Court of Queen's Bench of Alberta

Citation: Lightstream Resources Ltd (Re), 2016 ABQB 665

Date: 20161125
Docket: 1601 12571
Registry: 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, 1863360 Alberta Ltd and Bakken Resources Partnership

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Decision of the
of the
Honourable Mr. Justice A.D. Macleod

Introduction

[1] Lightstream Resources Ltd and its subsidiaries ("Lightstream") are under creditor protection pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") by virtue of an Order of this Court dated September 26, 2016. Lightstream is an oil producer which sought creditor protection because of protracted low oil prices which it, like many others, has found financially challenging.

[2] On October 11, 2016 a comeback hearing took place and with respect to claims by Mudrick Capital Management ("Mudrick") and FrontFour Capital Corp ("FrontFour") I directed that this hearing be held, the purpose of which is to answer two preliminary questions related to their claims. Mudrick and FrontFour are sophisticated investment firms.

[3] Their oppression claims invoke Section 242 of the *Alberta Business Corporations Act,* RSA 2000, c B-9 (the "*ABCA*"). They are both asking this Court to order an exchange of securities with Lightstream as if they had participated in an earlier transaction with two other creditors who had exchanged unsecured notes for secured notes and provided $200 million US dollars to Lightstream in July 2015 (the "Secured Notes Transaction").

[4] Mudrick and FrontFour seek the Order pursuant to subsection (3)(e) of section 242 which provides that, to rectify oppressive conduct, the Court may order an issue or exchange of securities.

[5] The two questions are:

1. In the context of CCAA proceedings is there jurisdiction in the Court to recognize the Plaintiffs' claim as secured claims after the granting of the Initial Order and to make an order varying the Secured Notes Transaction and requiring Lightstream to issue additional Secured Noted to remedy alleged oppressive conduct?

2. If there is jurisdiction to make an Order recognizing the Plaintiffs' claim as a secured claim and varying the Secured Notes Transaction, would the Court exercise its discretion to do so based upon the facts as pleaded and supplemented to represent the highest and best factual case of the Plaintiffs?

[6] Some of the ground work necessary to achieve a compromise and an arrangement under the *CCAA* had been done prior to commencing the *CCAA* proceedings. Secured creditors had tentatively agreed to an arrangement which might see Lightstream survive provided that certain matters fell into place by the end of December 2016. Accordingly, time is in short supply as it often is in proceedings of this type.

[7] The oppression proceedings had been commenced in July of 2015 and documents have been produced and questioning is complete. The matter was virtually ready for trial at the time of the Stay Order.

[8] It is useful at this stage to review the chronology of events which give rise to the claim for oppression. When reviewing the chronology as it relates to Lightstream's representations, it is important to understand that it is primarily the evidence of Mudrick and FrontFour because for the purpose of this application I am to take the best view of the Plaintiffs' cases. Lightstream witnesses take issue with much of the evidence alleging misrepresentation but that evidence is left out of the chronology. If I answer both of the questions put forward in the affirmative, a trial will take place in December 2016 in which I will have a full opportunity to assess all of the evidence.

Chronology

[9] On January 30, 2012 Lightstream issued $900 million in unsecured notes pursuant to an Indenture agreement. Lightstream repurchased $100 million in unsecured notes in 2014, leaving $800 million outstanding.

[10] FrontFour met with Lightstream in January of 2014 to discuss the unsecured notes and the state of Lightstream's balance sheet. In December of 2014 an internal email in FrontFour discussed the risk of being "primed" (which means having secured debt added to Lightstream's

balance sheet, which would rank ahead of the unsecured notes) FrontFour believed the risk was minimal.

[11] On January 21, 2015, Lightstream held a conference call with Mudrick in which Lightstream explained that it had the capacity to carry $1.5 billion in total secured debt, but that liquidity was not an issue, so Lightstream did not need or intend to restructure its debt at that time.

[12] On January 22, 2015 Mudrick purchased a series of Lightstream's unsecured notes on the secondary market. All told, Mudrick purchased $32,200,000 of unsecured notes between January 22, 2015 and the date of the July 2015 exchange transaction.

[13] FrontFour followed suit with its first purchase of unsecured notes on February 2, 2015. FrontFour currently holds $31,750,000 worth of unsecured notes.

