to address any questions or comments the Court may have regarding TD Securities engagement as sale advisors to Lightstream.

For my submissions, My Lord, you're only need two documents and I'll only make brief reference to them. They are both Monitor reports, the proposed Monitor's report and then the first Monitor's report, I don't know whether you have those handy --

THE COURT: I do.

MR. ANDERSON: Okay, good --

THE COURT: I have them both.

MR. ANDERSON: Excellent. Okay. The framework -- well first of all, let me say this, the sale procedure is designed as you've heard for the backstop credit bid by an Ad Hoc Committee of the Secured Noteholders, which they cannot increase, that's in my view, very important and it has a two phase sale procedure to canvass the market for higher bids.

The framework and pricing of the credit bid were made public and are summarized as we've heard in the proposed Monitor's Report. And I'd like to take you to that, if I could now, to the proposed Monitor's Report and I'll look particularly at paragraph 58 to 70.

THE COURT: All right.

MR. ANDERSON: So 68 makes the point that: (as read)

> The general concept of the Sale Procedure are to continue in these *CCAA* Proceedings with the efforts previously undertaking in the pre-*CCAA* SISP in order to determine if a Qualified Bid (or combination of bids) can be obtained that would exceed the recoveries contemplated under the Secured Noteholder Credit Bid.

And then the overview of the process is continuing later on in this document. And the credit bid is set out, as you've heard in paragraph 69 through 70, in those two paragraphs and they even give the amount, a framework in the amount which is in the neighbourhood of $1.3 billion.

The reason I point this out, is this is a public disclosure of what the credit bid will be and so -- and so every -- it creates a very level playing field for any potential purchaser as you can see because they will see what -- what bid they have to top, so to speak, in order to have -- in order to be a qualified bid in the process.

I wanted next to take you to the Monitor's first report, but before let me just give you these comments. The sale procedure is designed to illicit the highest sale price available in the current market with the creditors backstop and to ensure it is not sold for less than that credit bid amount. And we can see from the Monitor's first report that would be -- during the first phase, the qualification indications of interest, as it is called started in July, more than 600 prospects -- excuse me -- more than 600 prospects were contacted, 37 signed NDA's and the deadlines for indicative bids is October 21st. That second stage will continue for qualified bids assuming the credit bid and they will be considered by the company, the sale advisor and the Monitor.

Now, in this context, My Lord, TD Securities considered the allegation of conflict of interest to be speculative and unsupported. Although TD Securities has been engaged since May -- since last May this allegation of conflict has not been raised by anyone else and has only very recently been raised by the Ad Hoc Group of Unsecured Noteholder.

I wanted to address lastly and this is my last point, the subject I thought I heard you raised in some of the questioning earlier about sufficient time to effectively run the sale procedure and for that, if I can speak to that, first to paragraph 73 of the first -- sorry it's the proposed Monitor's Report, it speaks to this issue to some degree, 73, 74.

THE COURT: Yeah.

MR. ANDERSON: Paragraph 72, 74 and 75 and 72 makes the point that while it's a more condensed timeline than typical, the Monitors notes you see there in paragraph 73 and 74 he says: (as read)

> After consultation with TD Securities, the Proposed Monitor agrees that this initial 25-day period of submission of a Qualified Indications of Interest is reasonable.

And then in 77: (as read)

> The Proposed Monitor believes, after consultation with TD Securities, that the duration of the Phase II part [which of course is due diligence and is defining bids and so on] is a reasonable period of time to allow any Phase I bidder sufficient time to complete remaining diligence and prepare a final bid as set out above.

So he makes those points and then there's just a follow-up point that's made in the second -- his second quotes, called the First Report -- but it's paragraph 16 to 18 of the First Monitor's Report, if you have that at hand and I'm going to refer specifically to paragraph 18. It's at page 6 of the First Report.

THE COURT: All right. I'm there.

MR. ANDERSON: Okay, the Monitor comments: (as read)

> The Sale Advisor has advised the Monitor that the Sales Procedures have been implemented with no material issues to date. Further, the Monitor understands that there have no significant concerns expressed from potential bidders with respect to the timelines or process as set out in the Sales Procedures.

THE COURT: Right.

MR. ANDERSON: So at least from the standpoint of the experts that are conducting this sale process, the parties involved, the reaction of the market to what is occurring, there's been no indication by anyone in the evidence, other than of course the Ad Hoc Group of Unsecured Noteholders, about problems with the timing and sufficiency of time to fairly conduct the process and solicit the market to see whether there really can be found any bids higher than the current bid.

Subject to your questions, My Lord, those are my submissions.

THE COURT: Thank you, Mr. Anderson.

MR. ANDERSON: Thank you.

THE COURT: Okay, Mr. Simard or Mr. Pinos?

Submissions by Mr. Simard

MR. SIMARD: Thank you, My Lord. My Lord, we've been sitting for two hours or maybe just over. I don't know if you wish to take a break, I expect I'll be about 40 minutes.

THE COURT: Well, I really don't have that much time, so I guess we better carry on.

MR. SIMARD: Very good. So, My Lord, I will speak to the *CCAA* points, we've not yet gotten to the threshold issue obviously. The documents you should have in front of you that I'll refer to mostly are our brief, filed October 6th and then Ms. Bourassa's that's cerloxed and Ms Bourassa's reply brief from Friday.

Sir, essentially what you're being told in the written submissions from the company and its supporters and what you've been told today, is that you have no alternative but to approve this credit bid sale process path. And the reasons you're being told that, we heard from Ms. Bourassa, because the company has decided that it wants to pursue that path, that's a business judgment matter, other stakeholders agree, so you have no choice.

What you heard from the counsel for the two groups of secured creditors, especially from Mr. Bish, go and look back at the agreements we signed in July and August and September, we pre-negotiated how this *CCAA* should run. And that was the only reason we allowed the company to get to this stage and so again, you have no choice, we've already preordained how this should play out.

What we heard today, although not any evidence anywhere, but we heard I think from each of the three counsel who preceded me, that my clients are out of the money. That's not in evidence and I'll take you through that later, but they build their argument today and try to buttress their argument by saying we are just complainers who are out of the money and our point, of course, which I take from your initial comments, you know, our position My Lord which is; we very well maybe in the money if a proper sale process, properly canvasses the market to realize the fair market value of this company.

You do have an alternative though, you don't just have a single path they lay before you and that alternative is to hit the pause button. We don't say there should be no sale process ever, we say there should be a pause now, you should let the Monitor report on other options and what a proper sale process would look like and then if other alternatives are not available, the proper sale process should be run. So that -- that is our position. We're not saying never to a sale process, we're saying yes to a proper sale process, but alongside consideration of other alternatives.

I'm going to show you first, Sir, where Justice Newbould of the Ontario Superior Court was presented with exactly the kind of arguments you've heard today; you have no choice, this is preordained, there's a support agreement, just approve this quick, credit bid sale. But, Justice Newbould hit the pause button. And that is in the *Nelson Education* case, tab 14 of my brief.

This was just over a year ago, May 2015 --

THE COURT: Is that in your --

MR. SIMARD: Tab 14 of our -- our brief.

THE COURT: Okay. Yes, I've got it.

MR. SIMARD: So May 2015, like this hearing, it was a comeback hearing because the initial *CCAA* application was brought on short notice and so all the parties came back to argue about the relief being sought in the initial order. And what was presented to the Court was, there was a support agreement from the first lien lenders. Under that support agreement if the pre-*CCAA* sale process did not realize a transaction then the credit bid would quickly be approved in the *CCAA* and the assets would go to the first lien lenders.

And so tab 14 is Justice Newbould's comeback hearing decision. I'll take you first to page 4, paragraph 29 near the bottom of the page, the page numbers are faint, but they're in the bottom right corner. So go to paragraph 29 and you'll see his comment there that: (as read)

> This is a true comeback motion with no onus on RBC . . .

RBC was the agent in the second lien lender group equivalent to my client's position in that they were opposing various of the relief and so on the true comeback motion, it is the company Nelson whose required to establish, in this case, that A was the proper Monitor.

So that's the point I tried to articulate at the end of the last hearing, My Lord, that this is a true comeback. Everything's on the table and the company still bears the onus of proving that the relief in the initial order is justified. That becomes important when we get to the sale process.

What was the case though, the facts were quite different in *Nelson*. What we had prior to this May 2015 hearing, was a sales process that started in September of 2014. So about eight months before the initial order application and the comeback application. At this hearing, like you're hearing today, the company and the first lien lenders, who were the credit bidders and the proposed Monitor, Alvarez & Marsal, although an affiliate of Alvarez had been sales agent, they all said that pre-*CCAA* sales process was robust. And in fact, it was robust, far different than the process we've had there. There is evidence in another *Nelson* decision which is in Ms. Bourassa's brief that there were -- over that eight months, there were multiple rounds of bids, first round bids were submitted, second round bids were submitted, deadlines were extended so other parties can conduct further due diligence. So a seven or eight month sales process that was taken up by the market, multiple bids, multiple parties doing due diligence.

In this case, all we have, I would suggest, are assertions. We hear from the company, you hear in a hearsay way from some other parties, the sale process was designed here, the pre-*CCAA* sale process that was commenced only in mid-July, two months before the parties were here on the *CCAA* application was robust. But, what I'll show you in a few moments, My Lord, is that there's zero evidence before you as to whether there has been any robustness or any update of the pre-*CCAA* sale process.

There, as well, the parties were telling the Court that the second liens, the objectors were out of the money. In that case, they were basing that on the bids that had been received in the six or seven-month sale process. However, even though there was a robust sale process proceeding the application, Justice Newbould did not accept hat submission. He didn't simply accept what you're hearing today, okay, well these guys are out of the money, they're just objecting, I will approve this quick credit bid.

And I'll take you to page 5, I'll show you the statements he makes about the role of the sale process. Page 5, paragraph 37, so the first three or four lines are about the impartiality of Alvarez & Marsal. There as I said and Alvarez company was the sales agent for the eight months prior to the *CCAA* and even prior to that a second Alvarez entity was proposed as Monitor and Justice Newbould said, well I'm not doing that because there's obviously an appearance of bias. But I'm looking at the last three lines -- sorry My Lord, back one page, page 5, paragraph 31, not paragraph 37. So paragraph 31: (as read)

> Nelson intends to request Court approval of the proposed transaction. [That's the credit bid.] An issue that will be front and centre will be whether the SISP process prior to this *CCAA* proceeding [that's the seven or eight month process in that case] can be relied on to establish that there is no value in the security of the second lien lenders [that's the first question - so is the sale process reliable to prove fair market value and secondly] whether other steps could have been taken to obtain financing to assist Nelson in continuing in business other than a credit bid by the first lien lenders.

So the same two questions arise here and those are the two questions, My Lord, that we say this pause button should be hit on the sale process. The Monitor should go and come back and report on, not only the pre-*CCAA* process that has been run, but what would an appropriate sale process look like now to properly and fairly test market value. And secondly, are there other alternatives? We've come up with a couple through our cross-examination of Mr. Scott, that is, there was a framework for restructuring before the shareholders were getting something, they're now out of the picture. Why might that not work?

Mr. O'Neill states as an assertion it simply won't, well we don't know that. There may be other ideas the Monitor could come up, there may be other possibilities. The case law is replete with statements of this nature. The *CCAA* stay comes in, there's the status quo, so all parties are treated equally and fairly while the company tries to work out a restructuring. Failing that, that's when sale processes become available. And that simply hasn't been tried here because the companies are on this path to pursue this very quick sale process.

And then I'll take you to the final quote on this case, on the final page, page 7, paragraph 45, Justice Newbould said this: (as read)

> No determination has been made in these proceedings that there is no value available for the second lien lenders. RBC disputes the applicants' views on this point. RBC contends that these *CCAA* proceedings should not commence with the Court accepting as a fait accompli that the second lien lenders should not be paid in the proceeding when every other stakeholder is being paid.

So you're being presented with a fait accompli today, in my respectful submission, you should just accept the path agreed to by the company and secured creditors, my clients are

out of the money and just go forward with this path, which in our submission is insufficient to properly canvass the market and determine fair market value and determine whether, in fact, our clients are in the money or out of the money.

What happened in this case, is that Alvarez & Marsal was not appointed as Monitor, FTI was, the same Monitor you have here. FTI then went and did a report, it did a report on the pre-*CCAA* sale process. It did a report on other alternatives and ultimately it came back and some three or so months after the case started the credit bid was approved. But, there was a process -- there was a proper process. And we don't know what the result will be here, Sir, all we know is that there has to be a fair process to determine value. In that case, when the pause button was hit and the reporting was done and it turned out there were no better alternatives, then the credit bid was accepted.

But, the Court resisted what was being urged upon it at the start without determining fair market value through evidence or a process, just accept this and approve it on day one or near day one.

So again, the facts are, in my submission, the facts were much stronger in the *Nelson* case to urge the Court to approve the path the company sought. There was a robust seven-month sale process, the Court said no and then there was a comprehensive report from the Monitor and then there was a transaction approved.

Here and I'll get to this in a moment, there has been no -- there's no evidence before you at all that there's been a meaningful SISP that has at all canvassed the market in the last two months. There's an absolutely dearth of evidence. And yet, the secured creditors and the company want you to race to the conclusion that my clients and all unsecured noteholders are out of the money and this process should simply succeed when the evidence, in my submission, shows the process is not -- is not sufficient.

I've addressed -- Mr. Bish in his comments said a number of times, we are here telling you we're out of the money, that's not the case and I think you understand the distinction. We're saying if this very fast process goes ahead, the risk that we may be ultimately out of the money is greatly increased, but with a proper process, with a proper canvassing of the market, we may very well be in the money because we believe there is value in the assets to repay the secureds and get down to us.

On the business judgment point, My Lord, that's if my friend's reply brief, Ms. Bourassa, and she commented on it this morning. There are a number of answers to the business judgment point. First of all, we're not challenging a current exercise of the company's business judgment. In fact, we want them to exercise their business judgment, we say they have a duty to do so in the *CCAA*. But, what is currently happening, in our

submission, is the company is not exercising its business judgment because it is fettered by the support agreement and the forbearance agreement. It's following that single track path, rather than exercising its business judgment as it must do in the *CCAA*.

We know from the cross-examination of Mr. Scott, one of the things that the company has made a business judgment on, that is that as things stand right now, with current commodity prices and current costs, there are capital expenditure opportunities that the company believes would increase asset value. So you spend A and you get A-plus back in value. So the company should exercise its business judgment to expansively and broadly consider how to unlock that value now for shareholders. It could be a DIP loan, could be something else; but the company's not doing that because it's following the path set out in the pre-*CCAA* agreements.

The company wants to follow that path, the exit financers want the company to follow that path, as do the secured noteholders, they just want it to happen after the credit bid is approved and after our clients are vested out. And that's clear from what's going to happen if the credit bid is approved. The exit lenders, so four of the existing lenders and one new one, they're going to increase their exposure to this company from a current $371 million to $400 million. The secured noteholders are going to take all the shares of the company and put in an additional $50 million more. So they believe in the value of the company going forward, they just don't want to unlock that value until we are pushed out of the way.

So that's one answer to this business judgment point. The second answer, My Lord, is that with respect, business judgment in *CCAA* or other insolvency cases is not unfettered. This is not a private receivership. Despite some of the language you heard from Mr. Bish and from Mr. O'Neill, who told you look at how we've negotiated how this will play out; they cannot through contract supplant your discretion and your jurisdiction and the Courts have made that clear.

With the benefits that a company gets in *CCAA* come burdens and among the most important burden is this is a public, court supervised process and the company has a duty to ensure a fair process in which the goal is to maximize value to all creditors. And courts will and have in the past, overridden pre-*CCAA* contracts to ensure the company takes that expansive view and tries to maximize value.

I won't take you to it, My Lord, but there is a point in the Torys' brief, Mr. Bish's firm, it's paragraph 17, page 5, and what they recite there is acknowledgements in the forbearance agreement. So page 5, paragraph 17 if you wish to look at it, Sir. It's the Torys' brief filed October 5th.

THE COURT: Yes, right.

MR. SIMARD: So at the bottom of that page, they start quoting from one of the forbearance agreements in which they had the company acknowledge that the SISP is commercially reasonable in all respects, including the proposed length thereof and the steps taken et cetera et cetera. So yes, the company agreed to those things, acknowledged those things, back in July or August, when it had very little leverage with its lender, but that agreement between private parties can't supplant your jurisdiction in *CCAA*. Whether a sales process is fair, is commercially reasonable et cetera, that's the ultimate decision for you and it's not something parties can agree to and then point to in an attempt to dictate how these proceedings should go forward.

THE COURT: Doesn't the company, the executives and the Board of Directors, still owe a duty to the company? If they thought there was something operating in the (INDISCERNIBLE) that was against the best interests of the stakeholders, I would expect to see them here making that argument.

MR. SIMARD: The reason -- you're right, My Lord, they do have ongoing duties to the company and the best interests of the company and all its stakeholders. Why they're not here, I would submit, is because they exercised their business judgment in July and August, signing these agreements and now they're on this path. But, it's the Court's role, whether they're here or not, it's the Court's role to stand up on behalf of all creditors and say, look, as Justice Newbould did, we have to stop here, there's no prejudice to pausing the sales process and we're talking about however long the Monitor thinks it needs to report. We're not talking about the six or nine months Mr. Bish suggests. The Monitor can tell you how long it would take to report on these things, I would imagine --

THE COURT: But, this deadline, now I know you don't -- you call it a self-imposed deadline, but it's December 31st, that's not that far away, right?

MR. SIMARD: It isn't. It isn't.

THE COURT: And I think we all know for a Judge of this Court to second guess all of the business judgments of this kind and I'd have to have a pretty good basis on which to do so.

MR. SIMARD: And I would submit and the record, you do have a basis. What Mr. Bish raised again the point made in their brief, December 31st, he used the words 'critical', 'pivotal', 'fundamental'; but he never answered why in my respectful submission. Why? Why is December 31st a drop dead? Well it is because

they agreed that with the company back in the summer. They picked that day. The evidence is clear his clients, the first lien lenders, they're in the money. Nobody disputes that. It's clear from the fact that Mr. O'Neill's clients, are willing to make a credit bid for the full amount of their debt behind the first lien lenders.

So for the first lien lenders to say we have to be out of this thing by December 31st, is meaningless, with respect. We all know they're going to get out at 100 cents --

THE COURT: But if you're right -- if you're right, then there should be no problem in getting a bid that tops the bid of the credit bid, I mean --

MR. SIMARD: I agree, if the process is robust and lengthy enough to allow parties to properly assess the assets. Let me -- let me jump right there. If that's troubling you, My Lord, here where I say it breaks down. It's their onus to show you that this process will -- will be sufficient to generate fair market value bids. That was the point from *Nelson* and that's why the Court hit the pause button.