[14] On February 3, Lightstream's CFO prepared an internal email identifying a number of transaction alternatives to restructure Lightstream's debt, including an exchange transaction involving unsecured notes. In respect of the exchange transaction, the CFO noted that such a transaction "might require to be a tender for fairness to all note holders".

[15] On February 11, 2015, FrontFour held a conference call with Lightstream in which the parties discussed the possibility of a third party unsecured note holder initiating an exchange transaction. Lightstream advised that, while they had the capacity to issue additional debt securities, no such transaction had been contemplated and Lightstream had ample liquidity.

[16] Mudrick met with Lightstream on February 18, 2015 to discuss Lightstream's liquidity situation. Lightstream maintained that they had sufficient liquidity.

[17] In an internal email dated February 22, 2015, FrontFour managers discussed a conversation with Lightstream's CFO advising that nothing in the Indenture prevented Lightstream from issuing additional senior unsecured notes.

[18] On March 8, 2015 an internal memorandum circulated FrontFour which stated that Lightstream's ability to issue senior debt securities was "limited" and that the current trading price of the unsecured notes presented an opportunity for "equity-like returns".

[19] In early March of 2015, unsecured note holders, Apollo Management LP ("Apollo") and GSO Capital Partners ("GSO"), approached Lightstream about a possible exchange transaction of their unsecured notes for secured notes.

[20] On March 13, 2015 FrontFour met with Lightstream. FrontFour emphasized that if Lightstream was planning on an exchange transaction of unsecured notes for secured notes with selective note holders, all unsecured note holders should have the opportunity to participate in the transaction. Lightstream maintained that it did not intend a debt exchange because of its favorable liquidity situation, and if a transaction were to occur, the transaction would be offered to all unsecured noteholders.

[21] In May of 2015, Lightstream retained a division of Royal Bank of Canada ("RBC") as financial advisor for the purposes of a potential debt exchange transaction.

[22] On May 9, 2015, Apollo sent Lightstream a term sheet proposal containing the proposed terms for a secured notes exchange transaction. Apollo and GSO both advised Lightstream that they were not prepared to have other unsecured noteholders participate in any exchange

transaction, beyond certain follow-on exchanges. Apollo and GSO collectively held $465 million in unsecured notes, and Lightstream's view was that any transaction without their participation would not likely have a material upside for Lightstream.

[23] Lightstream held its Annual General Meeting on May 14, 2015. Lightstream executives were asked about the company's capacity to layer secured debt on top of the unsecured notes. Lightstream stated that it would be possible to layer additional secured debt, but that this debt would have a higher cost, and at this point Lightstream was not "enamoured" about adding on additional debt to add liquidity that was not necessary.

[24] On May 19, 2015 an internal FrontFour email circulated acknowledging an awareness that Lightstream was in talks with its creditors. The email posed the question: "shouldn't we work to insert ourselves into creditor talks?"

[25] On May 26, 2015, RBC told Lightstream that it would need to seek incremental liquidity in 2016 and that Lightstream should consider the Apollo and GSO transaction against the importance of maintaining senior secured financing flexibility.

[26] Lightstream spoke to Mudrick on May 27, 2015 to the effect that it was comfortable with its liquidity. Lightstream also said that any issuance of secured notes in exchange for the existing unsecured notes was unlikely. After this meeting, Mudrick circulated an internal email indicating that although Lightstream did not say an exchange transaction was likely, Lightstream did seem more inclined to do one than before.

[27] On May 29, 2015 an internal email at FrontFour outlined secured note issuances carried out in the energy sector in recent months, and posed the question "how much debt can be put ahead of us in [Lightstream]?"

[28] By the end of May, Mudrick considered selling its position in the unsecured notes to avoid the negative consequences of an exchange transaction of unsecured for secured notes. Based on assurances from Lightstream, Mr. Kirsch, a managing director of Mudrick decided not to sell. FrontFouralso says that it did not sell its position as a result of the assurances it had received from Lightstream that such an exchange transaction would not occur without them.

[29] In June 2015 all the parties were in New York and FrontFour and Mudrick each received assurances that while the company had been receiving more reasonable financing offers, that there was no contemplated debt exchange, and if there were such an exchange, Lightstream would offer it to all of the unsecured noteholders. Indeed Mudrick was assured that to do otherwise would be an "un- Canadian" way of doing business.

[30] On June 4, 2015, RBC emailed Lightstream a presentation in which it addressed Apollo and GSO's proposal for an exclusive secured note exchange. The presentation highlighted some of Lightstream's 2017 liquidity issues, and advised that Lightstream make efforts to rectify the liquidity shortfall.

[31] On June 5, 2015, Lightstream emailed Apollo and GSO its comments respecting the proposed exchange transaction. The parties agreed on June 10, 2015 that the terms for any follow-on deal could not be offered on terms more favorable than those accepted by Apollo and GSO.

[32] On June 10, 2015, Mudrick emailed Lightstream and asked that he be kept apprised of any debt exchange proposals so that Mudrick could participate in the discussions. That same day,

Mudrick circulated an internal email indicating Mudrick's confidence in Lightstream but also with an awareness of the risk to the value of Mudrick's position if a debt exchange transaction were to occur.

[33] On June 11, 2015 RBC provided Lightstream with an assessment of the proposed exchange transaction by Apollo and GSO. They concluded that the deal would provide liquidity through 2016, and up to the end of 2017. Later that day, Lightstream sent Apollo and GSO a signed letter of agreement with the final term sheet.

[34] On July 2, 2015 Lightstream entered into a note purchase and exchange agreement with Apollo and GSO. The deal exchanged $465 million of unsecured notes for $395 million of secured second lien notes, and issued an additional $200 million of secured notes. The press release associated with the exchange stated that the transaction would provide Lightstream with the ability to reduce its outstanding borrowing under its credit facility, give the company financial flexibility in the low-price commodity environment, and potentially accelerate its drilling program in the event commodity prices recover.

[35] On July 6, 2015 Mudrick circulated an internal email in which members of the firm stated that Lightstream "just did the exchange we thought might be coming."

[36] Before the end of July 2015, Mudrick and FrontFour both filed actions claiming oppression by Lightstream in relation to the debt exchange transaction executed with Apollo and GSO. Both Mudrick and FrontFour alleged that they were oppressed because it was improper to offer the debt exchange transaction exclusively to Apollo and GSO, and to leave them out, particularly in light of the alleged misrepresentations made by Lightstream management. In addition, the exchange transaction was allegedly in breach of the unsecured note Indenture agreement.

[37] Among the remedies sought by FrontFour and Mudrick to rectify the alleged oppression was an order by the court compelling Lightstream to allow FrontFour and Mudrick the opportunity to participate in the debt exchange transaction on the same terms negotiated by Apollo and GSO.

[38] Since then, Mudrick has purchased approximately $36 million US dollars worth of the unsecured notes on the market.

[39] On September 26, 2016 Lightstream brought an application seeking *CCAA* protection, including a stay of all proceedings against it. Mudrick and FrontFour brought an application seeking an order to exclude their claims against Lightstream from the stay, and to have the issues raised in their claims heard before any proceedings under the *CCAA*. This court granted the stay but on October 11 ordered the threshold issues referenced above be determined in the *CCAA* proceedings.

Framework of Analysis

[40] Because of the obvious time constraints under which we are working, this is a pragmatic exercise. We often refer to this as "real time litigation" which does not give us the luxury of time for extended reflection.

[41] While this was not framed as a summary dismissal application it proceeded like one. Lightstream, Mudrick and FrontFour along with Apollo and GSO put forward that part of the

record upon which they rely. This included affidavits by representatives of Mudrick and FrontFour, excerpts from questioning, and documents produced as well as answers to undertakings. I received extensive briefs and was favored with oral presentations over two days.

[42] I think it is appropriate to apply the same test with respect to the two questions as the Court would apply in a summary judgment application. That test has been variously described as whether there is a genuine issue to be tried or whether the plaintiffs are bound to fail. As was appropriate, I am confident that each side put its best foot forward with respect to the existence or non-existence of material issues to be tried. ***Papaschase Indian Band No 136 v Canada (Attorney General)***, 2008 SCC 14 see also ***Windsor v Canadian Pacific Railway***, 2014 ABCA 108 and ***Pembina Pipeline Corp v CCS Corp***, 2014 ABCA 390.