So we know they started a *CBCA* sales process in mid-July. All we know from the evidence is that they went to over 600 parties and 37 signed confidentiality agreements. We know it doesn't take much effort to sign a confidentiality agreement. And so I asked Mr. Scott in cross-examination, okay well what happened after that? Were there management presentations? Did people hire engineers to look at the reserve reports? Did people hire financial analysts to look at the revenue and cash flow? Did people ask for due diligence on environmental? Did people do site visits?

We know this company has 2500 drill wells, 1500 prospective locations; this is a big oil and gas company. Those are the types of things that people do to assess it. And those questions were all objected to on the basis that my client can't know those things, because it's a prospective bidder, which it is. But, there's no excuse in the world why the company hasn't told Your Lordship about those things. Why do you not know whether the two months from July to September had any robust uptake from the market in this sales process?

So that is a complete gap in the evidence, I would submit, and it's their onus to prove to you that the sales process has been robust because what we're faced with now is a very short deadline post *CCAA*. Courts have allowed very short sales processes in *CCAA*, they've approved them. In my submission, that is usually the case where two factors are present. One, there's no choice because the liquidity situation is very, very tight. That was the case in some cases we've seen in this Court earlier this year, *Endurance* was one where the company needed a DIP loan imminently and so there was a short sale process. *Sanjel* was one where the company ran the sale process before the *CCAA* and moved

quickly for approval because it was a dire liquidity crisis.

But, that is not the case here. Here as we know from the Monitor's Reports, cash flow would be neutral if the company wasn't paying interest. It's dipping modestly from about $38 to $32 million by the end of the year. So we have no liquidity crisis and we have no evidence that what has happened to date in the sales process has resulted in any robust uptake or bidders have been actively working for the two months between July and August. So they're ready to make a bid and that's the risk and that's what the Monitor has to access independently because you don't have -- you don't have the answers and given the lack of evidence, I would submit, that they have not met the test to have this very short sale process approved.

Someone made the point that, well it's -- you know, October 24th is the deadline for the round one sale process and then as another month after that program to binding bids. But, everybody in this process knows that if they don't meet the mark two weeks from now, on October 24th, it goes to the credit bidder. That's built into the sale process. So it's not simply a matter of throwing a number in, you have to be seriously committed because if you don't meet that mark in two weeks, this process is over.

Sir, the *Fracmaster* case, I was just going to draw your attention to that case, it's tab 9 in our brief. It is a case like this one where the Court was advised that the only stakeholders who had any interest in that was a lending syndicate, a first lien lending syndicate had supported a particular bid and so the Court should just accept that bid. It was a receivership at this stage, but in the *CCAA* a company called UTI had bid for *Fracmaster's* assets. The lenders had agreed to support that bid and had signed essentially a support agreement called a side letter there.

And then the Receiver found a better bid from DG Services. That better bid still wouldn't have paid the bank, but it would've paid the bank back more and the Receiver went for the approval of that better bid. The lenders continued to support pursuant to their contract the UTI bid and what the Court said and this is at on page 6, paragraphs 30 and 31. See paragraph 30: (as read)

> The narrow issue raised in the appeal is the weight to be given to the lending syndicate's wishes to accept the UTI offer. But this appeal raises a competing issue, the integrity of the bid process.

Paragraph 31: (as read)

> Lenders have the ability to appoint private receivers and deal with assets without court approval. In the circumstances of this case,

> where Fracmaster has many offshore assets, we are told that a private receivership without court involvement would not be expedient? Once a creditor embarks upon a court appointed receivership, the creditor loses an element of control, including the power to dictate the terms of the disposition of assets. Although the lending syndicate's preferences are an important factor to be considered by the court, its preferences do not fetter the court's discretion and are not necessarily determinative.

So the exact same rationale applies here, even though it's not a receivership, it's a *CCAA*. Just because these parties have signed agreements and just because the company is here supporting this path, the Court has the ultimate discretion and there are costs of coming into a *CCAA* in that you have a duty to make sure the processes are fair and seek -- seek to maximize recovery for all stakeholders.

Sir, in answering some of your questions, I've already dealt with much of what we say is wrong with the sale process. Obviously, the length of it is troubling, the length of it in the absence of any evidence from anyone, no one, TD, neither TD nor the Monitor, nor anyone else says those two months from July, September, people have done a ton of diligence, they've moved forward very, very quickly, so they're in a position where they're way down the path. Nobody says we're not at square one. All they say is 37 people have signed confidentiality agreements.

I will deal with the oppression claim, just very briefly, Sir, because of the structural difficulty it presents to the *CCAA*, I won't talk about the threshold issue. But, at page 2 of our brief we've listed a number of factual or practical problems. And the problem here is, if we continue going on with this sales process with the credit bid and the uncertainty created by the credit bid, we'll get some results, we may get bids, we may -- we may not get bids. The problem is, the bids we don't know about because if a sales process doesn't have integrity and isn't designed in a way that we know it will return reliable results and that's something you need the Monitor's report on, I submit, then we simply won't know who didn't bid.

So you can see the problems. Who is in the secured noteholder group? We won't know until the oppression issue is dealt with and so that means we don't know whether a credit bid will even proceed. There may be governance issues once the composition of the secured noteholder group changes. So bidders looking at this process thinking there's a credit bid, they can quantify the credit bid, they can try to top it, but what about bidders who would've bid maybe on two different parcels? And this is -- this is an important point here. Remember the company has three different business units. Bakken in Saskatchewan, Cardium in Alberta and then Alberta/ BC. What about a bidder who sees a

non-block credit bid of $1.2 or $1.3 billion and would've bid a billion for the Saskatchewan assets? These numbers are hypothetical, of course. That bidder may just not bid because it's not interested in all three assets and it knows it will lose to the on block bid unless someone else is making a similar analysis of a part bid.

So the quantum is not known. The composition is not known, whether the credit bid will go ahead is not known. All of which can be solved, in my respectful submission, by hitting the pause button while the Monitor reports on what a process should look like. At the same time, the oppression claim will be advanced. Everybody seemed to be on the same page, not on how the issue should be framed, but on the fact and reality that they will then try to deal with that issue expeditiously before the Court and get an answer.

So that's the second problem with the sale process. How do we deal with that structure issue? It creates a great deal of uncertainty in the marketplace and we don't know who will not bid. We just don't know and there may have been some good bidders who would've come forward if there was certainty.

My friends spoke about the make whole premium. Ms. Bourassa said it was a red herring and small piece of the large picture. It's a $60 million issue. That may seem like a small piece but to some bidders, having the certainty over the make whole premium could be important as to whether they bid or how they bid, if they're making a part bid on some of the assets or a non-block bid.

The Monitor has been asked to review that issue. That's another simple issue, relatively legal issue that the Monitor could roll into its report, if it -- it we pause the and the Monitor takes the time it needs to report back on what alternatives are available and what we should do to go forward.

And the third problem after the structural problem with the oppression claim and after the problem with the lack of evidence on whether -- whether this very short sale process can go ahead, My Lord, the third problem with respect is the role of TD Securities. That's Mr. Anderson's client. We're not saying that TD Securities won't do their best to be unbiased. We're not saying they -- they will do anything actively to slant this process to favour their affiliate TD Bank. But we're saying is that there is an appearance of bias. That has been dealt with in a number of the cases we have cited to the Court and it's a matter on which the Court should not take the risk because of the extreme importance of the integrity of these proceedings and the integrity of the sale process itself.

So what we know is TD Bank plays a number of roles, they're the agent in the existing facility. They're a lender in the existing facility. Mr. Scott confirmed in cross-examination they're the largest lender in that facility. And then go forward if the

exit facility falls into place, they will be both the agent earning fees and one of the lenders, who has loaned money and is earning interest and other fees on that loan.

The exit facility commitment letter is before you confidentially. So I don't think I can speak to numbers, but I think I can say, TD's -- TD's investment in this company, TD Bank's if the current facility is paid out and the exit facility goes forward, its -- its exposure to the company will increase. So if the credit bid is accepted TD gets paid out as agent and existing lender. TD Securities get a success fee obviously. TD Bank extends more credit, gets more fees as agent under the exit facility and so objective observers, My Lord, would fairly ask, will TD Securities be incentivized to bring forward a bid or to treat equally a bid that would not require the exit financing and would not generate additional fees and return to its affiliate TD Bank?

Even in what we've seen from TD already, you've seen in the confidential exhibit to the Monitor's Report, TD saying we can do all these things, the sale process timing is okay, an objective observer would ask, well, if TD -- TD's affiliate gains by having the credit bid approved, what incentive does TD have, at this point, to hit the pause button? As we say the Monitor can, as an independent party, and say, no, this process is too short and nothing has happened in the two month sales process, nothing substantial under the *CBCA* and so we should change course. That is the kind of structural appearance of bias, potential conflict that the Courts have been very careful to avoid.

The *Nelson* case which I took you through, A was not approved as the Monitor, as the Court's officer because it had been involved in the sale process. *GuestLogix* which is the next case, our tab 15, again Deloitte Restructuring was not approved as Monitor because a Deloitte affiliate had advised the independent committee of the Board on the company's accounting practices. So those both were Monitor cases.

But the concept applies equally when we are dealing with the integrity of the sale process and that is clear, My Lord, from the *Ivaco* case which is our tab 16. And if you could turn to page 3, paragraph 15, I'll just read you a brief quote, speaking about sales processes, starting at the end of the first line: (as read)

> First, there cannot be a sales process whereby one unsecured creditor secures a secret benefit or advantage over the other unsecured creditors. [That's not the case here, it was a different factual case.] Such a result would be the equivalent of providing a preference for that creditor. Fairness to all the creditors is a prerequisite to a satisfactory sales process. Second, the sales process must be seen to be fair. That is, there must be transparency.

In this case, there is the structural potential conflict and creates the appearance of bias and in those cases, there was no evidence of actual bias. One of my friends made the point that we haven't brought any evidence and being an affiliate was simply enough in those cases to preclude those parties from fulfilling the role of Monitor.

There are numerous other parties in Calgary who are not associated with Banks who could perform the financial advisor role for the sale of these assets, if and when a sale process proceeds. So there are numerous options and the Court, I would submit, should not potentially risk the sale process by approving TD.

So, My Lord, we say all of the problems with the sale process can be fixed by hitting the pause button and having the Monitor go back and report on what other restructuring alternatives are available, what an appropriate and fair sale process would be, what has happened in the *CBCA* sale process, who should be the financial advisor and a matter I'll speak to in a couple of moments, what should the financial advisor fees and charges be? Because there is overlap of between Evercore and TD.

And as we've made the point in our brief, this is not a company where they're on their last legs with respect to liquidity. There is time, there is a runway. Not paying the banks' interest and banks getting interest payments is not always done in *CCAA's* sometimes it's negotiated, sometimes it is not. Whether that creates a regulatory issue for the bank or not, that would extend the cash flow runway for the company. Again, it would not impair the ultimate recovery of the banks, which everyone in the courtroom agrees is assured because they are well in the money because of the asset value of the company. So the Monitor can and should report on all those things, My Lord, and then we should decide where we go next.

There has been some discussion, I won't take you there, but paragraph 23 of Ms. Bourassa's reply brief on Friday, she speaks to the fairness opinion. And the fairness opinion is attached to her brief, not as part of an affidavit, so it's not really in evidence, but it is put before Your Lordship and the comment is made there in the brief that -- that my clients, two of the unsecured noteholders rejected this plan. Mr. O'Neill said something similar today, we shot that down. Again, these statements are not in evidence. My friends cannot give evidence. What is in evidence, is that a settlement of the oppression claim was a pre-condition to the *CBCA*. They never got there; full stop. These are without prejudice discussions so --

THE COURT: So I can't infer they shot it down?

MR. SIMARD: What -- well I don't think you can infer who

shot what down. Bi-party discussions --

THE COURT: It didn't work, so it doesn't matter which way you want to (INDISCERNIBLE) --

MR. SIMARD: That's right, I agree. It doesn't matter. It didn't work, is as far as we can go. But, to suggest that, when there's no evidence, that my clients shot down the *CBCA* plan or rejected it is not -- is not appropriate.

Just very briefly wrapping up on the last couple of points, My Lord, the admin charge and the inclusion of my clients' legal fees in the admin charge; you've seen the law in our brief. Company's counsel, Monitor, Monitor's counsel; those are the parties who are invariably included in the admin charge and of course, that's appropriate. But, with respect to any third party advisors, in this case, you have the first lien lenders counsel, their financial advisor, secured noteholders counsel and their financial advisor, all getting the benefit of charges and the test is the same; is the charge necessary for their effective participation? Mr. Bish suggested that my clients are not vulnerable. Surely he's not suggesting that the five largest banks in Canada are in some way vulnerable. So the law applies equally to each of those third parties and the fact is, sometimes they're negotiated and sometimes they aren't.

The case of Justice Nixon earlier this year in *Argent* where unsecured noteholders and ad hoc committee was included in the charge, that is exactly a parallel to this case. That decision was made on the basis that it was not certain in the *CCAA* proceedings whether that party was in or out of the money. Mr. O'Neill suggested this morning that that decision was made because there was a third party bid that was on the table that put them in the money. I'm aware from Mr. Zweig, who was on the case, that there was a historical third party bid, but it was no longer on the table at the time of the *CCAA*. So that's another -- I guess I'm responding to Mr. O'Neill's evidence with evidence of my own, but it's not on the record before you.

So you could do it, you have the authority to add our clients to the charge. The Monitor has stated in its first report that there is some merit to that charge and Ms. Bourassa drew your attention to those points. The fact of the matter is, Sir, although parts of what my clients are doing here is related to the oppression claim, those are the parts being dealt with by Mr. Pinos; what we are doing here as restructuring counsel, we're the only one who are speaking for anyone on the unsecured side of the ledger and in our submission, trying to constructively guide these proceedings to a place where we know at least that the process was fair. So if we're out of the money at the end of the day, us and the other unsecured creditors, we know that the process was fair and gave us a chance.

And so that -- that part of our representation is certainly benefiting all unsecured creditors and unsecured noteholders, whether they are in our group, or not. So we think there is jurisdiction, there is a basis and there is a precedent to include us in the administration charge.

Someone made the comment this morning that no other bidder is having their fees paid while Mr. O'Neill's clients, of course, are having their fees paid and presumably a great deal of the work to which he referred this morning is the negotiation of their bid, their asset purchase agreement. I presume those -- that part of their fees are not being carved out and they are being paid, not only for their work as a creditor and stakeholder, but also advising on the bid.

With respect to the financial advisor's charge, this is tied to the issue of TD. This has not been drawn to your attention, My Lord, but the engagement letters of Evercore and TD, both of who were engaged earlier this year, they are in evidence. Evercore's is Exhibit 18 to Mr. Scott's affidavit. TD's engagement letter is Exhibit 17. And when I go through the mandates, it is clear that there is significant overlap. Evercore will get a success fee for something called a restructuring, that includes a credit bid sale. TD gets the success fee for something they call a corporate sale, which is the sale of all or substantially all of the assets, that is the credit bid sale. Evercore gets a fees for financing, that would include the exit financing and the new second lien financing.

So there is significant overlap. It's not clear to me, nor is it clear to anyone or could it be clear to anyone, I suggest, what the division of work is. What the extent of the overlap is. That is something that the Monitor should certainly report on before any engagements are approved or the financial advisors charge is approved.

We may end up in a situation like *Sanjel* where there were two sale advisors, there was overlap and what the Court granted in the initial order there, was the approval of their agreements, but a financial advisors charge that covered only about 80 percent of their combined fees. That might be something that the Monitor, if it has an opportunity to look at this, would come back and recommend to the Court.

And I question the role of BMO. BMO as you saw from the confidential appendix, BMO is the financial advisor not to the company, but to Mr. O'Neill's clients as secured noteholders. But, it appears that BMO is earning a success fee to be paid in cash by the company on the sale of the company's assets. I would submit that that is extremely unusual in *CCAA* proceedings, perhaps unprecedented, but it something the company or the Monitor rather, should look at it for certain. Because I think it is more the norm that financial advisors to creditors or stakeholders are paid on an hourly basis, not a doubling of a success fee that a company's agent is already going to receive.

Sir, we're not here to obstruct, we're not here to slow down. We are here to ensure that there's a fair process and I think a fair process can be reported on and determined by the Monitor relatively quickly and then implemented. As further evidence that we're not here throwing the kitchen sink and everything against the wall, we got information from the Monitor on the Director's charge, on the Key Employee Incentive Plan, Key Employee Retention Plan; and so as we advised my friends and advised you in the brief; we're not objecting to those portions of the initial order. We're trying to stay focused on what we think is necessary to fix this order to make the process fair for the benefit of all stakeholders.

Any questions, My Lord?

THE COURT: No, thank you very much, Mr. Simard.

MR. SIMARD: Thank you.

THE COURT: Ms. Bourassa?

Submissions by Ms. Bourassa

MS. BOURASSA: My Lord, I know we have taken significantly more time than any of us probably intended, so I will try to keep my reply comments very brief and to leave some time for Mr. Collins to speak, as Monitor's counsel.

My friends talk about a proper process and they have characterized this process as being a short process. That's their characterization. In short, both TD Securities as sale advisor and the Monitor as the independent court officer, have reviewed this process and they have said, it is a proper process. My friends say that the Monitor should review all the options available to the company. There's no need for the Monitor to review the options available to the company because, in fact, the evidence before you is the company has already gone down all those paths.

And My Lord, I could take you -- I won't go through it in detail, but the initial order affidavit starting at paragraph 80 speaks about the company's strategic review process and other initiatives and it references the preliminary interim order affidavit, which was the affidavit filed in July and that is attached as an exhibit to Mr. Scott's September affidavit, where they talk about the various steps the company took.

And when I turn there, the company on the evidence, has already look at alternate first lien financing. They have already looked at the sale of certain assets and they have also

looked at the recapitalization alternative. If I turn to the transcript from the questioning of Mr. Scott and this is at page 75 of the transcript --

THE COURT: Just let me find it. Right.

MS. BOURASSA: So it's page 75 and the question put to Mr. Scott was factors dictated pursuing the sale process at the commencement of the *CCAA* and on line 14 he begins his answer: (as read)

> A Well, given the fact that the *CBCA* process became derailed and off track it seems to us, as well, the only logical thing to do was to pursue the sale process to try and maximize value.

And I read this to you, My Lord, to speak to my friends' comments about the business judgment of the company having been exercised in July or at some earlier date. This was the company's view and the business judgment of the company in September, less than two weeks before we brought the *CCAA* initial application.