[43] I will outline the requirements necessary to apply the oppression remedy recognizing this Court is being asked to grant a particular remedy in the context of ongoing *CCAA* proceedings.

[44] The function of the supervising judge in this context is to supervise matters during the course of the stay of proceedings and this includes adjudicating with respect to claims such as the ones advanced here by Mudrick and FrontFour. They argue that as of the date of the exchange transaction in July 2015 and before the *CCAA* proceedings they were entitled to the remedy sought, i.e. to participate in the secured notes transaction on the same basis as those which did. Implicit in their arguments is that, if successful on this application and the subsequent trial, their claims as secured creditors can be dealt with under section 19(1) of the *CCAA*.

CCAA Process

[45] The *CCAA* is a broadly worded remedial piece of legislation. The Supreme Court in ***Ted Leroy Trucking [Century Services] Ltd,*** 2010 SCC 60 wrote about the broad scope of the *CCAA* at paragraph 59:

> The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
> >
> > (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

[46] The *CCAA's* general language provides the Court with discretion to make orders to further the *CCAA's* purpose. The source of much of the Court's discretion originates from section 11 of the *CCAA* and is supplemented by other statutory powers that may be imported into the section 11 discretion by way of section 42: ***Re Stelco Inc***, [2005] OJ No 1171 (ONCA) at para 33.

[47] Section 11 states:

> **11** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may,

> subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[48] Under section 11, the court may issue any order that it considers appropriate in the circumstances. Our Supreme Court addresses appropriateness in this context in ***Century Services*** at para 70:

> Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA.* The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company.
>
> ...

[49] The Ontario Court of Appeal addressed the scope of section 11 in ***Re Stelco***, at para 44. The Court acts as a referee and maintains a level playing field while the company and its creditors attempt to achieve a compromise. While the Court has much discretion, it is limited by the remedial object of the *CCAA* and the Court must not usurp the roles of the directors or management.

[50] The Ontario Court of Appeal revisited the discussion of the scope of section 11 in ***US Steel Canada Inc, Re***, 2016 ONCA 662 and made the following comment, at para 82:

> There is no support for the concept that the phrase "any order" in s. 11 provides an at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors. The orders reflected in the case law have addressed the business at hand: the compromise or arrangement.

[51] An essential element of negotiating a compromise or arrangement is the stay of proceeding associated with the initiation of a *CCAA* proceeding. This allows for a status quo as between creditors so that the insolvent company has an opportunity to reorganize itself without any creditor having an advantage over the company or any other creditor: ***Woodward's Ltd, Re***, [1993] BCWLD 769 (BCSC) at para 17. Any order under section 11 should be made with the view to facilitating a fair compromise or an arrangement.

The Oppression Remedy under the *CCAA*

[52] Section 42 of the *CCAA* allows for the import of remedies from other statutory schemes:

> **42** The provisions of this Act may be applied together with the provisions of any Act of Parliament, or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

[53] FrontFour and Mudrick take the position that the oppression remedy pursuant to section 242 of the *ABCA* may be imported into a *CCAA* proceeding by way of section 42 of the *CCAA.* ***Re Stelco*** describes this proposition in detail at paragraph 52:

> The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them". Accordingly, the powers of a judge under s. 11 of the CCAA may be applied

> together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 [now s. 42] as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 [now s. 42] mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances. [emphasis added]

[54] While the Ontario Court of Appeal in ***Re Stelco*** addresses the *CCAA* in the context of the *CBCA*, the same logic applies to the *ABCA*. I also agree that, while the oppression remedy *can* be a tool under the *CCAA*, it should be utilized in only the appropriate circumstances. Circumstances that qualify as appropriate will be those that accord with the purpose and objectives of the *CCAA* process. Thus, while this Court has jurisdiction to apply the oppression remedies the exercise of this discretion is limited to cases in which the remedy serves the purpose and scheme of the Court's function under the *CCAA*. This analysis will usually involve two questions. Was the conduct oppressive and, if so, what is the appropriate remedy in the context of the *CCAA*?

The Oppression Claim

[55] FrontFour and Mudrick assert that because they held identical notes and they were so assured, they had a reasonable expectation that they would be included in the transaction executed among Lightstream and Apollo and GSO. FrontFour and Mudrick argue that by failing to include them in the exchange transaction, Lightstream acted oppressively.

[56] Under the *ABCA* the oppression remedy is set out in section 242. The Supreme Court of Canada in ***BCE Inc, Re***, 2008 SCC 69 provided a two-part framework for analysing an oppression claim (at para 68):

1. Does the evidence support the reasonable expectation asserted by the claimant?

2. Does the evidence establish that the reasonable expectation was violated by conduct, and falls within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[57] The Alberta Court of Appeal outlined three governing principles under which a court is subject to when exercising its broad equitable jurisdiction under the oppression remedy: ***Shefsky v California Gold Mining Inc***, 2016 ABCA 103, at para 22:

> • First: not every expectation, even if reasonably held, will give rise to a remedy because there must be some wrongful conduct, causation and compensable injury in the claim for oppression: *BCE* at paras 68, 89-94.
>
> • Second: not every interest is protected by the statutory oppression remedy. Although other personal interests may be connected to a particular transaction, the oppression remedy cannot be used to protect or advance, directly or indirectly, these other personal interests. "[I]t is only their interests as shareholder, officer or director as such which are protected": *Naneff v. Con-Crete Holdings Ltd.* at para 27. Furthermore, "the oppression remedy protects only the interests of a shareholder *qua* shareholder. Oppression remedies are not intended to be a

substitute for an action in contract, tort or misrepresentation": *Stahlke v. Stanfield*, 2010 BCSC 142 (B.C. S.C.) at para 23, aff'd 2010 BCCA 603 (B.C. C.A.) at para 38, (2010), 305 B.C.A.C. 18 (B.C. C.A.).

• Third: courts must not second-guess the business judgment of directors of corporations. Rather, the court must decide whether the directors made decisions which were reasonable in the circumstances and not whether, with the benefit of hindsight, the directors made perfect decisions. Provided the directors acted honestly and reasonably, and made a decision in a range of reasonableness, the court must not substitute its own opinion for that of the Board. If the directors have chosen from one of several reasonable alternatives, deference is accorded to the Board's decisions: *Stahlke* at para 22; *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.) at para 36, (1998), 44 B.L.R. (2d) 115 (Ont. C.A.); *BCE* at para 40.

(i) Reasonable Expectations

[58] The claimant must identify the expectation they had and must demonstrate that such expectations are reasonable in all of the circumstances. Evidence of an expectation will depend upon the facts of each case. In the context of this case, the basis of FrontFour and Mudrick's alleged reasonable expectation derives from Lightstream's representations and assurance, and the Indenture agreement governing the unsecured notes.

[59] ***BCE*** sets out factors helpful in determining whether a reasonable expectation exists. These factors are:

- general commercial practice
- the nature of the corporation
- the relationship between the parties
- past practice
- steps the claimant could have taken to protect himself
- any representations and agreements, and
- the fair resolution of conflicts between corporate stakeholders

General Commercial Practice

[60] A departure from the general commercial business practice that has the effect of undermining or frustrating a complainant's legal rights can give rise to a remedy: ***BCE*** at para 73.

[61] FrontFour and Mudrick argue that there is no evidence that debt exchanges done on a selective basis is the general commercial practice. It was their belief that such an exchange should be offered to all unsecured noteholders.

[62] Lightstream takes the position that the absence of a prohibition against selective debt exchanges is evidence that selective debt exchanges are permissible. Lightstream points to an internal email sent by FrontFour on May 29, 2015 which listed recent secured note issuances in the energy industry and posed the question "how much debt can be put ahead of us?" in respect of FrontFour's Lightstream unsecured notes. This, according to Lightstream, is evidence of FrontFour's knowledge that an exchange transaction was possible and in accordance with general commercial practice. There is little doubt that the Plaintiffs were aware that a selective exchange transaction was a possibility.

The Nature of the Corporation

[63] This factor carries more weight in instances where a small, closely held corporation deviates from corporate formalities. In the context of this case, Lightstream is a large public company and it is presumed that such a company would comply with corporate norms and formalities.

[64] Lightstream takes the view that it is relevant to consider that FrontFour and Mudrick are also sophisticated firms that are in the business of managing significant amounts of money by, among other things, buying and trading securities on the secondary market. If FrontFour and Mudrick were nervous about a potential debt exchange, they could have sold their position.