My friend directs you to the *Nelson* case and the *Nelson* case, My Lord, is entirely distinguishable from what's being sought before you today. In the *Nelson* case you had a pre-filing sale process that was run and had been overseen by A who was the proposed Monitor and who had been the sale advisor, as my friend said, for some time prior to the filing. The company came on the initial application and they sought approval of a sale. They weren't seeking approval of a sale process, they were looking to have a transaction approved and they were looking to have that transaction approved on the recommendation of their proposed court officer, who had been running the sale.

That is not what is happening in this case. Yes, the company commenced the SISP. On the first day though, we didn't bring forward an offer that had come from the process and ask for approval. What we brought forward was a process that we felt needed to be approved so that we could properly market the assets in these proceedings to come back to you, hopefully later in November, with a sale to be approved. Throughout this period of time, the company will be conducting the sale process with the assistance of its sale advisor and under the supervision of the Monitor.

So the case that you have before you is entirely distinguishable. This is not a case where it's necessary to push the pause button and direct the parties to go back, because in fact, the parties have already done everything that my friends are asking and the Monitor, as the independent party and not like in the *Nelson* case where that proponent as Monitor had been advising the company for a significant period of time, this Monitor was engaged to be the proposed Monitor. This Monitor was not making decisions and directing the

company, the company was making the decisions with the advice of its professional advisors and was consulting with the Monitor.

If you look, My Lord, at the Monitor's Report, this is the first report and it's paragraphs 17 and 18 and this goes to my friends suggesting that there should be all sorts of information before the Court as to what has come before. And what I say, My Lord, is that evidence is not necessary because the evidence that has been put before you is the evidence as to, whether or not, this process is an appropriate process and a proper process. Do you have that, My Lord?

THE COURT: The proposed report --

MS. BOURASSA: No, it's the first report, it's not the proposed.

THE COURT: Yes, got it, yes.

MS. BOURASSA: So it's on page 6 and paragraph 17 and 18.

THE COURT: Yes.

MS. BOURASSA: The Monitor notes that they speak about people who have been contacted, people who have signed CA's, what has taken place since the initial order. Paragraph 17: (as read)

> The Sale Advisor has advised the Monitor that a number of counterparties have signed CA's since the Initial Order was granted and accessed the virtual data room in addition to requests for management presentations.

Following along in 18: (as read)

> Furthermore, the Monitor understands that there have been no significant concerns expressed . . . with respect to the timelines or process set out in the Sales Procedures.

My Lord, if you turn to confidential Exhibit A, to the Monitor's Report, in that exhibit TD Securities talks about the range of factors that it considered in setting -- in constructing the proposed timeline. And it looked at typical timelines for processes conducted by TD Securities for similar E companies.

They looked at the bid submission requirements, that the bidders would need to satisfy,

which is limited to a submission of non-binding proposal. They looked at the activity level to date including the fact that they had contacted, and this is in the public record, the more than 600 parties and 37 NDA's had been signed. And they consulted with the company and the Monitor.

What I'm saying, My Lord, is you have the evidence before you today to approve this sale process. What happened between July and September, is the fact that the assets were out in the market, there was some interest engendered, there were some people -- this was not a hard start. It wasn't a cold start. There were parties already in the process moving forward and while they may or may not have spent as much time on the assets as they will now, the assets were out there and the evidence is that this process is a proper process.

My friend speaks about the litigation as being -- having an impact and to that point again, I would point you to the TD confidential exhibit where they note that the litigation has not been raised by any prospective party as an issue.

The TDSI as an affiliate, I had spoken of that before, I won't go back to my earlier submissions. But, I would note, My Lord, that it is very different to say that the Court officer must have absolutely no connection or perception of bias. I'm not aware of any perception of bias with respect to TDSI, but the approval of the sale advisor does not raise to the level of approval of a Monitor.

With respect to the financial advisor roles and the financial advisor charge and my friend's comment about duplication, I would point you both to the confidential memo that was attached to Mr. Scott's transcript as a confidential exhibit, the memo from FTI that sets out the roles of each of the financial advisors and the test in *Walter* which is not that they're not be duplication, but there not be unwarranted duplication. And what is clear from the chart in the Monitor's memo is there is not unwarranted duplication.

As to the fees and the payment of the restructuring related fees of the plaintiffs, I would note the comments that my friend made where he talked about the oppression claim briefly and spoke about how it went to structure. The plaintiffs' claims in the litigation are so intertwined with what they are doing here in this entire proceeding that we see no way to draw it out. And I want to reiterate the point I made earlier, that the benefit that the plaintiffs are seeking in the litigation is not something that would be shared with all of the members of the unsecured notes. It is something they are seeking for their own benefit. This is not a situation where they're representative of a class.

And I would just like to take you, as a last comment, to the *Nelson* decision, not the one that was attached to my friend's materials, but the one that was attached to our reply brief

at tab 4.

THE COURT: Yes.

MS. BOURASSA: And My Lord, I'll use -- like I said it's tab 4, I'll use the same reference that my friend used, it's page 7, which is the little number, paragraph 38 and this is where the Court is going through the factors with respect to approving a sale process. And at paragraph (e) where he's looking to the effects of the proposed sale on creditors and other interested parties and this is one of the factors that I had pointed out earlier in my submissions, when I was speaking to the sale approval. But, if you go to the bottom of that paragraph (e), I think there is a very important quote there and here he's talking about the first lien lenders, be it the first lien lenders, the second lien lenders, be it any stakeholder: Parties with security are not obliged to wait in the hopes of some future result.

We are here today having explored every alternative available. There is no criticism of the fashion in which this company has been managed. The Officers and Directors are trying to do the best thing for the company and there is no reason today for the pause button to be pushed. None of the parties in this courtroom are obliged to wait for some future result in the hope that the price of oil will return.

And so, My Lord, we would submit that the relief sought in the initial order should be granted, was appropriately granted and that on this comeback the company has met the threshold for approval of all of the facets of initial order that were granted on the 26th.

THE COURT: Okay. Mr. Collins?

Submissions by Mr. Collins

MR. COLLINS: Thank you, My Lord. Again Collins, initial S. for the Monitor, we'll try to be brief, given the hour. Parties have ably put the Monitor's material before you, My Lord, so we should be able to shorten things up here.

With respect to the sales process, My Lord, the Monitor is satisfied with the integrity and ethicacy of the sales process. I suppose put another way, My Lord, the Monitor's submission is that this sale process is a proper sales process and one that will properly canvass the market.

In particular, My Lord, the Monitor has considered the timelines that are set out in the sales process and you've had reference to confidential Appendix A to the Monitor's Report and the TD memo that's at page 19. Attached to that report, My Lord, you know

TD's advice that this timeline is typical in a sale process of this nature, that the first phase of the process is one that's seeking non-binding expressions of interest, My Lord. In addition to TD's advice in the concluding paragraph at page 19 of Exhibit A, My Lord, with respect to its view on the impact of lack thereof of the ongoing oppression and the *CBCA* process.

My Lord, in response to counsel to the unsecured noteholders contention that there's been no analysis with respect to the pre-filing SISP, what the Monitor would say in response to that, My Lord, simply is that at paragraph 72 of its pre-filing report, it indicated that the interested parties were likely contacted in the pre-filing process. That the pre-filing process was press released by this company. The Monitor, My Lord, is also informed by the fact that this is a distressed exploration and production company who's publicly announced a sales process in a generational if not historic downturn, in its industry My Lord. That is to say, parties are aware that these assets are for sale, were aware that these assets were for sale at least by July of 2016 and so this matter, My Lord, in the Monitor's respectful submission, is somewhat different than an education publishing firm in Ontario, which is the *Nelson Education* matter, My Lord.

My Lord, in terms of TD Securities, similarly the Monitor has no concerns with TD Securities acting as sales agent in this case. The Monitor brings to this view its role as the objective, impartial Monitor, the officer of this Court, My Lord. If the Monitor understand the contention of the unsecured noteholders correctly, which I believe it does, My Lord, it's that there could be a perception that TD will not seek out transactions that do anything more than facilitate the closing of the credit bid. What we have here is a sales process, My Lord, that's already in process, which is designed to solicit bids without more, My Lord, the Monitor is looking over the shoulder of TD Securities.

If anything came to the Monitor's attention that in any way indicated that the integrity of the process wasn't being respected, the Monitor would draw that matter to the Court's attention immediately, although it does not anticipate that the professionals involved in this case would engage in that type of conduct.

And given its views on the sales process, My Lord, and this is set out in the Monitor's memorandum, which is also enclosed in confidential Appendix A, the Monitor's view, My Lord, is that there's no reason at this point to provide its view on restructuring alternatives. Certainly, My Lord, its heard from the company and from TD Securities and to the extent there is an alternate restructuring alternative brought forward, be it a plan, a recapitalization proposal or something along those lines; that both the company and TD Securities have committed to bring those matters forward for stakeholders' consideration and determination.

Quickly, My Lord, in terms of things that seem to be in issue; on the issue of suspending interest, you've heard from the company and from counsel to the first lien and second lien lenders that indeed it is common where a first lien lender is in the money for payments to continue to be made to it and the Monitor concurs with that observation. The Monitor approves the payments being made to the first lien lenders in this case.

With respect to the financial advisor charges, My Lord, both the pre-filing report and then the first report of the Monitor, indicates the Monitor's support for the quantum of the charges sought in connection with the financial advisors. As between Evercore, My Lord, and TD Securities, it's the Monitor's understanding that the role of TD Securities is to run the sales process and that broadly speaking, the role of Evercore was to search and source restructuring alternatives.

With respect to the request of the unsecured noteholders to be included in the administration charge, My Lord, if you've read the Monitor's Report, you'll note that the Monitor does not support the inclusion of the unsecured bondholder's counsel in the administration charge and the Monitor does take cognizant of the objection by the company and the second lien lenders to any inclusion in any charge of those parties. The Monitor would note, My Lord, however that if not rare, it is not unprecedented to include the reasonable costs of parties opposite to a company's proposed restructuring in a charge of some sort.

And so, My Lord, the Monitor's conclusion in its report was that it recognizes that to the extent that Mudrick and FrontFour are advancing interests of unsecured noteholders in connection with the restructuring and not advancing solely their own interests as plaintiffs, then it may be appropriate to provide them with a charge to secure payment of their counsel fees. In its report, My Lord, the Monitor noted what in its views ought to be the conditions of such a charge, if the Court were inclined to do so and those, just to summarize, My Lord, is that it would be in a separate charge subordinate to the charge of the first lien lenders in this case. Any charge would have to be limited in quantum, My Lord, that is it wouldn't be a blank cheque and perhaps most critically, is that the amount secured by a subordinate ascertainable charge would have to be limited solely to restructuring advice that's given by counsel to Mudrick and FrontFour with respect to advancing their interest qua unsecured creditors representative of the group as a whole in this restructuring and not as it pertains to counsel's role as plaintiffs in the class action -- or in the oppression proceeding and as bidders in the matter.

I think it's within the art of possible to parse accounts in subsequent date, My Lord, contrary to the suggestions by those that oppose the granting of the charge. The Monitor does believe it would be possible to parse that. It would take some effort, but it's something that's open for the Court to consider.

My Lord, do you have any other questions of the Monitor with respect to his report?

THE COURT: No, thanks Mr. Collins.

MR. COLLINS: Thank you.

THE COURT: I'm have a matter at 2 which I hope will not take very long. So let's -- I'm going to -- I'll give my judgments on the matters that have been argued thus far at -- we'll shoot to 3:00 and if -- how much longer do you think we're going to be on the so-called threshold question?

MR. SIMARD: I don't think we're going to be that long.

THE COURT: That long?

MR. SIMARD: You've got three issues to decide and they're not substantive. They're time tabling and the question to be put to the Court.

THE COURT: Okay. Thank you. We'll reconvene at 3.

THE COURT CLERK: Order in court.

PROCEEDINGS ADJOURNED UNTIL 3:00 PM

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Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary, Alberta

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October 11, 2016	Afternoon Session
The Honourable Mr. Justice MacLeod	Court of Queen's Bench of Alberta
K.J. Bourassa	For the Applicants
M. Barreck	For the Applicants
K. Bell	For the Applicants
T. Pinos	For the Respondents FrontFour and Mudrick
C.D. Simard	For the Respondents FrontFour and Mudrick
S. Zweig (by telephone)	For the Respondents FrontFour and Mudrick
K.J. Zych	For the Respondents FrontFour and Mudrick
D. Bish	For the Respondent First Lien Lenders
E. Paplawski	For TD Securities
A. R. Anderson, Q.C. (by telephone)	For TD Securities
W.W. Macleod	For the Monitor FTI Consulting Ltd.
S. F. Collins	For the Monitor FTI Consulting Ltd.
M. Khedri	Court Clerk

THE COURT CLERK: Order in court.

Decision

THE COURT: Sit down, please. Okay, again I would like to thank counsel for their extensive briefs and their comments which, while took up the morning, considering the number of issues we had to deal with I thought they were focused and I thank them all for their comments. I don't think my comments will do justice to the submissions but I think it's important that this matter proceed and that timeliness is more important than eloquence at this time. There's no need for me to repeat the lengthy history of matters surrounding the Lightstream Group of Companies, but it's clear to all of us here, particularly those in the audience, that the Lightstream Group has had to deal with one of the most severe and sustained drops in oil prices in our living memory, and there has been for some time now a great deal of thought gone into what the reaction of the Lightstream Group was going to be and is going to be to deal with events that were not foreseen and in order to maximize the value of the company for all stakeholders.

So we have heard about the early discussions and brainstorming with the various

stakeholders, including all of the lenders and particularly the secured lenders, and the Board's desire to maximize value for all the stakeholders including shareholders and involving the lenders from early on, which is only prudent and which more and more enterprises are doing, and which I think has been part of the contribution of proceedings in this court under the *CCAA* legislation, which does give very broad powers to the court. It has I think generated very thoughtful and creative work on behalf of all stakeholders in unfortunate situations like this.

In any event, last summer there were some proceedings taken under the *CBCA*, the *Canada Business Corporations Act*, under the arrangement section. I believe it's 191 of that Act but I get them backwards, whether it's the *ABCA* or the *CBCA*, but anyway, that doesn't matter. And the view was that there maybe was some way to reorganize the Lightstream Companies in such a way that there would be some value preserved for the shareholders and accordingly an initial order was granted under that Act and the lenders were very much involved in that and were prepared to backstop the company. But, particularly in the case of the first lien lenders, there were parameters surrounding that because, as Mr. Bish says, they're not really concerned with taking some of the risks that those less secured people are quite happy to run.

In any event, there was a pretty comprehensive plan established and so the negotiations which might have borne some fruit under the *CBCA* proceedings were unsuccessful and the company had to fall back on its plan 'B', which was to proceed -- and when I say the company I mean the Lightstream Group -- which was an application under the -- which is the one that was heard by me on September the 26th of this year under the *CCAA*. So I gave an initial order after hearing argument for most of the morning and provided a come back proceeding which was heard this morning. On both occasions I was favoured with a great many briefs for which I thank counsel and extensive affidavits and extensive records, most of which I have tried to read and absorb and made sense of, and I've had a great deal of help from counsel on the 26th and again today. Thankfully counsel were able to isolate specific issues for the come back hearing and it first deals with the sales process.

As I said before, it's clear from all the material I've read that a great deal of thought has gone into this from early on. And there was a lot of planning that went into various things that might happen and changes were provided should certain courses fail, such as the plan 'B' to go on to the *CCAA*. And it's clear to me that a great deal of thought was given by Mr. Scott's affidavit and from everything else I've read that management and the Board of Lightstream Group have given a lot of thought to maximizing the value for all of the stakeholders. And in order to do that it was their view -- and I see nothing to suggest otherwise -- and I think it's usually the case that in order to do that you need the cooperation of the lenders and, in particular, hear the first lien lenders and what's been

referred to as the ad hoc committee. In any event, a comprehensive plan was established. It was acted on and that's what's led us to where we are now.

Now this process is difficult and it's always difficult to get consensus among stakeholders with differing interests, but it's made much more difficult in this case because overlaying with all the other complication was a group of oppression claims. And their claim is based on the fact that in their view the unsecured note holders have been oppressed and at their expense benefit has been given to formerly unsecured noteholders who have put additional money into the companies but received a security for it. And their claim is in the form of litigation. Litigation has been commenced and is proceeding in case management in this court and those claims are well documented and reflected in the pleadings. They are presently in hiatus now I understand because of the proceedings under the *CCAA* legislation. So that has made things much more complicated because of course the concern of the oppression claimants is there may not be, given what's being proposed, sufficient money available to satisfy all of the secured creditors and their claim, which pending the resolution of the oppression claim at least, is unsecured.

So that makes it even more complicated because in pursuing all of the matters, including the proceedings under this legislation, the oppression claimants seek to serve their interests and, as everyone has knowledge, that's understandable. But the result does not make life easier for the judge who is adjudicating on the reasonableness of the process before it. And the judge is -- I guess it's a two-edged sword. On the one hand, as counsel have observed, the Court is entitled to rely upon the business judgment exercised by those are much more able than the Court for many reasons. Not the least of which is they are more familiar with the situation, more experienced in the area, and nobody knows the business of the company more than its management or its Board of Directors. And it's those people to whom we rely to make business judgments on behalf of their stakeholders. And I'm under no allusion that of course this Court has a discretion.

I understand totally that there is no gun to my head and I don't have to do what I'm told. I do have a choice here. But as a matter of common sense and as a matter of the law and the pronouncements of our appellate courts that I don't go second guessing the judgments of Boards of Directors or management or experts who are lenders with financial advisors who have poured over these documents for weeks and months, and I am not going to second guess or fiddle around with matters, let alone minor matters, unless I have a very good reason. And I do take Mr. Bish's advice that one must be careful when one starts to unravel the thread because if they pull the thread in one area you may have an effect elsewhere. I don't take that as some sort of a threat that don't you dare mess with this judge, but I do think it's a very cautionary note that one -- in other words, I think there has been a great deal of thought put into this process and I'm not going to second guess the business judgment of particularly the Board of Directors but also the management.

And particularly if the reasons put forward, which were put forward to me this morning, all seem to be sensible reasons as to why things were done the way they were done.

I also want to make a note about the role of the Monitor in this case. The Monitor is kind of the supervisor of this process and he of course consults with the various financial and legal advisors and he has legal advisors of his own. But he is an officer of the court as counsel had pointed out and he is to exercise a very active role in this whole process, particularly one such as this which is dynamic, which is compressed. I think we all agree that we don't have the -- well, there's a difference in opinion as I would say the oppression claimants say we do have the luxury of time, but I'm persuaded that, you know, time is not a luxury and that there is merit in proceeding as has been suggested. So what I'm saying here though is that the Monitor retains a very active role. And if some of the concerns that have been raised by the oppression claimants do arise and the Monitor has concerns, I certainly expect the Monitor to come forward and advise the Court that it feels that things are proceeding in such a way as maximum value is not being obtained and robust -- there is no robust response to the -- to the marketing that has occurred so far and will occur in the future.