Relationship between the Parties

[65] The parties had some familiarity with one another. FrontFour and Mudrick held a sizable enough position in Lightstream's unsecured debt that it allowed them access to Lightstream's CFO and other executives on a regular basis. FrontFour and Mudrick claim that such a relationship implied a reasonable expectation of honesty and candor. On the other hand, professional investors who work daily in a market rife with misinformation ought to beware.

Past Practice

[66] FrontFour and Mudrick claim that no transaction like the debt exchange transaction has occurred in the past. Lightstream points to the repurchase of $100 million in unsecured notes in 2014 as evidence of a transaction done selectively, and not on a pro-rata basis.

Preventative Steps

[67] FrontFour and Mudrick claim that by continually asking Lightstream for inclusion and any exchange transaction they took the appropriate preventative steps to avoid its loss.

[68] On the other hand, there is a significant amount of evidence which indicates that FrontFour and Mudrick were aware that in exchange transactions such as the one that took place was being considered by Lightstream. Despite that, they chose not to sell their notes, they say, because of the assurances both public and private

Representation and Agreements

[69] In addition to the assurances, FrontFour and Mudrick also claimed that the wording of the Indenture agreement supporting the original issue of the unsecured notes contributed to their reasonable expectation that they would participate in any exchange transaction.

[70] I was informed that if this issue does go to trial the interpretation of the Indenture agreement would be the subject of expert evidence. It is a complicated agreement with lengthy provisions and terms. In light of the fact the parties intend to call expert evidence, this hearing is

not the place to make a definitive finding as to what it says on this issue. Nevertheless, there is no evidence before me that anyone associated with the Plaintiffs ever raised the wording of the Indenture agreement with anyone associated with Lightstream prior to the exchange transaction in July 2015. Nor is there any evidence that either Plaintiff raised it internally. Finally, there is no evidence that anyone with Lightstream thought that the Indenture agreement was an obstacle to the transaction. Indeed, it is clear from the evidence that the Lightstream thought it could do so and so informed the Board of Directors in June 2015.

[71] Finally, the Indenture agreement contains a "no action" clause which prescribes specific steps as preconditions to initiating an action relating to the Indenture or notes. It required the Trustee of the Indenture to be notified so that the Trustee could take carriage of the action on behalf of the class. I will return to this clause later.

Fair Resolution of Conflicting Interests

[72] Lightstream asserts that its decision to execute the debt exchange transaction was a business decision done in the best interest of the corporation. As an overture to FrontFour and Mudrick, Lightstream offered them the opportunity to participate in the exchange of unsecured to secured notes. FrontFour and Mudrick rejected this opportunity because the terms of the exchange were less favorable than the terms of the first exchange transaction. Nevertheless, Lightstream points to this as an attempt at a fair resolution for conflicting interests.

Was there a Reasonable Expectation?

[73] Arguably on the evidence, Mudrick and FrontFour were repeatedly told by Lightstream that no exchange transaction was contemplated, but if there was one, all of the unsecured note holders would be able to participate. At the same time, the evidence is that both Mudrick and FrontFour were aware that a selective exchange transaction was in play. However, they each say that they did not take steps to sell their positions because of the repeated assurances given to them by Lightstream management. Moreover, those assurances continued while the impugned transaction was being negotiated. In the absence of hearing the evidence from those witnesses involved, I cannot conclude that the Plaintiffs are bound to fail on this issue. In other words I think that whether or not there was a reasonable expectation and whether it caused a loss as alleged, are genuine issues for trial.

(ii) Oppression, Unfair Prejudice, or Unfair Disregard

[74] The second part of the framework examines whether the evidence establishes that the alleged reasonable expectation was violated by Lightstream conduct, and falls within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[75] When a conflict between the interests of corporate stakeholders arises, it falls to the corporation to resolve the dispute in accordance with their fiduciary duty to act in the best interest of the company, viewed as a good corporate citizen: ***BCE*** at para 81.

[76] ***BCE*** also states, at paragraph 83:

> Directors may find themselves in a situation where it is impossible to please all stakeholders. 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": *Maple Leaf Foods* per Weiler J.A., at p. 192.

> There is no principle that one set of interests — for example the interests of shareholders — should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way.