So what I'm saying here is that I am not going to put a stop or even a pause on the sale. I'm not going to press the pause button as Mr. Simard has suggested. I'm going to affirm the sales process and I am satisfied on the basis of the evidence before me and the position of the company and supported by its lenders and by the ad hoc committee. It's supported by all of the stakeholders but the oppression claimants. I am going to affirm it and send a signal that based on the information I have I am satisfied that it is a sensible process. The idea of a credit bid I think is a good idea. I think it sets out clearly the parameters of those bidding what they have to -- the number they have to beat and it in my view simplifies the process and makes it a better process. So I'm saying that it should go ahead.

Related to that issue is the issue of TD Securities. It's alleged that it is in a conflict because it wears many hats. It is in addition to being the financial advisor to the Lightstream Group it is a lender under the first lien group and is also an administrative agent for that group. And it's suggested that it is not in a position -- or I should say that perhaps its interest is not best served by making sure that there is a bid from the marketplace which is superior to the credit bid. That view has been expressed late in the day by the oppression claimants. It is not a view shared by the other stakeholders who are involved. They are on the contrary happy and comfortable with TD in its role. I agree with counsel for the Lightstream Group that it's not the same thing as the Monitor, who the Court relies upon to be independent counsel to advise the Court on certain matters. They're acting simply as the advisor to the company. The company is comfortable with its role. The ad hoc committee who arguably as Mr. O'Neill says because they are the

(INDISCERNIBLE) maybe they are the ones that are really hoping for success in this area and they're happy with TD Securities.

More important in this debate, however, is that we are already at October the 11th and we're well down the road. The effect of replacing TD Securities now in my view would impair what's already been embarked upon and I'm just not prepared to do that. So I'm not going to touch that make whole issue. I agree with Mr. O'Neill, that can be dealt with down the road. It's not something we have to deal with now. I'm quite happy to have it as part of the bid which has to be beaten by any successful bid from the market. Similarly, on the matter of the continuation of interest payments to the first lien lenders I'm persuaded that that should continue. As to the fees paid to the financial advisors, on the question of the overlap the Monitor is comfortable with the fees and in one of the confidential documents that's been referred to the Monitor has referred to the differing roles of TD Securities and Encore. This may or may not be a continuing problem. I'm not going to interfere with it now. If the Monitor feels there is unwarranted duplication down the road I would expect this would be one of the things that he would bring to the Court's attention. And there may well be other matters which the Monitor will want to bring to the Court's attention which may affect the marketing of the assets which are being sold. If the Monitor can see certain advantages in doing things a certain way, I expect the Monitor to come to the Court and make a recommendation. So it's not as if everything is cast in stone now. This is a process over which this Court is going to exercise supervisory jurisdiction and expects will count on the help of the Monitor and counsel for all the parties.

With respect to the fees of the oppression claimants, again, at this point in time, as I say, I am persuaded that the driving force of the oppression claimants is their claim for oppression and it's driving everything that's being done. They are proceeding as the litigant and they see their interest as not being served by this process. They see it's serving only, primarily at least, the secured lenders and it's simply coming from in my view the oppression claim and I'm not persuaded that their costs should be covered by the administration fund. I have heard the Monitor's view that he believes that there may be some effect beneficial to the overall process in terms of restructuring and that counsel for the oppression claimants is providing that service. And it may be that I'll be persuaded that is the case but I'm not there now.

Okay. I don't know whether I'm finished on the come back issues. If there's other issues let me know what I haven't dealt with.

MR. SIMARD: My Lord, it was tied to the sale process but our suggestion that the Monitor go out and do a report on other alternatives, I assume that's not --

THE COURT: That's right. I'm satisfied -- well, frankly, I'm -- based on the -- yeah. I'm satisfied that the company is totally on-side what's happening, the Monitor is on-side, the sales advisor's on-side, the lenders are on-side. Everybody is on-side except your group. You know, Mr. Smart and -- anyway. No point in piling on. Yes, Ms. Bourassa.

MS. BOURASSA: So, My Lord, just one thing that goes with a that. Given that you have affirmed your order I don't think there's any further initial order that's necessary but we do have a sealing order with respect to that confidential exhibit to --

THE COURT: Right.

MS. BOURASSA: -- the Monitor's report. If I can pass that up to you.

THE COURT: Right. And while I'm -- I'll wait until the clerk gets back. Madam clerk, would you order a copy of what I've just said so that I can take the errors out and I'll provide a copy to counsel.

MS. BOURASSA: Thank you, My Lord. And as you're aware, the test government sealing orders is from the *Sierra Club* case, whether there is a confidential commercial interest to be protected. And the position of the parties is that there is and I'm not aware of any objection to the sealing order.

THE COURT: No, and I agree that there is.

MS. BOURASSA: Thank you.

MR. BARRECK: So that brings us to the threshold issue, Your Honour. Barreck, initial M.

Submissions by Mr. Barreck

MR. BARRECK: We had three things for you to decide and I think we're down to two. And the issues are the questions to be put to the Court and the evidence they're to be based on. And if you go to our reply brief at page 10, I'll refer to some of those (INDISCERNIBLE) what we're talking about. So it's Lightstream's reply brief.

THE COURT: Yes, right. What page, I'm sorry?

MR. BARRECK: Page 10. You see where it says the threshold issue.

THE COURT: Right.

MR. BARRECK: So you're aware from everything you heard in this proceeding that the plaintiffs are today unsecured creditors --

THE COURT: Right.

MR. BARRECK: -- who may or may not be out of the money.

THE COURT: Right.

MR. BARRECK: The relief they're seeking in the *CCAA* is unique in two regards. It seeks to unwind a transaction completed prior to the *CCAA* and it seeks to reorder the priorities on behalf of part of a class of creditors. So in effect they were saying issue the securities to us under the prior transaction and treat us as secured creditors in the *CCAA.*

THE COURT: Right.

MR. BARRECK: Now if that's granted, it's to the detriment of the secured creditors who provided cash to the company. But it's also potentially of detriment to the other unsecured creditors if in fact there is value for the other unsecured creditors because they move ahead.

THE COURT: Right.

MR. BARRECK: So why we have proposed the determination of a threshold issue is to attempt to use the resources of the Court and the company efficiently. Determining a threshold issue -- and I want to address the point that you raised at the outset -- does not tie the hands of the Court or pre-determine any issue whatsoever. The issues that we're seeking your guidance on today are the questions to be put to the Court and the evidence that they're to be based on. We also in our brief dealt with time tabling but Mr. Pinos and I have agreed that if you give us guidance on issues in the evidence, we'll work out the time table. We don't need you to do that today. What we will want you to do is tell us when the Court is available or assist us in finding out when the Court's available, both for the threshold issue and, if the threshold is

unsuccessful, for the hearing of the substantive matter.

So let me turn to the issue of the questions to be put to the Court. And at page 11 in paragraph 30 we have set out the three questions that we think should be put to the Court. And the real difference between us is we say 'A' and 'C' should be put the Court and Mr. Pinos says only 'B' or a form of 'B' should be put to the Court. So the first question that we say should go before the Court are have the claims that the plaintiffs asserted in the actions become potential claims within the *CCAA* proceeding? And actually, when I listened to your comments this morning I was glad that we had put that question in because as I understood your comment it was, listen, I made an initial order but nobody addressed me in any detail on the initial order as to what the affect it would have on the oppression claims.

THE COURT: Yes, what I meant to say, Mr. Barreck, is that when we were here on September the 26th my idea was to grant an order which would allow us to deal with those claims. But if in effect by signing the order I was limiting them I would have been expected to have been told that because if I had I wouldn't have granted the order.

MR. BARRECK: Right. And so that's why we say the first question -- and again, we're putting these questions for the Court to answering, not having the Court answer them today. But the first threshold issue becomes for any Court or any judge turning their mind to this is what are we dealing with today post *CCAA filing?* How do we deal with these claims? So have they become potential claims within the *CCAA* proceeding? And the company's position will be yes, based on *Abitibi,* based on the law, and I could take you there if you want. On the -- there's a single proceeding model that goes forward that these have to be dealt with within the *CCAA.* Mr. Pinos may say, well, that's now moot because he accepts that they have to be dealt with in the *CCAA.* We think that the Court having clarity on that particular issue as to what's been dealt with informs the answers to the next two questions. So that's why we have it there.

And really, the gut issue there -- and, you know, I probably said to you the last time that you never want to hear from your doctor or your lawyer but maybe you do if you're a judge that you've got an interesting case. This is an interesting case. There are some interesting issues to be dealt with here. And one of them is what are we dealing with? What is the effect of a *CCAA* order on these claims? What's their character? So once we get past that question the question that we both agree on is -- as a threshold is is there jurisdiction in the Court to recognize the plaintiffs' claims as secured claims after the granting of the initial order, or to make an order varying the transaction in requiring Lightstream to issue additional secures notes to remedy the alleged oppressive conduct. And the reason those are stated the two ways is I'm kind of a decision tree guy. I mean,

one is if we are now in the *CCAA* process then -- and these are claims within the *CCAA* process they can only be secured claims or unsecured claims. So going back and saying to the company issue the secured notes and unwind the transaction may have no meaning in the context of the *CCAA.* The appropriate remedy, if there's jurisdiction to grant it, is to take an unsecured claim and treat it as a secured claim.

Alternatively -- and why we have the first question here is if you're thinking about this and you say, well, no, we're gonna deal with this without reference to the *CCAA* and somehow we're gonna think about the Court granting the jurisdiction of allowing the oppression claimants to patriciate in that historical transaction, then the relief might be different. But what we're trying not to do is tie the Court's hands through this decision tree process as are we in, are we out, do we then stay out and merge in or do we do everything within. That's why we framed it that way. And there is agreement between us that this question about the jurisdiction of the Court is one that we both agree should go forward as a threshold issue.

The third issue that we've put forward is is there jurisdiction to make an order recognizing the plaintiffs -- sorry, if there is jurisdiction to make an order recognizing the plaintiffs' claims as secured claims or varying the transaction, would the Court exercise its discretion to do so based upon the facts as pleaded and evidence agreed upon? And that is nothing more. The first is a jurisdiction question that is informed by the pleadings. The second is make all of the factual calls in favour of the plaintiff. So rather than -- you know, in the guts is -- and where the -- ultimately when we have the hearing the biggest factual issue for determination by the Court will be what, if any, representation was made to the plaintiffs that if there was a transaction that they would be included and all unsecureds would be included or was that representation not made. That's the biggest factual difference between us.

So this threshold motion goes forward on every factual call gets made in favour of the plaintiffs. Let's say that the representation that they pleaded was made as pleaded, not as denied in the pleadings, and any other facts that they have admitted on the discoveries. And there are a number of non-controversial facts that have been admitted, such as how many -- how many of these notes they bought subsequent to the transaction. That's an uncontroverted fact. These are not facts that anybody's going to ask the Court to make a factual determination on. And what we had proposed in our time tabling was to try and identify those by agreement in advance so that what we have is a factual record entirely positive to the plaintiff, no decisions being made against the plaintiff. We either take their pleadings or facts they've admitted, take the highest and best case that the plaintiffs can put forward if every factual finding is made in their favour.

THE COURT: Is that captured in your --

MR. BARRECK: That's in our 'C' --

THE COURT: -- text?

MR. BARRECK: -- a discretion based upon the facts as pleaded and evidence agreed upon. So --

THE COURT: So evidence agreed upon --

MR. BARRECK: If you want to change the wording to capture it in 'C', that's the thought we're trying to convey. The thought we're trying to convey is that there will be no factual determination that the Court will have to make but if there are agreed facts --

THE COURT: Yes.

MR. BARRECK: -- that are, you know, simply agreed --

THE COURT: So pleaded or agreed upon.

MR. BARRECK: Pleaded or agreed upon.

THE COURT: All right.

MR. BARRECK: Okay, or evidence agreed upon. And when we say agreed upon, you know, if -- I don't want them to be obstreperous. If there's a clear admission, and I take something as simple as did they buy securities after and their witness said it and they haven't retracted it, I mean, that's a non-controverted fact. But that's what we're trying to get to the Court to the place. Where we have a factual record we're not gonna come and say, well, when you get to the hearing it's gonna be -- we're gonna prove that that's wrong. Because we believe that it's a valid and -- it's a valid question to be asked and may shorten this proceeding to say, well, oppression plaintiffs, if you get every factual finding in your favour the Court in these circumstances would never exercise its discretion to unscramble the egg. And the reason is because -- two primary reasons; number 1, you didn't put money in like the secureds did, cash in addition to the swap of securities at the beginning, and 2, you're going to -- it's going to be averse to the interests, and 3, what you're really bringing here is a breach of contract and a misrepresentation claim and the appropriate remedy for that is damages. And if the appropriate remedy is damages it's unsecured and it gets subsumed into your admitted claim today for the full value of your notes.

And so that's the simple logic that we are proceeding on. We laid out a time table and as I said -- so that answers the two questions. We would say these are the three questions. They're based on the pleadings and anything that's admitted or agreed upon. There are some, you know, non-controversial facts. They're put to the Court. We had laid out some time tabling when you indicated the week of November 14. I've spoken to Mr. Pinos. If you give us a date and give us the questions, we'll work out the time tabling between us as to how to brief it.

THE COURT: Okay. How much of my time do you want?

MR. BARRECK: A day.

THE COURT: One day?

MR. BARRECK: Yeah.

THE COURT: Now, come on. Two days. And which two days of that week do you want?

MR. BARRECK: Of the 14th I think I can make myself available with whatever's good for you. I can move everything that week so I can be available when you are.

THE COURT: How about the 17th and 18th?

MR. BARRECK: That's fine with me.

THE COURT: Mr. Pinos?

MR. PINOS: I'm checking. I'm free on the 18th. Unfortunately, I'm at our divisional court on the 17th.

THE COURT: Well, do you really think that one day is enough?

MR. PINOS: Well, yes. I'd like to make submissions why I think one day or less is enough with respect to this because at the most it will be an argument. And in my respectful submission the argument should be as to the jurisdiction of the Court, which I submit could be done in half-a-day.

THE COURT: Okay. Will there be briefs?

MR. PINOS: Yes.

MR. BARRECK: Yes. I think we can do all three in a day. I think, you know -- I'm not a wordy guy at the best of times and I think that there are some -- there are some interesting calls but I don't think that the record and the -- even the jurisprudence. I think this really is a matter somewhat of first impression. I don't think there's gonna be a great number of cases to go through and I think it's gonna be a tough call but I think it's gonna be -- I don't think it's gonna take us a long time to put it in front of you. But if you think two days is safer, I'm happy to adjust to two days. I'm also in your hands.

THE COURT: All right. Well, I'll give it some thought I guess but -- and I guess there where the -- I don't think I care if it's the 16th or the 18th.

MR. BARRECK: Right. If Mr. Pinos has to be in divisional court I'm easy because we both know that those trial days and prep times -- he may have a preference one way or the other. I can adjust either way. I should add that if you have read the reply brief there was an issue about the officers and directors. And what had happened is when this matter -- before it went into *CCAA* there was an application that had brought to the officers and directors. We were going to ask for that to be time tabled ahead of the full hearing if the threshold motion is unsuccessful. Mr. Pinos has indicated that the oppression claimants are withdrawing that application with a view to letting the *CCAA* go forward and then holding fire as to what they do with that. So that has come off the table. We don't need any guidance on that.

THE COURT: Okay.

MR. BARRECK: And then the other thing that everyone has agreed might be useful is that in the event that the threshold issue is unsuccessful and we do have to have a full trial, should we be looking forward and trying to block some dates before the end of December to do that and we can work out a time table for that so that we don't impair the transaction -- the credit bit if that turns out to the transaction that goes ahead. But I'll leave that in your hands.

THE COURT: Okay. Well, so take me through that. I mean, you're saying if the oppression claimants are successful in the three questions then we're going to have to have another hearing. How long --

MR. BARRECK: We're going to have to have that three to six

day hearing they talked about originally because we're going to have to do that on full evidence. So we're going to have to try and get some time to do that and we're going to have to deliver expert reports and exchange them and move forward. But again, we can do our time tabling back from when the Court lets us know that that time would be available and it would probably not be wise of us to not contemplate that potentiality.

THE COURT: No, of course not because, as I'm sure your court does in Ontario, we take a break before Christmas some time and we don't come back until --

MR. BARRECK: Right.

THE COURT: -- after the New Year. So several -- we're looking at some time between the 1st of December and probably the third week in December.

MR. BARRECK: Right. I think you have the point and I'm not sure what the formalities are to get that but I'm in your hands.

THE COURT: Yes, well, I'll have to counsel with the Chief Justice and see what we can do.

MR. BARRECK: Okay. Subject to any questions those are my submissions.

THE COURT: Thank you.

Submissions by Mr. Pinos

MR. PINOS: Good afternoon, My Lord. I'd like to correct a few mischaracterizations that have come from the other side of the room in terms of what my clients were seeking here. From day one they've sought an order under the *Alberta Business Corporations Act* that they ought to have been entitled to participate in the June/July 2015 transaction that allowed certain unsecured creditors to become secured creditors. We are not seeking to have the transaction unwound. We're merely asking that the Court say you were entitled to participate in that and if you put your money on the table you're entitled to have secured notes the way Apollo and GSO negotiated their way into secured notes. That's -- it's not an unscrambling of the egg. It's not an unwinding of the transaction. It's a remedy that wouldn't affect them that would directly address the fact that we were unfairly excluded from the transaction.

THE COURT: When you say wouldn't directly affect them, who -- first of all, who is them?

MR. PINOS: The other secured creditors.

THE COURT: Well, the people represented by the ad hoc committee, it would affect them.

MR. PINOS: It would -- well, it would affect them in the sense that they would get the -- they would be in the transaction they would have been originally entitled to.

THE COURT: But only -- it would only be -- it would be diluted by whatever effect if you're --

MR. PINOS: We would rank pari passu with them.

THE COURT: Right, right.

MR. PINOS: Now when we first brought a joint issue on this back in September my friend indicated in his bench brief that the question he wanted addressed was whether the remedy we sought is available in the *CCAA*. That is issue number 'B' in the list of A, B and C.

THE COURT: Right.

MR. PINOS: With respect to 'A' I say we're at ad idem on that because our application that we filed in response to the originating application out of the *CCAA* asked that our rights be determined within the *CCAA* proceeding. So I don't know what value is added to this process by having a Court consider whether the claims of the plaintiffs asserted in the actions become potential claims within the *CCAA* proceedings. They are and we are asserting them as such right now. So our response to 30(a) is that it's an unnecessary question. By having the jurisdictional motion you're treating it as a claim within the *CCAA*. You're adjudicating on a portion of the claim within the *CCAA*. So in my respectful submission that is not a necessary question.

We're in agreement on 'B'. 'B' is a genuine jurisdiction question. It's a genuine threshold question because it says, you know, does the Court effectively have the power to grant the remedy we seek of having our claims treated as secured claims or requiring that notes be issued in lieu thereof under the oppression statute in the *CCAA* proceeding. That's a pure jurisdiction issue. That's a pure threshold issue.

With respect to 'C' we disagree. That's a substantial expansion of what Lightstream suggested at the last hearing, was the threshold issue before this Court. It's a what if. If there's jurisdiction would the Court -- it's conditional, it's hypothetical -- exercise its discretion to do so based upon the facts as pleaded and the evidence agreed upon. Well, facts as pleaded are the claim and defence. My friend said a number of times he wanted to put the plaintiffs at their highest in this hypothetical determination, but that's not what the words "evidence agreed upon" stands for. They would have to agree to the other evidence put before the Court and we simply cannot agree to a partial process You're asking the Court to effectively determine the merits on some kind of bowdlerized partial record that could finally dispose of my clients' claims without a full factual record.

I'd like to take Your Lordship to our bench brief and illustrate why we submit that number 'C' is inappropriate for consideration as a threshold issue. If you can lay your hands on the brief of argument of Mudrick Capital Management and FrontFour for today's date filed on October 6. It's a cerlox bound document. It's the one I think Mr. Simard took you to on a number of occasions.

THE COURT: It's right here, yes.

MR. PINOS: Yeah. If we could turn to page 27 of the brief which is where we deal with the threshold issue.

THE COURT: Is this the one today?

MR. PINOS: Yes, today's bench brief.

THE COURT: Okay, yes. Right, okay.

MR. PINOS: It's a spiral bound cerloxed --

THE COURT: Yes, I've got it.

MR. PINOS: Okay. If you could turn to the brief at page 27.

THE COURT: Yes.

MR. PINOS: You'll see under the heading Threshold Issue.

THE COURT: Yes.

MR. PINOS: And then if you flip two pages over at page 29 --

THE COURT: Yes.

MR. PINOS: -- under heading 2 we set out submission that the third question, which is the one that I've just addressed, inappropriately asks this Court to determine the ultimate issue in this case on a partial and incomplete factual record. In my respectful submission asking a Court, whether it's you or some other judge, to take a -- some kind of statement of fact -- and we don't know whether it truly is my case at its highest or some -- subject to some agreement by the other side and it denies the Court the full -- it asks the Court would you exercise your discretion only on the basis of a partial record of fact before you. And if there's one thing that the jurisprudence of this Court and the Supreme Court of Canada -- sorry, not this Court -- the Alberta Court of Appeal and the Supreme Court of Canada made clear that oppression is a very fact specific remedy that requires to determine what is just and equitable based upon a determination of the reasonable expectations of the stakeholder and the conduct of the company. And in paragraph 98 I set out the classic quote from *BCE* that it's the entire inquiry is a fact specific one and facts which may give rise to a finding of oppression in one case may not give rise to a finding of oppression in another case. And then in paragraph 99 I have a similar quote from the Alberta Court of Appeal case in *Shefsky* that also emphasizes the crucial nature of factual findings.

If the Court is going to entertain a threshold issue -- and I don't want to be taken to agree to it. We accept your finding from the 26th that there is a threshold issue which the Court should consider about jurisdiction. We do not submit that that should be expanded to turn into effectively a mini-trial of the issue on a paper record where it's completely uncertain what facts will be in and what facts will be out. In my respectful submission the issue that the Court should determine is 30(b), is there jurisdiction, which is a true threshold issue. And that's a purely legal matter that can be determined on the pleadings without any further facts, and it's a matter which wouldn't take one or two days to argue. When we're talking about the jurisdiction of the Court, we're talking about looking at the *CCAA* and construing it, look at the oppression -- looking at the oppression statue and construing it, and reading them together to determine whether this Court has jurisdiction to grant the remedy we are seeking. That's an hour or two max in my respectful submission, My Lord. And in my respectful submission the Court's time would be much better served hearing that very soon.

If we lose, that's it -- that's it for our claim at least for this proceeding. If we win, then we can get on with the issue of having the three to six-day hearing that my friend averted to whereby we would have some form of trial combining pre-filed evidence in-chief with

cross-examination so a Court could determine the merits, if appropriate, on a full factual record. But we object most strenuously to the notion of asking a third question that effectively says here's a hypothetical set of facts that may or may not be true, that we haven't figured out how we're going to decide what's in an out, and we'd like the Court to decide whether it would exercise its discretion in favour of the applicants in the oppression action in those limited circumstances. In my respectful submission, you know, as I think became clear in your interactions with Mr. Barreck, if you find it would you're going to have to re-do most of that hearing in the context of the full hearing of the merits.

THE COURT: No, I think what he was saying -- and he can speak for himself -- but he's saying putting your case at its highest.

MR. PINOS: Well, that isn't what evidence agreed to says.

THE COURT: No, I know. That's why I --

MR. PINOS: That's -- that's our problem.

THE COURT: -- that's why I brought it up to him. That's why he said he would change that wording.

MR. PINOS: But --

THE COURT: But the concept at least is very much alive, as you're well aware. We have Rules for summary trials and for summary dismissals or partial dismissals and our Supreme Court has affirmed the fact that, you know, it's entirely appropriate to do that if the situation calls for it. So what I hear Mr. Barreck saying is, look, you know, let's assume everything they're saying is true. It's all for naught.

MR. PINOS: Well, then let -- then it shouldn't be evidence as agreed to.

THE COURT: No, I agree.

MR. PINOS: It shouldn't be that. It should be --

THE COURT: He's saying --

MR. PINOS: -- cases --

THE COURT: -- putting your claim at its highest you aren't getting there from here.

MR. PINOS: Well, I still --

MR. BARRECK: And if you're going to --

MR. PINOS: -- I still think -- let me finish. Allow me to finish, Mr. Barreck. My submission still is that that is a wasted day of the Court's time. That at the end of the day a true threshold issue as mooted last time is the jurisdiction of the Court. Once you say the Court has jurisdiction, then the case falls to be determined on its merits. There's no suggestion by the defendants in the course of the oppression case over the last year-and-a-half they wanted to bring a summary judgment motion or we were headed to anything other than a full trial of the issues following discovery.

THE COURT: We don't have the luxury of them doing that. You know, this process might be a bit down and dirty but, you know, it is where --we are where we are.

MR. PINOS: I agree. That's why -- and I'm aware of that from my experience in Ontario that you hold summary hearings. But you have a full hearing and not a partial hearing. You hear all of the issues or you hear none of the issues. And in my respectful submission the way to deal with this is deal with 'B' as a pure question of law, and then -- then fashion the hearing that could have one kick at the can for both parties with respect to the merits in this case, rather than dealing with effectively a hypothetical situation. Those are my submissions.

THE COURT: Thank you.

MR. BARRECK: I'm not going to say much. You have the point, Your Honour. But with respect to practicalities if there are facts that they think are going to be helpful to them at the trial, then if they haven't been admitted in the discoveries or they're not currently in the pleadings, I'm happy to work with Mr. Pinos to get that list of additional things that he thinks he's gonna be able to prove at trial so that they can put their case at the highest and best and we can go forward from there. So that we can say if -- however we get their case that it's highest and best before the Court. I'll take my chances on that. And there isn't really that much evidence here. I mean, this isn't like a 20-year history of dealings. It's -- you know, they owned the -- they bought the securities, they held the securities. They had some -- they say there were representations to them, that there would be no deal if it didn't go to everybody. There was a deal. They bought some more securities -- one of them bought some more securities. They said they would

have sold had they known. And what do we make of all that? This isn't a complex factual record and we can get it to their highest and best for the Court.

MR. O'NEILL: My Lord, very briefly.

THE COURT: Oh, sure, Mr. O'Neill.

MR. BISH: Well, I'd like the opportunity to reply to Mr. O'Neill if possible --

MR. O'NEILL: Sure.

MR. BISH: -- because no doubt he's going to say something worth replying to.

Submissions by Mr. O'Neill

MR. O'NEILL: I will be brief. Obviously we were dragged into this action afterwards. Our clients participated in the transaction in 2015 and the oppression claim that followed is based on alleged statements that the company made to Mr. Pinos' clients and that has mired us down since. This is an issue that has to be dealt with in the *CCAA.* We've talked about parallel paths, things should be dealt with. In our submission the proposal that the company is making is an eminently practical one. It's one that's in line with real time litigation in a *CCAA* as our Justice Myers in Ontario would refer to it. And I think that with respect the plaintiffs are perhaps playing a little bit of hide the ball with you because of what Mr. Barreck just said. The entire case -- this whole hullabaloo of oppression that we've been hearing about across these hearings as I understand comes down to one sentence, which apparently the company CEO made to their clients. One sentence. Which, by the way, is denied.

So there is not some massive factual record here that we need to wade through for days. We should do exactly what the company is proposing because it's practical and it can be done in November. Give them their evidence at its best, whatever it is, and then let's decide where it could ultimately lead to then. Can once sentence really undo a transaction from 2015 and prejudice us a year later? Let's have that discussion. It's a very reasonable proposal. The proposal not to do that in my mind is frankly perhaps a bit mischievous that we're gonna have some mini-trial on jurisdiction that isn't really gonna decide anything because that's gonna take us into a six-day trial, which is what they want because they want to hold us up. And for that reason we support the company's submission. I do think a day is enough to work -- for the parties to work their way through that decision.

THE COURT: Okay, thanks.

MR. O'NEILL: Thank you.

Submissions by Mr. Bish

MR. BISH: Your Honour, David Bish again for the bank lenders. This is principally not an issue that concerns the banks. We had only a single submission and that is again our concern with process. You have just ruled the sale process should continue, there should not be pressing of the pause or the stop button. Our principal concern is having ruled directly that the process should not be stopped, we would say of course that the litigants should not be able to do indirectly what you have said should not happen directly. However this process is carried out -- and we'll stay out of it -- but it should be carried out in a manner that coincides with the sale process that's underway and does not indirectly thwart that process from being concluded. That's the only submission we have, thank you.

THE COURT: All right. Anybody else? Okay. Mr. Barreck, what do you say about question 'A'?

MR. BARRECK: Well, there's a bit of an admission in Mr. Pinos' statement that we're doing this within the *CCAA* so with that admission I'm happy to let it go.

THE COURT: So you're okay with the --

MR. BARRECK: I'm okay with 'B' and 'C' and 'C' has to be amended so that we get this concept in --

THE COURT: Okay. So 'A' -- so do we have admission then that the plaintiffs' claims are now part of this proceeding or is that how you want to --

MR. PINOS: That's why we brought our application that was returnable last --

THE COURT: Well, can you guys cooper up some wording that accomplishes that?

MR. BARRECK: Okay.

THE COURT: Okay. So if we do that the only issue then is

’C’, right?

MR. BARRECK: Yes, yes.

THE COURT: And I’m persuaded that there is merit in the Court deciding that if there is jurisdiction as ’B’ has put the problem, then -- and again, I’m inviting you to agree on this wording but so that would the Court exercise its discretion based upon the -- based upon the best or the most favourable view of the plaintiffs’ case.

MR. BARRECK: We can work with that and we will work out a procedure.

Decision

THE COURT: It seems to me there is merit. I agree totally that we -- as you may have heard, we have had -- we’ve had nothing but problems in getting matters to trial or to special application and it’s become a real serious problem where litigants are simply refusing to come to this Court and they’re going elsewhere. And, you know, this commercial court branch we have is an exception to that but our time is not unlimited. We can’t -- you know, I mean, I’m not saying that it affects the way we decide things but it’s entirely appropriate for this Court in this situation where we are in what somebody has called a real time litigation to say, okay, given the most favourable view of the claimants here and their claim of oppression, is this the kind of a case where the Court would exercise its jurisdiction, if it has jurisdiction. I think it’s entirely appropriate and so I’m directing that that be done. I leave the wording to you. If you can’t decide, can’t agree on it, I’ll impose it. All right.

MR. BARRECK: Thank you.

THE COURT: Now back to timing. Now that I said that I expect two days is more appropriate than one day. And I’m going to leave it to Mr. Pinos -- you’re the man with the commitments in Toronto so --

MR. PINOS: Well, I’m clear that week except for that one Thursday so I could do it Tuesday, Wednesday.

THE COURT: All right. So that’s what we’ll do. Tuesday, Wednesday, all right. So that will be November the --

MR. BARRECK: Fifteenth and 16th.

THE COURT: Yes, all right.

ME. BARRECK: And then, Your Honour, the one other timing thing is -- and I don't -- we may not want to deal with it now but in the event threshold isn't successful setting aside some time later.

THE COURT: Yes, well, I'm going to have to get busy on that right now so --

MR. BARRECK: Okay.

THE COURT: -- I'll advise you on what progress, if any, I've made with that as soon as I hear.

MR. BARRECK: Okay.

THE COURT: I will say this, I'm in a hearing tomorrow and then I'm off to the east for a couple of days so I may not get to this until next week.

MR. BARRECK: That's fine, Your Honour. Thank you very much.

THE COURT: Thank you all very much.

THE COURT CLERK: Order in court.

PROCEEDINGS ADJOURNED UNTIL NOVEMBER 15, 2016

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Action No.: 1601-12571
E-File No.: CVQ16LIGHTSTREAM
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

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,
863360 ALBERTA LTD. and BAKKEN RESOURCES PARTNERSHIP

P R O C E E D I N G S

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September 26, 2016

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Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary, Alberta

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September 26, 2016	Afternoon Session
The Honourable Mr. Justice Macleod	Court of Queen's Bench of Alberta
K.J. Bourassa	For the Applicants
M. Barrack	For the Applicants
R. Bell	For the Applicants
T. Pinos	For the Respondents FrontFour and Mudrick
C.D. Simard	For the Respondents Front Four and Mudrick
S. Zweig	For the Respondents FrontFour and Mudrick
L. Cassey	For the Respondent First Lien Lenders
G. O'Neill	For the Respondents Ad Hoc Committee of Secured Noteholders
W.W. Macleod	For the Monitor FTI Consulting Ltd.
S.F. Collins	For the Monitor FTI Consulting Ltd.
L. Arguelles	Court Clerk

Discussion

THE COURT CLERK: Order in court.

THE COURT: Sit down please. Okay.

MS. BOURASSA: Good afternoon, My Lord, Kelly Bourassa, for the record representing the Lightstream Group of companies. As you will see, we have a full courtroom so I will take a minute to introduce everyone, there are a few out of town folks here.

THE COURT: Thank you.

MS. BOURASSA: To my right is Mr. Barrick from the Blake's Toronto Office and Mr. Bell from our Calgary office; both of them have been dealing with this litigation that has been commenced by the Mudrick and FrontFour group; which has been brought to your attention through some of the materials filed and they're here to respond to that.

THE COURT: Right.

MS. BOURASSA: On my left is Mr. Pinos, from Cassels Brock in Toronto and then Mr. Simard, who you will be familiar with, and his partner Mr. Zweig; all on account of the plaintiffs.

Behind me from my right to left, Mr. O'Neill, who represents the Ad Hoc Committee of Secured Noteholders. Mr. Cassey who represents the first lien lenders and then directly behind me Mr. Macleod and Mr. Collins who represent the proposed monitor FTI.

In the courtroom, we have quite a few people, some that are notable would be some representatives of the company, including Board of Directors and also Mr. Scott who is the deponent of the two affidavits before you this afternoon. Also representatives at FTI and representatives of Price Waterhouse Coopers, who are the financial advisor to the first lien lenders.

So My Lord, that is the cast today and what you should have that would've been delivered to your office was an originating application together with an affidavit of Peter Scott, sworn on September 22nd. Those were delivered on Thursday morning, I believe.

THE COURT: There's been a ton of material.

MS. BOURASSA: There has and that's why I thought I'd walk you through it first just to make sure that you have everything that we think you have before we get going.

THE COURT: Okay, sure.

MS. BOURASSA: There is also included in the package that was sent up to you on Thursday, there was our proposed form of initial order which attached a proposed form of sale procedures, as well as a, black line of our proposed initial order to the Alberta template.

On Friday, counsel for the proposed Monitor provided to you a proposed Monitor's pre-filing report. Also on Friday, my friends from the Cassels and Bennett Jones firms submitted an application and affidavit of David Kursch (phonetic), in respect to the relief that they are seeking today by way of cost application.

And then this morning, you would've received from our office, a bench brief and then I think later in the morning a bench brief from my friends at Cassels and Bennet Jones.

THE COURT: Yes, and I haven't even had a chance to read it.

MS. BOURASSA: So, My Lord, I wanted to come to that -- I wanted to make sure we had the materials and I wanted to also see -- we got this time by way of an emergency application because there was a cancellation. We have been moving very quickly to try and get our materials finalized because matters only changed late the week before last and early last week that necessitated the bringing of this application today.

But, we were told that there was an hour available today and I wanted to confirm that that is still the case?

THE COURT: As far as I know there is another application at 3:30, but whether it's going ahead, I don't know.

MS. BOURASSA: Okay. Thank you My Lord.

Submissions by Ms. Bourassa

MS. BOURASSA: Maybe I can start by saying that I think there is consensus among the parties that an initial order is necessary. The question becomes, whether or not, all the relief that we are seeking in the initial order should be granted today? We take the position that it should and that it's necessary and that view is supported by the first lien lenders, the secured noteholders and has also been reviewed and supported by the Monitor as an independent party.

And so, I wonder if you are fine, I will just proceed with my submissions but --

THE COURT: Well, let me say this. I think it's probably more -- maybe this is what you're going to do, but highlight -- if there is a consensus, let's carve out what is in a consensus and talk about what not's in consensus and that seems to me the most fruitful way to go about it. I mean there's no point in just going through the motions if we're all in agreement here.

MS. BOURASSA: And, My Lord, I agree. I do think that while there are, you know, as I said the fact of the initial order is not something that is being objected to. I think there are areas where we're close and areas where we're further apart so I am certainly happy to give you a very brief thumbnail overview of the company and how we came to be here today and then focus in directly on the matters that are in dispute so that we can try and resolve this as expeditiously as possible.

THE COURT: Sure.

MS. BOURASSA: Okay. So, My Lord, as you will know the Lightstream Group consists of five entities. There are three corporate entities and two partnerships, as is common in oil and gas entities. The mineral rights are held by the partnerships with title to real property in the name of Lightstream Resources who is the parent of the group.

One of the heads of relief that we're seeking today is to have the stay of proceedings and the other relief in the initial order extend to the two partnerships, notwithstanding that they do not meet the definition of debtor company under the *CCAA*. There is ample authority for extending that relief to partnerships in cases where the assets are and operations are inter-related.

THE COURT: You're all agreed on that?