[77] FrontFour and Mudrick claim that Lightstream completely and unfairly disregarded their interests by going forward with the selective debt exchange transaction. They further assert that the exchange transaction was not necessary in light of Lightstream's available liquidity. To go forward with an unnecessary transaction to the exclusion of the rest of the unsecured noteholders qualifies as unfair disregard, according to FrontFour and Mudrick.

[78] Lightstream takes the position that the selective debt exchange transaction was a good faith business decision made with a view to the best interests of the corporation.

[79] Lightstream hired financial experts to evaluate the company's liquidity in the context of Apollo and GSO's term sheet. In May of 2015, the financial advisor made a presentation to Lightstream in which it recognized the need for incremental liquidity in 2016, and that the Apollo and GSO transaction should be viewed as a potential solution to this problem. On June 11, 2015, the financial advisor provided its assessment of the Apollo and GSO transaction and concluded that the deal would provide liquidity through 2016 and up to year end 2017.

[80] While there were representations made by Lightstream to FrontFour and Mudrick that it would be a fair business practice to offer the exchange transaction to all unsecured noteholders, Lightstream ultimately believed that there was no obligation to do so. At the June 11, 2015 meeting of Lightstream's Board of Directors, the meeting at which the debt exchange transaction was given the go-ahead, the directors discussed the need to offer the transaction to all unsecured noteholders. According to the meeting's minutes, "management confirmed that there was no requirement under either the unsecured note Indenture or applicable U.S. securities laws to make the same offer to all unsecured noteholders."

[81] Apollo and GSO held more than half of the outstanding unsecured notes. Apollo and GSO had said that they would proceed with the transaction only if it was done on a selective basis. The deal, according to Lightstream's financial advisors, would provide liquidity into 2017. Management of the company considered any obligation to offer the transaction to all unsecured noteholders and concluded that none existed.

[82] I would not second guess the Board of Directors on the issues of whether the transaction was necessary or whether it was in the best interest of Lightstream. I defer to their business judgment. Nevertheless, there is no evidence that the Board was told that Mudrick and FrontFour, holders of a significant amount of the unsecured notes, were repeatedly told by Lightstream that they would be included in the transaction. If indeed those assurances had been given, the Board should have been so informed. Had they been so informed the Board may have or maybe should have taken a different decision. Accordingly, on that issue too, I cannot conclude that the Plaintiffs are bound to fail.

Appropriate Remedy

[83] A finding of oppression may give rise to equitable remedies aimed at rectifying the oppression and putting the oppressed in the position they would have been had it not occurred. In this case the Plaintiffs assert that the oppression was the discriminatory way in which they were

treated in the face of the Indenture, the representations and the assurances. They argue that they had the right to expect that they would be included in any exchange transaction. In the end the exchange transaction which occurred was only with Apollo and GSO. It is argued that the only just way to rectify the oppression is to order Lightstream to issue them their pro rata share of secured notes and they have filed an undertaking to contribute their share of cash to Lightstream.

[84] On the other hand, Lightstream and Apollo and GSO argue that even if there is a basis for granting an oppression remedy, it would clearly be a case for damages and in any event, an order directing Lightstream to issue securities and incur further debt is a remedy which is extraordinary, inappropriate and contrary to the function of this Court in supervising the *CCAA* proceedings. They argue that if this action were outside of the *CCAA* proceedings an adequate and thus appropriate remedy would be damages. They further argue that within the *CCAA* proceedings the remedy sought is contrary to the scheme of the *CCAA*.

[85] I have reviewed the very excellent briefs filed the by the parties and listened carefully to their arguments. I agree with the position advanced by Lightstream, Apollo and GSO to the effect that even if a claim for oppression is made out the appropriate remedy is damages. It would not include the equitable remedy sought. Moreover, in the context of the *CCAA* proceedings, it would be inappropriate to grant the relief sought.

[86] Damages are adequate to compensate the Plaintiffs for their loss. Both Plaintiffs claim that if they had known about the transaction they would have sold their notes. The market consensus at that time was that an exchange transaction with existing unsecured noteholders would adversely affect the market price of the remaining notes and the market price at the relevant times is ascertainable. The Plaintiffs claim that because of the assurances received from Lightstream, publicly and privately, they chose not to sell the notes. Accordingly, an award of damages is adequate to compensate the Plaintiffs for their loss. Investments have no intrinsic value beyond their financial return.