MS. BOURASSA: And I'm not aware of any objection.

THE COURT: Okay.

MS. BOURASSA: I will note that there is a sixth entity who -- which is a numbered company called ArrangeCo and you will be aware Lightstream commenced arrangement proceedings under the *CBCA* in July by way of a preliminary interim order that was followed by an interim order on August 5th. The intention was to complete a restructuring outside of the *CCAA* and so a *CBCA* shell corporation with no assets and no liabilities was created for that purpose. That entity is not part of these proceedings and I anticipate it will be just be wound up in the normal course, but it has no assets and no liabilities.

THE COURT: So the *CBCA* proceedings are off the table but for the sale process that was instituted because of it.

MS. BOURASSA: So, My Lord, the *CBCA* proceedings sought to take the difficult corporate structure of the company and I can just take you through that quickly. At the top, of course, we have the first lien lenders who are owed approximately $371 million and have security over all of the assets of the Lightstream Group. Immediately behind them are the secured noteholders, to whom the company is obligated to the extent of approximately $650 million US and so that's why you'll see different numbers in different materials, whether we're speaking in Canadian funds or US funds. The secured noteholders also have security over all of the assets of the corporation and then the next major group of stakeholders are the holders of the unsecured notes and my friends, to my left, represent a subset of that group, being Mudrick and FrontFour; both

parties who have invested in the unsecured notes and who at the very least hold the position that would block any vote under the *CBCA* that required two-thirds support of each class of security holders voting.

So the original intention of the company was to put a proposal to, not the first lien lenders, they've always been on the side and you will have seen in our materials that we talk about exit financing having been secured, which would've been used by Lightstream in the case of a successful *CBCA* arrangement and is also available to the acquisition co. that has been created by the secured noteholders to advance a credit bid in the case that they advance that credit bid and that it is the successful bid. So that was what was happening to the first lien lenders in the arrangement proceedings.

What was proposed with respect to the secured notes, the unsecured notes and the shareholders; was effectively for the secured and unsecured notes a conversion of debt to equity and for the shareholders there was a consideration of their shares being consolidated and shares in the new recapitalized Lightstream being offered.

As part of those proceedings, the company entered into a support agreement with the secured noteholders, which set out the milestones and the general deal terms of the arrangement. It also provided for this alternate *CCAA* in the event that the company was either unable to meet one of the *CBCA* milestones or got to a vote and was unable to obtain the requisite majorities of security holders voting. What happened in this case is the drop dead date was September 16th recognizing that Mudrick and FrontFour effectively had a block in the *CBCA* it was necessary to come to a settlement of their litigation which we have discussed in brief in Mr. Scott's affidavit and we've also attached the defences that have been filed by Lightstream in those proceedings.

Those proceedings have been ongoing since about July of last year and to distil it down, the proceedings are launched in misrepresentation and oppression and the relief -- well one of the heads of relief in addition to a mere damages claim, one of the heads of relief is what we call a re-characterization of their unsecured notes as secured. And it is that element of their claim which we say does have some impact on the company's ability to go through with the credit bid.

THE COURT: Right.

MS. BOURASSA: And that threshold issue we are all in agreement needs to be decided, the difference being we view the threshold issue as being the important issue because if there is no re-characterization my friends are litigants and have the same type claim as every other party that has outstanding litigation and to the extent there's a claim process in the *CCAA* their litigation will be dealt with there.

But if there is merit, if the re-characterization is available to them, then that determination, we will be seeking a direction today, not for Your Lordship to make this determination, but rather to direct us so that we can seek the availability of a Judge to hear this threshold issue on a fairly expedited basis.

So that, My Lord, is the capital structure and a bit of the background to the *CBCA* arrangement. Because a settlement was not reached, which would have then allowed the company to proceed with the *CBCA* arrangement proceedings and the meetings have been or were scheduled to take place this Friday. Because we weren't able to get the settlement by the 16th of September, the support agreement required that we move forward with the *CCAA* proceedings as did the forbearance that is in place with the first lien lenders, who have agreed to forebear during the pendency of either the *CBCA* or the *CCAA* proceedings.

So that is where we found ourselves when the settlement wasn't reached on the 16th and it was later in the day on Monday of last week that the company press released that no settlement had been reached, it was necessary to move down this path.

So, My Lord, that takes me to one other piece of background that I want to give you before launching into the areas of the order that we're seeking that may or may not be in dispute which deals with the strategic review process that the company has undertaken for some time, since as early as December 2014 and which you had noted in the materials, one of the requirements of the support agreement and also the forbearance that was in place at that time; there was a first forbearance agreement which was in place when the company brought its preliminary interim order application. That forbearance ultimately expired, the company was without forbearance for some period of time and then on September 15th the second forbearance was entered into.

So the forbearance that was in place in July, required the launching of a sale and investment solicitation process a SISP. That SISP has been undertaken by TD Securities who was retained in May of this year by the company to specifically undertake that process. There are details with respect to the breadth and scope and reach of what TD Securities has undertaken since July and that includes having contacted over 600 parties, having NDA's signed up with 37 parties.

And so in short, the company's view which we understand is supported by the Monitor and is certainly supported by our sale advisor; is that the market is aware of these assets, they know they're out there and we've already had a good result in the process that has been ongoing since July, which are factors that weigh in favour of the sale process that is being proposed and that is one of the matters which is being objected to by my friends.

So, My Lord, a couple of other points about the framework of what has brought us here, is that the company has been working for many years, including through the proposed *CBCA* proceedings to resolve the crisis that it finds itself in today, which is largely as a result of the declining commodity price and this is not a story that is new by any stretch in this courtroom and it's one that we've heard many times this year and last year with companies struggling with the current commodity market. They have done everything they can do outside of the *CCAA* proceeding to try and come to some sort of reorganization that would allow them to continue as a going concern without seeking this Court's assistance.

They are now at a stage where there is nothing more to be done. My friends are going to say that a sale process should not be launched today. The sale process was already launched and we are seeking to have it continue and my friends do not have another proposal or another solution for the company in the situation it finds itself in now. What we really need to do, is get the process running. It is a broad process that is going --

THE COURT: Well, what could be the objection to that? If the object here is to market the stuff to get the best value for it, surely the interests of the noteholders who say they should have a secure debt is in doing that, but preserving the money until the dispute is resolved?

MS. BOURASSA: That My Lord is our intention here and like I said, the sale process has been formulated with the support and assistance of TD Securities as sale advisor and also in consultation with the Monitor and the company believes and this is supported by the first lien lenders, the secured noteholders and the Monitor; that this process will adequately test the market and will allow the assets to be exposed to the greatest number of parties for the benefit of all stakeholders.

THE COURT: I guess I'm trying to get my handle on -- just what is the nature of the dispute? Do they say this is not going to attract the best value or do they say like you just can't do it until you resolve with us?

MS. BOURASSA: My Lord, I think they say three things and perhaps I'll go through some -- I kind of jumped to one of the hardest --

THE COURT: Okay.

MS. BOURASSA: -- issues, I'll go through some of the easier ones and then let my friends respond. But, I understand that one of their heads of complaint is that the oppression litigation needs to be determined. One is that a sale

process shouldn't be ordered today and one is that phase 1 of the sale process is not sufficiently long. I think there are three objections and we, of course, dispute all of them. We think that the threshold issue needs to be determined and can be determined on a parallel track with phase 1 of the sale process. We believe that the time set out is more than sufficient, particularly given the interest that has already been -- that has already been shown through the exercise that TD Securities has undertaken to date. And as I said, we have the support of the Monitor and the major secured stakeholders in moving forward in this path.

So, My Lord, as far as our order goes, I will maybe just shopping list the heads of relief. So the first I've touched upon which is, we are seeking your typical stay of proceedings. We are looking for it and the benefits of the order to extend to the partnerships. As my friend has indicated there is no dispute for that. In our brief, we provide various law including the Ontario *Lehndorff* decision and Justice Romaine's decision more recently in the *Calpine* case, as well as other initials orders recently granted in this court where such relief has been extended to partnerships. And we say that the law on this point is that the operations of the partnership need to be so inter-related and intertwined to the corporate group that it is appropriate to include them.

So, My Lord, the next point of course is appointing FTI Consulting Canada as Monitor. I'm not aware of any objection to that and you will have seen their consent to that and there's no question of their qualifications for that role.

The next head of relief is the typical allowing the company to remain in possession of its property and to operate in the normal course, there are a couple of elements of that relief that are, I'll call it off template. The first is to allow them to maintain their cash management systems, as in many corporate groups, the money gets funnelled into one bank account and distributed out as necessary, so it results in essentially inter -- inter entity unsecured lending or lending arrangements. Again, no objections that I'm aware of to that and the intention is, the company will keep their accounts with TD, who is the agent -- Toronto Dominion Bank who's the agent in the credit agreement and we're not aware of any objections to that relief which is not uncommon.

Another head of relief in this category is the ability to continue both to pay post-filing amounts due and owing, but also to make payment of pre-filing amounts with respect to trade payables, where it is necessary to avoid disruption and for the continued operation of the company and with -- in consultation with the Monitor. This is less common relief though it has been granted in other proceedings including *Quicksilver* and *Lone Pine*, more recently in this Court and the Monitor has reviewed it and has undertaken to the Court that these amounts are included in the company's 13-week cash flows and they will continue to monitor this. I'm not aware of any objection to that. If there is, I'm happy to

go into more detail on the law on that point, but I'll leave it unless the Court has any questions.

The last element of that head of relief is retention of operatorship, which is a matter I know Your Lordship is familiar with and it does go back to the *Oakwood Petroleum* case where this Court determined that the *CCAA* stay was broad enough to stay counterparties under joint operating agreements from exercising their capital rights during the pendency of the stay in order to allow the company to continue its operations in the normal course and to see if it can complete a restructuring. And so, My Lord, that is off template language, but I know it is quite common in proceedings of this nature to get that type of stay included in the initial order. And again, I'm not aware of any objection to that.

THE COURT: Okay.

MS. BOURASSA: So, My Lord, where -- and then I should maybe touch -- because it's -- the piece that the supplemental affidavit deals with and I'm not aware of any objection to this, which is extending the time for holding the company's AGM. In early August, when we were before Justice Jones for the interim order, we sought an extension to the time for holding the AJM, which under the *Alberta Business Corporations Act* and the Lightstream Resources and the two numbered companies, but Lightstream Resources is the key party here; is an ABCA company. The ABCA requires that an annual general meeting be held at least 15 months after the last AGM. The last AGM was in May of 2015 and so we sought relief at the beginning of August to extend that out to the end of September. As part of the arrangement proceedings, the intention was to have an annual general and special meeting of shareholders whereby they would vote on regular yearly shareholder matters as well as the plan of arrangement. So far the polling that has come in, in terms of proxies is showing that it is likely or quite possible that the company will not have quorum for that meeting. Given we are standing in front of you seeking an initial order under the *CCAA* today, it is our view that that matter should be and is appropriately pushed off and we are seeking an extension for an additional six months; such that that will allow the company to run its sale process and determine what, if any of the Lightstream current corporate structure remains at the end of that time so as to determine whether an AGM is even necessary.

But, there is some disruption to the company in being required to hold that meeting and potentially adjourn it and recall it, if we can't meet quorum. So we're asking for that deferral at this stage. And as I said, I'm not aware of any objection to that.

So My Lord, the objections as I understand them, are firstly, my friends have stated that they think that the litigation under the two actions commenced by Mudrick and FrontFour should be exempted from the stay of proceedings. I think we have come to some

understanding on that point, My Lord. I think we are all in agreement that whatever happens with those proceedings needs to be determined in the *CCAA* proceedings given where we are, but I would just note that it is not appropriate for their litigation to be able to proceed on a separate track than the *CCAA*.

And given all the parties in the room who are also affected by the stay of proceedings, including the first lien lenders and the secured noteholders, there is nothing weighing in favour of excluding them from the stay. Their claim will be dealt with in the *CCAA*, either by way of a threshold issue or if the Court is inclined to direct the trial of an issue or at the end of the piece to the extent it's necessary to have a claims process. But, these proceedings are the proper proceedings to bring forward any kind of claims against the company and so they shouldn't be allowed to run separately.

The other elements that I understand my friends may take issue with, but we do have the support of the first lien lenders, the secured noteholders and the Monitor, relate to the six priority charges that are being sought and also the sale procedures. So, My Lord, I will walk you through the six priority charges if I could. The first is the administration charge to the quantum of $2 million which is proposed to be in first priority over all of the assets. You will have seen that there are various parties that are sought to be included in that charge, including the Lightstream Group's counsel, it's independent Board of Directors' counsel, the Monitor, the Monitor's counsel. But also as a result of the contractual arrangements we have with our secured creditors, the first lien lenders, their financial advisor, the ad hoc committee and their financial advisor, to the extent of its monthly fee; are all proposed to be included in that charge.

My understanding is that my friends object to their fees not being included in the charge and their law for the appropriateness of the charge is no different than ours, that the Court should consider the size and complexity of the business, the proposed role of the beneficiaries of the charge, whether there is unwarranted duplication, whether the quantum appears to be fair and reasonable, the position of the secured creditors and the position of the Monitor and that's from the *Canwest* decision, My Lord. But, the one piece where we are in clear dispute on this is, if you read section 11.52 of the *CCAA* on which they rely and on which the other parties rely; that allows various professionals and advisors to be included and then has a provision and it's short so it may be best if I just refer to it directly that says that: (as read)

> Any financial, legal or other experts engaged by any other interested party if the Court is satisfied that the security or charge is necessary for their effective participation in the proceedings.

And My Lord, there is no evidence before you that Mudrick and FrontFour who are very

sophisticated investors cannot and will not be able to effective participate in these proceedings without a charge for their fees. Their participation in large part appears to be related to the outstanding litigation in respect of which they do not have any relief for their fees and so it would be inappropriate, the examples that were put before you in their brief which are one Alberta case, where I would note that my friend Mr. Zweig objected to the charge that was being granted, as did I, are not -- it's not appropriate in the circumstances. There's nothing to show that they need a charge in order that they can effectively participate.

And given that they are unsecured creditors, if they are somehow successful in proving themselves to be secured creditors, which we say they aren't, then their entitlement may be different. But, at this point in time, they are unsecured creditors who are not entitled and do not require, under the clear wording of the statute any security for their fees in order to participate.

THE COURT: So are you telling me that at some later date, if they're successful we can say that the fees are part of the administrative charge or what are you saying?

MS. BOURASSA: Well, My Lord, if they are secured creditors and entitled to the benefits of secured creditors then it may be that a charge for their fees would be appropriate, we would have to look at the other factors at that point in time, including whether there would be duplication because of course, there already is -- the Ad Hoc Committee is 91.5 percent of the secured noteholders and --

THE COURT: You're saying in effect the Court can declare, after the fact that certain charges can become part of the administrative charge?

MS. BOURASSA: My Lord, I'm not aware of anything that says that when the administrative charge is granted today that no one else can ever come under it --

THE COURT: Okay.

MS. BOURASSA: -- it would have to be on application.

THE COURT: Yes.

MS. BOURASSA: But, what I'm saying it's not appropriate today and the administration charge that is being sought is, My Lord, in our view appropriate and is supported by the secured stakeholders as well as the Monitor.

My Lord, there is a credit card charge which I understand is not objected to by any party and as you will have seen, that's really just to allow the company to continue in their operations. Typically, it is field workers who have these credit cards and they need to be able to continue using them in order to ensure there's no disruption to operations. So that is the second priority charge.

The third priority charge is the Director's charge and My Lord there is ample authority to grant such a charge, including the fact that the charge is contemplate in the Alberta model template. There is law in our brief as to the considerations and why a Director's charge is necessary, including the quote from the *Canwest* decision where Justice Pepall stated that: (as read)

> The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management.

My Lord, again we say it is appropriate in these circumstances that a directors and officers charge be granted. The sizing of the charge has been created in consultation with the Monitor and the Monitor has provided in its proposed Monitor's pre-filing report some background as to how the quantum of that charge has been come to, which deals with things like potential GST liability, potential employee liabilities for one payroll and it is set and it is set in the initial order that the relief under the charge is only available to the extent that the particular claims advanced are not covered by the existing insurance police.

So I understand that my friends do not object to the concept of a DNO charge but that they are not comfortable with relying upon the Monitor's review of it and would like to have independent -- an independent ability to verify the quantum which we think is just simply unnecessary. They also raise the issue of the insurance and as I said, My Lord, the ability to claim against the charge is only in the case where the insurance is not available. So again, in order to allow the company to continue in its operations and right now, given everything going on with the company, the engagement of the directors and particularly the senior officers is very important.

So the next charges, My Lord, are a key employee retention plan and key employee incentive plan, in that order and we are seeking both approval of those plans that have

been created but not yet put in place, as well as approval of the charges. These charges and the last one I'll -- I'll refer to; all find behind the indebtedness to the first lien lenders, the approximately $371 million plus any interest and costs that's owing to the first lien lenders.

So the KERP and the KEIP have both been prepared by the company in consultation with the Monitor. The Monitor -- the proposed Monitor has reviewed them and My Lord, the numbers on their face may appear to be high, but I personally found the charts in the proposed Monitor's report which are on pages 18 and 19, whereby the proposed Monitor does a review of the KERP and KEIP that are sought in these proceedings as against appropriately 21 cases in the past five years. My Lord, do you have the Monitor's report there?

THE COURT: I'm sure it is somewhere.

MS. BOURASSA: It's a fairly skinny report. I can see if I have an extra if you like.

THE COURT: It's not the -- what's the date of it?

MS. BOURASSA: It's from Friday, it was filed on Friday the 23rd.

THE COURT: I have a document here called Proposed Monitor, is that the one?

MS. BOURASSA: That's the one.

THE COURT: All right.

MS. BOURASSA: So, My Lord, on pages 18 and 19, the proposed Monitor has essentially done some calculations as to how the proposed KERP and KEIP weigh out as a percentage of book value, percentage of secured debt and percentage of total debt. But -- and you will see through these charts that in all cases it comes in below the mean and really in the ballpark of a lot of other files.

There is no statutory authority but it has been approved -- it has been recognized in various cases including *Grant Forest*, *Canwest* and *Cinram*; both -- all Ontario court decisions that the *CCAA* court does have authority to approve KERP's and KEIP's as well as the related charges. And there are various cases in Alberta where KERP's and KEIP's have been approved.

The company's evidence is that the approval of the KERP and KEIP is crucial to allow the company to continue in its operations to keep key employees in place and with respect to the KEIP, the Key Employee Incentive Plan, which is only being offered to nine executives, it is to incentivize them to go out and get the best deal available. Because there are a couple of factors about this KERP and KEIP that are important to have in mind. The first is, in the event that the credit bid is the successful bid and that AcquireCo takes on these employees, no KERP or KEIP is payable.