[87] If the transaction is found to be oppressive as against the Plaintiffs, it may also be oppressive as against the remaining unsecured notes, the value of which is approximately $150 million US dollars. The remedy sought would apply only to the Plaintiffs and thus the remedy may itself amount to oppression against the remaining unsecured note holders as well as a breach of the Indenture. In those circumstances, the Court would not grant the equitable remedy sought, particularly where the Plaintiffs failed to notify the Trustee of Indenture as required.

[88] Section 242(3)(e) of the *ABCA* empowers the Court to order an exchange of securities but in doing so, the Court should consider all of the factors affecting fairness. Here, the remedy would adversely affect Appollo and GSO because they insisted on exclusivity and insisted that others could participate only later and on less favorable terms. Neither Appollo nor GSO is alleged to have wronged the Plaintiffs. The remedy would also adversely affect the remaining unsecured note holders who have done nothing wrong. Finally, the remedy would impose debt upon Lightstream unilaterally.

[89] To grant the remedy sought would also be contrary to the scheme and object of the *CCAA*. I accept the argument that Lightstream's insolvency is an inappropriate reason to grant an equitable remedy in favor of two creditors particularly when it affects others and Lightstream. I agree with the Ontario Court of Appeal in ***Barnabe v Touhey***, [1995] OJ No 3456 where it said:

> While a constructive trust, if appropriately established, could have the effect of the beneficiary of the trust receiving payment out of funds which would otherwise become part of the estate of a bankrupt divisible among his creditors, a constructive trust, otherwise unavailable, cannot be imposed for that *purpose*. This would amount to imposing what may be a fair result as between the constructive trustee and beneficiary, to the unfair detriment of all other creditors of the bankrupt.

[90] In other words, the appropriate remedy is damages and, accordingly, it would be contrary to the purpose of the *CCAA* to grant an equitable remedy which would adversely affect other creditors.

[91] The Plaintiffs argue that the policy of the *CCAA* argues in their favor because to not grant it will encourage aggressive creditors to jockey for position prior to *CCAA* proceedings. First of all, there is nothing before me to suggest what occurred before the exchange transaction in July 2015 was "jockeying" as opposed to a bona fide transaction. Indeed, no claim is made against Apollo or GSO. More importantly, what is being sought here by the Plaintiffs is an order of this Court that would put them in a better position than the remaining unsecured note holders. I am mindful of the words of Farley, J in ***Lehndorff General Partner Ltd (Re)***, [1993] OJ No 14 where he said at para 6:

> It has been held that the intention of the *CCAA* is to prevent any maneuvers for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such maneuvers could give an aggressive creditor a advantages to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely the plan will succeed...

In my view, that would be the effect of granting the order sought.

[92] In the result, I answer the questions as follows:

1. In the context of CCAA proceedings is there jurisdiction in the Court to recognize the Plaintiffs' claim as secured claims after the granting of the Initial Order and to make an order varying the Secured Notes Transaction and requiring Lightstream to issue additional Secured Noted to remedy alleged oppressive conduct?

   Yes. The Court has jurisdiction but a limited one. It is defined by the scheme of the CCAA. Whether oppression occurred and whether the Plaintiffs suffered a loss are triable issues.

2. If there is jurisdiction to make an Order recognizing the Plaintiffs' claim as a secured claim and varying the Secured Notes Transaction, would the Court exercise its discretion to do so based upon the facts as pleaded and supplemented to represent the highest and best factual case of the Plaintiffs?

   No. On this question, the Plaintiffs are bound to fail and there is no issue to be tried. To grant the remedy sought would be contrary to law.

[93] The parties may speak to costs.

Heard on the 15th and 16th day of November, 2016.

Dated at the City of Calgary, Alberta this 25th day of November, 2016.

A.D. Macleod
J.C.Q.B.A.

Appearances:

M. Barrack, R. Bell & K. Bourassa
for Lightstream

T. Pinos & C. Simard
S. Voudouris & S. Kerzne
for FrontFour & Mudrick

K. Kashuba
for First Lien Creditors

J. Wadden & D. Conklin
for Apollo Management LP & GSO Capital Partners