So it is only in the instance where one of the employees is not taken on by AcquisitionCo or there is a bid that is higher than the credit bid that anything would be payable and the KEIP is payable in tranches. So it's not the full the full amount in one -- in one set as the Monitor sets out there are different success levels depending on how much -- high the ultimate purchase price is.

And so, My Lord, with respect to the 193 employees that are proposed to be covered by the KERP and the nine employees proposed to be covered by KEIP, this is consistent with other retention plans. It is something that the company believes is very, very important to be approved. The Monitor has reviewed it and has reviewed it very closely, as you can see from the proposed Monitor's report and we're of the view that should be approved.

The last charge, My Lord, is the financial advisor's charge and again, the number on its face may appear to be high, but if you go to the section of the proposed Monitor's report dealing with this, which is at page 22, first of all, the company's evidence is that these parties are required to assist the company in working through a restructuring. It is in sixth priority and the *Canwest* case in section 11.52 give the Court authority to grant the FA charge. And so what I would say is that if you assume that the credit bid is the successful bid and we all hope that it will be something much higher than that, but that is effectively a backstop. And so if that is our worst case scenario, then success fees that are proposed and the fees that are secured by the charge, are approximately 1.5 percent of the total transaction value, which according to the Monitor's review is not uncommon.

So, My Lord, the charges are matters that I understand are in dispute in varying degrees and the sale process which I think I've probably gone through in enough detail and so absent any further questions on the sale process, I will leave it at that, My Lord.

THE COURT: Thank you Ms. Bourassa.

MS. BOURASSA: And I suppose My Lord, did you want to hear from parties supporting the application or did you want to cut right to the objections?

THE COURT: Well, we'll see where this all comes out, but for now I guess I better get Mr. Pinos' take on it.

Submissions by Mr. Pinos

MR. PINOS: Good afternoon, My Lord. I'm going to be sharing comments with Mr. Simard, but I will deal with the major points.

My clients are FrontFour and Mudrick who together own a little over $139 million of unsecured notes. They say they should be considered to be secured noteholders, whether you call it a re-characterization as my friend, Ms. Bourassa said, or whether it's via a replacement of their notes by secured notes issued by the company. And the reason for that, is that they were oppressively and unfairly excluded from a secured notes transaction a little over a year ago, despite assurances that they would be allowed to participate.

A year ago -- or say a year ago last July, Lightstream had one category of noteholders, everyone was unsecured and sat behind the bank lenders. Lightstream engaged in an exchange with a select number of noteholders and elevated their status to secured noteholders and denied another set of unsecured noteholders the opportunity to participate. That's the basis of the claim which we say needs to be decided on a threshold basis.

Our objection to many of the aspects of this early order, flow from that claim. We don't object to a narrow stay right now. We object to the approval of a sales process that ties a sales process to a credit bid that will be upended if we get secured status. Because at this stage, the secured -- the credit bid only applies to the secured noteholders and we have no participation unless that changes.

As my friend said, things will change completely if we are successful in whole or in part in having all or some of our notes considered to be secured notes.

THE COURT: Maybe you better explain that to me a little bit, I didn't read a lot of the material so . . .

MR. PINOS: Right, well the sales process that's appended to the application not only involves a marketing process designed to illicit third party bids to the assets of this company or this company, it has a fall-back position that says, well, if at the end of this, what we say is a very accelerated process there isn't a successful bid over a certain level; the secured noteholders will take over the company with their notes as consideration and they'll take the bank out.

If we are secured noteholders we get to participate in that and presumably would've had

input into that credit bid. But, there's no reason why the credit bid needs to be tied to a sales process. The company can, while our claim is being dealt with, on an expeditious basis, go out and seek all the selling it wants. It can have a sales process. But, it doesn't need to have a credit bid process because the prejudices our rights, if they're not determine in an expeditious manner, such that we are allowed to participate in that credit bid, if we get the secured status we are seeking. That's the reason.

Right? We don't object to the company trying to sell itself, in fact, we think it should take more time to try and sell itself than it is baking into the scheduled proposed to you. So our view, sitting here right today is that a stay should be granted, an order for trial of an issue should be ordered. The company should be authorized to continue the sale process and the other matters that we object to that Mr. Simard is going to address, should come back with adequate time, rather than the brief hour we have here to deal with a laundry list of asks from the debtor here.

THE COURT: I strongly agree with that. I mean an hour doesn't resolve all this in ten more minutes.

MR. PINOS: That's our point precisely. You know, we've known this was coming down the pipe. We know this is a complicated matter an oppression claim at the heart of the status of the unsecured noteholders and we have an hour. I mean I suggest that there be a stay, there be authorization for the company's counsel and the Monitor's counsel to be paid on an interim basis; and that we find a reasonable amount of time to have our various objections that Mr. Simard is going to be dealing with in a few more minutes, dealt with.

But, right now, we're jammed. This matter was served early on Thursday morning and we've had virtually no time to reply in a --

THE COURT: When would you suggest that we resolve the rest of these issues? There are some pressing matters, we have to deal with to meet certain deadlines today.

MR. PINOS: Well, the company has the luxury of time. It's not out of cash. The Monitor's report indicates that to the end of the year, it has enough cash --

THE COURT: Okay, to the extent that we need to do things to meet deadlines like adjourn the meeting or whatever, let's do that.

MR. PINOS: Right, we don't have a problem with adjourning

the meeting.

THE COURT: And park the stuff that is -- when do you want to park it until?

MR. PINOS: As soon as we can find a two -- three hours, half a day to deal with them properly.

THE COURT: Well, when would you like to do it? On Friday?

MR. PINOS: I'd do it Friday, I'd do it a week from now, I'd do it ten days from now. I think that --

THE COURT: Well, I'm not here a week from now.

MR. PINOS: That would give us at least some time to respond properly rather than rushing our application and file a bench brief without any evidence to support it and without the opportunity to seek information from the Monitor who filed the report after hours on Friday and seek information from the company by way of an examination of Mr. Scott.

And I think at that -- that would be fair to everyone here because nothing's going to change in the next week to ten days in terms of this company. This isn't a case where it needs DIP financing today or the lights go out.

So I respectfully suggest that this matter be -- that you provide an order that provides for a stay, that provides for interim payment of the company's and the Monitor's necessary fees and that we come back and hear this properly because you know, I think it's unfair to everybody, including the Court to have to try and deal with what is effectively a very complicated matter in a very short period of time.

So I'm going to -- I'll let Mr. Simard, in a few minutes, illustrate the things that we want to dive into with respect to the sale process of the charge.

MR. SIMARD: Good afternoon, My Lord.

THE COURT: Just again, I just want to make sure I understand. I guess I already get this credit bid thing, as I said, as a matter of principle I would've thought that both sides of this fight would want to maximize the value of the assets, right?

Submissions by Mr. Simard

MR. SIMARD: Absolutely. I'll tell you what's wrong with this process, which is the only sales process before you for approval today. It is tied absolutely and centrally to the concept of the credit bid. As you've heard from my friend, we don't even know if we're in that group. So there's a credit bid, there's a credit bid number, they are telling the world in this sales process, you have 21 days to put in your bid. If you don't beat that number, that is the number to take out the first lien lenders and the number to take out the credit bidders; we can't tell you if the composition of that group is correct or if it will change, but you have to in 21 days decide whether you beat that number or it goes to them. So . . .

THE COURT: So your position is that "them" should include you?

MR. SIMARD: We say "them" should include us, but that changes the universe entirely because look at it from the perspectives of three stakeholders. We want to bid. We think there's way more value than the credit value in this company, but we're not in the group. How do we do it when we think we should be in the group? How do they go forward with a credit bid when they don't know if they have the whole credit bid group in the tent yet and approving it? And how does a bidder, most importantly, how does a bidder put a bid in? Twenty-one days is way too short. What you've heard from the company and seen in the material is well this process has already run since July, we have to be realistic about that, we know they sent marketing materials out and they opened the data room.

Their evidence says that 39 people signed CA's, but, we also know that for the last two months this company has been telling the world, we're going down the *CBCA* track. Well, what oil company or what bidder is going to devote any realistic resources over the last two months, knowing that they're going down an arrangement path until it changed last week and actually working on a bid. And I would submit that that omission in their materials is telling, they say 39 people signed confidentiality agreements, that doesn't take much work. They don't say anything about VDR activity, they don't say anything about people submitting bids, they don't say anything about people doing due diligence.

So realistically, My Lord, we're starting a sales process from square one. It's a sales process where no one knows if that target bid number is correct, or not and it's a process that is 21 days long which is, I would submit, and the Monitor even says in their report, it is a condensed time period, it is way below what we've seen this Court approve this year. In the *Endurance* matter, for example, it was an eight week first bid deadline from launch

date.

So that -- and let me answer one of the questions you posed to Ms. Bourassa, well what other options does the company have? The company has a lot of options here. Unlike *Endurance*, in *Endurance*, the company was out of money, a $15 million DIP loan was approved on day one and so you had new money coming in and you had the impetus to move things along. We'll be before you tomorrow -- that process started at the end of May, we'll be before you tomorrow to approve the sale on that process, so it was a lengthy process.

In this case, as my friend referred to, the company has $39 million in the bank today. Monitor projects that by the end of the year, it will have $29 million. It's not starving, the lights are not going out, it has -- it could have a number of options and those options, if this sale process, this flawed sales process does not go forward today, the options would include, let's -- on an expedited basis, we absolutely agree, we're not trying to buy time here, let's get this oppression issue dealt with, the company can then consider; can we restructure, can we put a plan in place?

THE COURT: What are the brackets, roughly, as to what realizable value we have here? The low side, the high side?

MR. SIMARD: I don't know if that's in evidence, My Lord, and I don't know.

THE COURT: I don't care if it's in evidence, I want your best guess, based on what you know.

MR. SIMARD: I can't -- I can't even guess, I've been on this case the same length of time as you. I've been on since Friday.

THE COURT: Oh no, you've been on longer than I have, I can tell you . . .

MR. SIMARD: Fair enough. So those are the problems with the sale process, My Lord, and that's why we say that should not go forward today, but I suggest there's another possibility. This is a sale process, so not only is it truncated in time, but they're only asking for purchase -- asset purchase bids. Most processes we see the Courts approve now are called sales and investment solicitation processes where you're saying, anything and everything, restructuring put that in.

And this company has time even if an order doesn't go today to sit back, it has cash and

to consider whether there's a plan. They were on the verge, they had a *CBCA* plan which was a debt for equity exchange, they also -- they saw more value because they were giving money in that plan to existing shareholders, they were giving shares to the existing shareholders. We know that tranche will be off the table now that we're in *CCAA* and so they have a number of options and the company is not here telling you that they won't consider their options.

Go back to what Ms. Bourassa, quite accurately said at the start of her submissions, they're here because they're contractually bound under their forbearance agreement and their support agreement to bring this application and get this sales process approved. They're not saying they won't look at all the possibilities and we know that once the stay order goes today, the banks, the first lien lenders and the secured notes will be stayed. And so the company then has to properly turn its attention to the best interest of all the stakeholders, including our clients and including other unsecured creditors who may not be moved up to secured status.

So I won't say anything more about the sales process, but with respect to the other, as my friend said, much flows from that. If the sales process does not go today, you don't need to approve the engagement of financial advisors today. You don't need to grant a $19 million financial advisors charge today.

You'll see in our brief, My Lord, that we want to get into some of those issues in a cross-examination of their deponent because we need to explore, among other things, the role -- the various role that TD is playing. TD is the proposed financial advisor, TD's also the agent of the syndicate and the lender. TD also is in position to provide exit financing if the credit bid is accepted, but not potentially if a superior bid that doesn't need exit financing is approved. So that has to be explored.

No need to go ahead with FA approval or FA charge today, I would submit. The admin charge, briefly, we agree absolutely there should be an admin charge, it should go today, it should approve the payment of company's counsel, the Monitor and Monitor's counsel; but all the points Ms. Bourassa ably made about section 11.52(1)(c) which says other people's advisors only need to be in the charge if they need that financial support to adequately take part, that applies not only to our client's counsel, it applies to the first lien lenders counsel. There's no evidence of their need. Nor is there evidence of need of the secured noteholders counsel, nor evidence of the need of the first lien lenders financial advisors. What there is, is again a contractual obligation to ask for this stuff.

The director's charge, we agree there should be a director's charge. Don't disagree with the word Ms. Bourassa said about the importance of making sure directors and officers are protected and engaged, but we do say that we would like to obtain more information

from the Monitor and the company in a cross-examination to determine if the sizing of that charge is correct.

With the KEIP and the KERP, $5 million and $4.1 million respectively; Sir, you won't have seen our brief, but they purport to label 193 out of their 300 employees as key employees who will be subject to that KERP. In contrast, *Sanjel* was a case approved by this Court earlier this year where 40 employees out of 2000 were deemed to be key and subject to the Key Employee Retention Plan.

So those issues should go over and should be subject to cross-examination. To cut to the chase, we think our application should be approved so the oppression action goes ahead. We think there should be a skinny stay, what is necessary only to maintain the status quo. And the other forms of relief I have mentioned, as well as reserving out right, My Lord, to cross-examine on their affidavit and we'd be prepared to do that very promptly so that we're back here before you promptly to deal on a comeback hearing with the remaining parts of the relief they seek.

THE COURT: Okay. I just want a better idea of where you're apart here. You say you don't want to be sent to a stay, you want to carry on with your litigation that you've got managed by Justice Campbell; is that right?

MR. SIMARD: Yes. But I think we're open --

THE COURT: So, how long --

MR. SIMARD: -- to suggestion on getting that heard on an expedited basis. My friend will speak to that.

Submissions by Mr. Pinos

MR. PINOS: Yeah. We estimate in our material, which you haven't had a chance to see, that this -- we estimate that this would take no more than three to five, maybe six days. If evidence-in-chief were pre-filed and we had a little bit of cross-examination it would take three to four days to have this thing heard. And we've asked that the trial of an issue be ordered in this proceeding. We don't -- we don't have a problem with that but we didn't want to --

THE COURT: Okay. You're together on that part.

MR. PINOS: We're together on that part. But we want --

THE COURT: All right.

MR. PINOS: -- you know, this isn't a matter where there's a threshold argument, you know. The law is clear that oppression remedies are available within *CCAA*.

THE COURT: Right.

MR. PINOS: The Ontario Court of Appeal decided that 12 years ago. So all we want to do is get on with it because once our status is known following that hearing, everything else can fall into place. If we're in the secure tent, great. If we're not, at least we have some certainty. We have a final order that the world can move forward on. .PP But until that exists, the litigation that we've been pushing hard to proceed with over the last year, and we issued, you know, literally a few days after the secured notes transaction was announced. You know, this isn't a case where we've come to this hearing and waved new rights. These are rights that we've been pushing for the last 14 months and we just want to get over the finish line and assist the Court with knowing who's on first, what's on second, I don't know's on third.

THE COURT: And how close are you to being ready to go to trial?

MR. PINOS: Well, we finished discoveries. We had a discovery motion scheduled for August 30th. Justice Campbell adjourned it when she heard about the *CBCA* application to see what would happen. My friends ended up producing a number of the documents that we wanted produced that they hadn't done. I think, you know, basically we're ready to go subject to, you know, a brief schedule for the delivery of any -- my friend indicated they would be serving an expert's report and we would want to respond. But after that, you know, everybody's been examined, you know, this happened last March. So this case has moved forward quickly and we're ready to have an expedited hearing in this. This could all happen within the next month.

THE COURT: Okay. Well, okay. Now is probably the time to hear from other people.

Submissions by Mr. Barrack

MR. BARRACK: So, Your Honour, Mike Barrack. On that point, this is not going to get done quickly - the trial. There's a threshold issue. Oppression can be done within a *CCAA*, but the open issue is can you change an unsecured claim into a secured claim. And that is the threshold issue we would like to bring back before you in a

week or so. We don't -- if we're right, we don't need to have a trial.

THE COURT: So you're saying that there would be no authority even if the Court found oppression to order the company to do something with an effect make them secured creditors.

MR. BARRACK: Absolutely.

THE COURT: That's what you're saying.

MR. BARRACK: Yeah. And that has to be determined as a threshold issue. We can either bring that back in a week or set a date in front of Justice Campbell for that, or do it however you want.

THE COURT: Well, it's not up to me. It's just a question of who's available when.

MR. BARRACK: And also I don't know what other judges are up to speed on this issue.

MR. BARRACK: Right. So because if we -- if we're successful on that point, you don't have the three to six-day trial. And you don't --

THE COURT: Yeah. You're just saying it's damages. If it's only damages, there's no argument.

MR. BARRACK: If it's only damages it's unsecured and it's an unsecured claim.

THE COURT: Right.

MR. BARRACK: What they have to do is they have to go back and unscramble the egg. They've got to unwind that prior transaction. They didn't put in 200 million -- there's lots, I can go through lots of it, but you don't need me to do that. They have to unscramble that egg.

THE COURT: Right.

MR. BARRACK: And we say no court has the jurisdiction to unscramble the egg. But even if a court has the jurisdiction to unscramble the egg, on the facts as pleaded in this proceeding, no court would unscramble the egg. And if we're

successful on either one of those arguments, and that's not going to be a short argument, that's going to take a couple of hours on both sides, but then we don't have expert reports. And you know getting to a three to six-day trial when there haven't been expert reports, when there haven't been discoveries, undertakings completed when there's an application to involve the directors and officers, that's going to take a lot of time. And that's going to become a sideshow that's going to derail this process.

So to avoid the sideshow, if there's a quick answer to avoid the sideshow, let's get that before the Court. Whether we win or we lose on that. If we lose on it, then let's do the trial.

THE COURT: Anyone else?

MR. O'NEILL: My Lord?

THE COURT: Sure.

Submissions by Mr. O'Neill

MR. O'NEILL: My Lord, Brendan O'Neill from the Goodmans law firm.

THE COURT: Yes, sir.

MR. O'NEILL: I represent the Ad hoc Committee of Secured Noteholders. And, as Ms. Bourassa mentioned, my clients hold 92 percent of the secured notes.

What I'd like to do is actually give you an idea as to how this can all hang together very simply today and what you should do, in my view, with each of these motions. Which I don't think is complicated. They've kind of thrown in the kitchen sink here which is making things seem more complicated than they are.

I'm going to start briefly with why we're here. We're here because my clients, for example, put $200 million in to this company last summer, in July 2015, after having funded hundreds of millions of dollars of unsecured notes and that didn't fix the problem. The company ended up with a borrowing based default and a borrowing redetermination (INDISCERNIBLE) from 550 million to 250 million. That led to a default under the first lien loan. They then didn't pay us $32 million of interest under the second lien loan. They didn't pay the unsecured noteholders $10 million in interest under their loan. These are not the unsecured noteholders, these are two plaintiffs in an oppression class. There are an

oppression case, an alleged oppression case. They didn't pay the noteholders. So the company is in default of every single one of its facilities.

There have been forbearances granted. We just spent two months in *CBCA* for one reason and one reason only - which was to try and find a solution with these plaintiffs who since, since making their claims, have tripled their position in the unsecured notes and, therefore, now control that class and said -- well, let's just say a settlement wasn't reached. So that would've been the easy way out of the room but we couldn't get a settlement.

So now we're in *CCAA* like every other company in Calgary that's in triple default of over $1 billion in debt. So that is why we are here. We don't have a lot of time. We have agreed to a very expensive refinancing of the first lien facility that expires at the end of December.

Okay. That is a hard deadline. This has to get done. Whether it gets done by way of our client's credit bidding, which we don't want to do, we are not in the oil and gas operations. My clients are Apollo Capital Management and GSL. They are New York investment funds, they don't run oil and gas companies. However, if the sales process, which is designed to maximize value which will accrue hopefully to the real unsecureds, not the plaintiffs, the unsecured noteholders, then we will have a good result. But if it doesn't then I, as a secured creditor, will have to exercise my inalienable, unfortunate right to take my collateral and satisfaction of my debt when a fully run sales process has been going on for months and is fully supported by your court-appointed Monitor which says it's behind, doesn't produce a result that brings value to them. So that's where we are.

And so you have before you an initial -- you have a company that has failed in its attempt to get settlement, notwithstanding best efforts by many parties, is in triple default and needs *CCAA* relief today in order to hopefully get a result by the end of this year. A much needed result that will save hundreds of jobs and put this company back into business.

The order that comes before you today is supported by every single person in this room except the plaintiffs. The first lien lenders, this cash that we're talking about today - financial advisory charges, director's charges, administration - that's our cash collateral. It's his cash collateral as the first lien lenders and it's our cash collateral as second lien lenders. We have no interest in wasting it. And every party here supports it including the Monitor. The Monitor has filed an extensive report. As they complained, it's longer than the affidavit. That's because it's a good report. It goes through every element of the initial order and says it's fine, and the first lien lenders say it's fine, and we say it's fine. Therefore, it should be entered.

And to the extent that they have an objection, we should do what courts always do in *CCAA* is come back one week from now for a comeback hearing on the initial order where every single person's rights are reserved to make arguments about the relief that I hope you will grant today. That doesn't prejudice them at all. It gives the company the relief it needs that everybody else wants, they do have the evidence for, and they can come back a week from now and argue about it. In the meantime, you will have the benefit of actually reading their brief, and we can file briefs responding to their briefs. That's the sensible way to do things. It's also the way it's always done.

And, in this case, this is a public company. This hearing should've been before you on an ex parte basis. But because we spend months with these folks trying to get a settlement they've actually known since September 16th when the settlement deadline passed that we were coming here. The company press released it on September 19th. So none of this is unusual, none of it's unfair, it's very simple. It's what we always do.

You enter the order today, it's without prejudice to anybody's rights to argue for different treatment. At the comeback hearing, if you're not satisfied that the initial order was appropriate, My Lord, you can amend it at the comeback hearing. That's the sensible way to deal with things, in my submission.

On the SISP --

THE COURT: Sorry?

MR. O'NEILL: On the sale procedures. Because they argue about the initial order and all this, blah, blah, blah, and then they argue about the sale procedures. The sale procedures are to find a bid that will repay the first lien lenders, repay me, because we don't want on this company, and hopefully create value for the unsecureds. Including them as unsecureds. They've now bought up 50 percent of the unsecureds after the action and so they'll get value there, too. That SISP should be approved.

Their argument on the SISP is if we don't all get repaid and there's a credit bid, which is us enforcing our collateral, they want part of it. Fine. There's lots of time. The phase 1 bids are due October 21 and those are just -- those are just letters of intent. If anyone puts in a letter of intent, they have until November 21st -- 25th. November 25th. A date in November. To put in an actual bid. Between then and now we can figure out if they're in our transaction or not. Which, by the way, they are not. Because that transaction, I'm not going to argue the case I promise you, but that transaction in July 2015 was permitted under the indenture.

And an oppression claim, with all due respect, is the claim you bring when you don't have a good breach of contract claim. That indenture is governed by New York law. There is no lawsuit in New York arguing breach of the indenture because there is no breach of the indenture because the transaction was permitted. They have an oppression claim here in Calgary based on things they say the company said to them which the company categorically denies.

And this is holding up an entire billion dollar restructuring of a company? I'm sorry. We have to deal with this in the right way. And we're not saying they won't be heard. Let's hear them on their issue between now and the submission of the bids. There is lots of time. And if they can establish that somehow they should be lifted up into the secure position and our clients should be affected by that, leading that, if they can establish that, fine.

So, grant us the initial order, give us the comeback hearing, all rights reserved until the comeback hearing, approve the sales procedures, put us to a trial coordinator to find a day to hear their issues on the credit bid --

THE COURT: Well, that's --

MR. O'NEILL: -- our threshold issue, et cetera, and there's time in the schedule for all that.

THE COURT: That's easier said than done because in order to get a trial date or even an application date, which I understand Mr. Barrack says we should just have that one narrow issue to determine which would take, what, two or three days, would be problematic to get somebody in a hurry to do that. But we could probably do that but not for a two-week trial.

MR. O'NEILL: It's not a two-week trial, My Lord. But let me help you on one other thing. In the event that I have to credit bid, I can assure you I'm going to be asking you for an order when I do that. I'm going to want a vesting order vesting those assets free and clear into our clients. And I can assure you that my friends are going to object. And so either we have dealt with them or we have not dealt with them within time frame.

So what I'm trying to say to you is if you approve the SISP today, including the credit bid, you are foreclosing their argument. Because if it comes to a credit bid I will be coming back to you, I assure you, be fired if I don't, to get a vesting order from you. And at that point there has to be a hearing on our credit bid. He's going to say they can't

credit bid, they're not -- we should be there, et cetera, blah, blah, blah. It'll get dealt with at that time if it hasn't been dealt with before.

So, again, there's no prejudice to approving the SISP and letting this move forward. And we should go, we should have our comeback hearing on the initial order. And if you'd also like to hear it on the same date we should have submissions to you about what it is that needs to be heard. The threshold issue and what amount of time that takes and set a schedule for that, or the full-blown trial on the oppression that's going to lead to unsecured damages. You asked about value, most likely I'm not getting repaid. That's our view of value. Which means they're nothing but plaintiffs on an unsecured claim for which there is no value.

But let's leave that aside for the moment. As the SISP runs forward we'll learn about that, too. As letters of intent come in on October 21st, we'll see if anybody's going to be paying for more than the amount of the first and second lien debt or not and that information will be valuable to them.

So I would suggest enter the initial order, approve the SISP. We come back a week from now, we hear their arguments on the initial order and the kitchen sink they've thrown in. We work through those and then we deal with the application for the threshold issue and we each make submissions. And we write briefs for you across this coming week so that you're not in the position that you're in today. I think that's a pretty simple --

THE COURT: When you say "me", you're saying I should do this comeback stuff?

MR. O'NEILL: Well, that's up to you.

THE COURT: Well, no, but I mean, I guess I would like to have some input on that. I mean, there's a lot of material here, I haven't read it all, but I gather there's been lots of other judges involved in this. So if you're saying I'm not going to -- I'm not backing away here, I'm saying if you think I should in effect seize myself with it I will. But, you know . . .

MR. O'NEILL: Let me answer some of your questions in there.

THE COURT: Yeah.

MR. O'NEILL: There have not been -- well, there has been a lot of other judges involved in this, which is to say there hasn't been anyone really involved. So for the *CBCA*, we had two hearings - one for the initial interim order and

one for an amended order. We had two different judges for that. So they weren't -- and those were hearings on consent so those weren't major hearings.

On the oppression action itself, Justice Campbell has been hearing essentially scheduling motions. There have been substance of hearings on that. So no judge is seized of this yet, which either means you can seize yourself of it or, in my respectful submission if that's not your desire, you can have someone else seize themselves of it.

THE COURT: Okay.

MR. O'NEILL: Because we're not really, for lack of a better term, pregnant with anybody at this point. That's my view. I'm not the company but . . .

THE COURT: Okay.

MR. BARRACK: I just wanted to clarify, My Lord, that the threshold hearing would probably take one day.

THE COURT: Right. And how much has to be done before that?

MR. BARRACK: We would want to brief it. So we can do it one of two days - we can come back on the comeback day and argue about whether we're going to have the threshold or the trial, or if we got one day for it, I think if we had two weeks to brief it we could deal with it (INDISCERNIBLE).

THE COURT: Okay. But what sort of examinations or --

MR. BARRACK: I don't think there would be any examinations on that. That would be on the record as it exists.

THE COURT: All right.

Submissions by Mr. Cassey

MR. CASSEY: My Lord, Lee Cassey of Torys for the first lien lenders. There's been a lot of talk today about charges and objections and what the natures of the objection is, and oppressive action. I want to kind of step back and look at the forest and not just the trees.

The forest, Your Honour, is we have a deal and that deal expires December 31st, of 2016.

That's a real deal, it's a real deadline. Everybody's known about it for months now. It was part --

THE COURT: That was the deal that was struck around the *CBCA* application?

MR. CASSEY: It was. It was, Your Honour. And the keystone -- the keystone for that as part of our first forbearance was that outside date. We would only consent to a process for the company to get a deal until December 31st. That was always our date. It was in our first forbearance in July, and it's in our second forbearance in September.

THE COURT: Right.

MR. CASSEY: Now the key to that is it ties with the exit finance. There's a $400 million commitment that nobody's talked about today. And one of the condition (INDISCERNIBLE) of that commitment is that there has to be a transaction, either it's from *CBCA* or *CCAA* by December 31st, 2016. If not, that commitment falls away. And if that commitment falls away, my clients are prejudiced. We have no guarantee that we're going to receive payment in full absent that commitment.

So when my friend talks about raising the question that there's no reason that the credit has to be tied to the sales process, it's the keystone of the sales process. The credit bid is the backstop of the deal that facilitates my clients being paid out in full and the commitment being put in place going -- for the company to exit *CCAA.*

THE COURT: Okay.

MR. CASSEY: But that doesn't preclude other parties from coming in and paying more. That's the whole point of the backstop.

And so what's the prejudice of letting that process run? So we have the December 31st date and that's a hard date, that's a real date. We don't control that date. I represent a syndicate of 16 lenders. The syndicate of the exit financiers, they're a group of five, four of which are in the existing syndicate, one of which is not. So I don't speak for both sides, Your Honour. So when you talk about a December 31st date and you talk about the prejudice of more time, adjourning the dates or adjourning the process, for what, Your Honour? To what, to run -- to send teasers out to get people in a data room to get them talking? To have a bid deadline?

All of that can be dealt with now and the parties can decide later whether they have

security or not. Why would you -- why would a process be essentially adjourned that is fundamentally tied to the solution of this case which is the December 31st date?

And what's the prejudice? The prejudice is the financial advisors go out, they go out to the market, they send their teasers, they talk to people, they enter into more NDAs, a process by the way that's already unfolding for two months. So it's not like we're starting a process, we're continuing a process and setting a deadline in order to meet that outside date.

So an adjournment, Your Honour, I really do think is just a red herring here to kind of extract more (INDISCERNIBLE). To push us closer to that December 31st date and say, Well we don't have an answer. We don't need to solve this by December 31st, let's go into January. Well, come January, we lose the exit financing and then where are we?

Now, the -- I think Mr. O'Neill's proposed solution here of a comeback hearing, a seven-day comeback hearing where everybody can report to you on the various objections and our resolutions of those if we can resolve some before then, makes absolute sense. It lets the process happen now. It lets the sales process happen now, which again from my client's perspective is absolutely critical, it's keeping our dates, and it gets the stay in place. And it allows certainty to the market that this is a process that's going to unfold. There will be some process developed to deal with the oppression situation but all that can unfold shortly before December 31st. Those are my submissions, Your Honour.

THE COURT: Okay. Thank you.

Anyone else?

Submissions by Mr. Collins

MR. COLLINS: Yes, thank you, My Lord. Good afternoon. Collins, initial S., with my partner Macleod, initial W., for the proposed Monitor - FTI Consulting Canada Inc. In the courtroom, Mr. Helkaa and Ulber (phonetic) of FTI.

You will have received and viewed I hope, to a certain extent, My Lord, the proposed Monitor's report.

THE COURT: I barely had time to skim.

MR. COLLINS: All right. The proposed Monitor, My Lord, upon receipt of and in terms of working with the applicants in this case, reviewed the various heads of relief that were being sought. And the proposed Monitor, My Lord,

supports and endorses the relief that's being sought today.

The proposed Monitor had not heard from my friends who were on the plaintiffs on the oppression case. It takes cognizance of the concerns that they've raised. But the process of having a comeback hearing to deal with those commends itself to the Monitor.

And, in particular with respect to the timing and the sales process, My Lord, the Monitor consulted not just with the company but as well with the experts behind developing the sales processes. In particular, TD Securities, My Lord. And the time frame that is set out there on the basis of the information that the Monitor has gleaned and attained from TD Securities in connection with kicking that process off today having phase 1 bids due on October 21st with phase bids due on November 25th, the Monitor views that as a reasonable time frame in the circumstances of this case. Including for the reasons as articulated by counsel to Lightstream being the fact that this is a continuation of a sales process, not starting from a dead stop but rather from a fast run. Under the circumstances, the goal being to try to solicit the best offer that is out there to see where we get to. That is what informed the Monitor's view in terms of the time frames within the sales process.

So that deals with time frames within the SISP. The punchline, if you will, for the balance of it is at this point in time the Monitor supports the balance of the substantive relief being sought, including the charges as articulated in the Monitor's -- the proposed Monitor's report, My Lord. And I don't know if we can provide any further information to you at this time or answer any questions but . . .

THE COURT: Thank you.

MR. COLLINS: Thank you.

THE COURT: Anyone else? Okay. I'm just going to take five minutes to think about this and I'll be back as soon as I can.

THE COURT CLERK: Order in court.

(ADJOURNMENT)

THE COURT CLERK: Order in court.

THE COURT: Sit down, please.

Decision

THE COURT: Thank you all for your comments. As I said, I have a lot of material, a lot of it I haven't been able to read. But it may be in part that, but also I am persuaded that by everything I have heard and read, that there is some urgency to this. So I'm persuaded that the order should go with a comeback date and I'm going to set the comeback date at October the 11th. And I know that some of you are from Toronto. I have something in the afternoon now but I can switch it to the morning if the afternoon is better for you.

UNIDENTIFIED SPEAKER: Either is fine. Speaking on behalf of Toronto, either is fine.

THE COURT: The morning of October the 11th, at 10 AM then. I am also -- I thought that Mr. Barrack's suggestion of having this threshold issue determined makes sense to me and I would ask Mr. Pinos to work with them. See if we can work out a wording of the issue, threshold issue, to be determined. I don't know how soon we can get it. I think it probably should be heard by somebody on the commercial list. I can speak with the Chief and see but, you know, I don't know what we can make available and when. I just don't know.

MR. PINOS: So, My Lord, we'll try and do that. If for some reason we have some difficulty or are unable to join issue on that maybe we can come back on the comeback date and settle that on the comeback date. Does that make sense?

THE COURT: That's a great idea. And I do have -- I do have some time during the week of November the 14th. I have two or three days in that week that I could -- if that suits timing.

So the order goes with the comeback. What else are we going to deal with?

MR. SIMARD: My Lord, two procedural items that arise from your decision to issue the order with a comeback. And the first is one I mentioned already which is we would like an express term in the order reserving our right to cross-examine on the company's affidavits prior to the comeback hearing.

THE COURT: Okay.

MR. SIMARD: And then the second thing which was a term granted in the initial endurance order requested by my friend, Ms. Bourassa, because they hadn't had time to consider the application or cross-examination, and that is that at the comeback hearing the company will continue to bear the onus to prove to the Court that the relief requested is necessary and appropriate.

THE COURT: Well, I don't know if -- I don't know if that needs to be in the order. And I feel you don't even know what the implications are. But I take your point that this is the company's application. I take your point. But I am satisfied now that the order should go. I haven't had a chance to read your brief yet, I don't even know what your -- so I'm saying, subject to the comeback date, if you come back and say look, you didn't consider this because you hadn't read our argument and so, you know, this is what needs to be changed, then fine.

MR. SIMARD: Understood, My Lord. And our --

THE COURT: Now, as to your cross-examination, is that a problem not staying that?

MS. BOURASSA: My Lord, I don't know that it needs to be said in the order but I've heard my friends --

THE COURT: Well, I make that --

MS. BOURASSA: -- and so if they wish to cross then, and in advance of the comeback, it would seem that you're prepared to allow them and I'm certainly not going to suggest that they don't have that right.

THE COURT: Okay. Good. That direction goes.

MR. SIMARD: Very good. Thank you.

THE COURT: Okay. Is there anything else?

MS. BOURASSA: So, My Lord --

THE COURT: Okay. What order?

MS. BOURASSA: Well, what I will do, I did circulate to my friends, I will pass up a form of order. It is quite thick so I put a tag where the signature page is. And before you sign it, My Lord, I just wanted to draw your attention -- oh, and sorry, My Lord, I actually have two forms of order. So, My Lord, the first one I passed up is the initial order with the sales process attached to it.

And I just wanted to note to you, we did circulate to the service list, but in the recitals we have included reference to the supplemental affidavit, as well as the affidavits of service

that were ultimately filed. And in the sale process which is attached we have filled in the action number and the date of today's hearing.

And then the other change is in paragraph 28, I believe it is. Yeah, 28, My Lord. There had been a footnote because it wasn't clear when we prepared our materials whether the credit bid would be submitted or not and so we had taken out the footnote and just drafted paragraph 28 to indicate the credit party will be submitting a credit bid which is borne out on the letter attached to Mr. Scott's supplemental affidavit. So this has all been circulated to the service list earlier today.

And the other short order is the order extending the time for the AGM.

THE COURT: Okay. Now, obviously the comeback date isn't in the order, so --

MS. BOURASSA: It is not in the order. But we've heard your direction today --

THE COURT: Yeah.

MS. BOURASSA: -- My Lord, and so I think that is on the record for today. Most certainly, and if you'd like, I can undertake to write to the service list and perhaps copy Ms. Stevenson, the commercial coordinator.

THE COURT: Okay. Thank you. So we will see some of you at least on the 11th. And, also, it's a good idea on the 11th we'll also settle the issue of the threshold issue. Okay.

THE COURT CLERK: Order in court.

PROCEEDINGS ADJOURNED UNTIL 10:00 AM, OCTOBER 11, 2016

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I, Su Zaherie, certify that

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