COURT FILE NUMBER	1601-12571
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

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

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

DOCUMENT

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

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

BENNETT JONES LLP
Barristers and Solicitors
4500, 855 – 2nd Street S.W.
Calgary, Alberta T2P 4K7

Chris Simard
Tel No.: 403-298-4485
Fax No.: 403-265-7219
simardc@bennettjones.com

Kevin Zych
Tel No.: 416-777-5738
Fax No.: 416-863-1716
zychk@bennettjones.com

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Timothy Pinos
Tel No.: 416-869-5784
Fax No.: 416-350-6903
tpinos@casselsbrock.com

Stephanie Voudouris
Tel No.: 416-860-6617
Fax No.: 416-642-7145
svoudouris@casselsbrock.com

Application Scheduled on October 11, 2016 at 10:00 a.m.
Before the Honourable Mr. Justice A. D. Macleod

TABLE OF CONTENTS

I. INTRODUCTION

1. This Brief of Argument is submitted on behalf of Mudrick Capital Management, FrontFour Capital Corp., and FrontFour Capital Group LLC (collectively, the "**Oppression Claimants**") in opposition to certain of the relief set out in the Initial Order granted on September 26, 2016 (the "**Initial Order**").

2. The Oppression Claimants believe that there is value in Lightstream beyond the amounts owed to the lending syndicate (the "**Syndicate**") and the Secured Noteholders. However, Lightstream is not pursuing or considering any transactions in these CCAA proceedings that would maximize that value. The evidence is clear that Lightstream feels forced, by its pre-filing contractual obligations to the Syndicate in the Second Forbearance Agreement and to the Secured Noteholders in the Support Agreement (both of which were negotiated privately without any court supervision), to pursue a truncated process that will not reasonably expose Lightstream's assets to the market so as to allow the value of those assets to be maximized. The unrealistically truncated Sale Process and consequent abdication by Lightstream of its obligation to consider all restructuring options, now being fully reviewed for the first time at the Comeback Hearing, will, if approved, inevitably drive these proceedings toward a swift, preordained and inequitable conclusion: the acceptance of the Secured Noteholders' Credit Bid, delivering the company to the Secured Noteholders for less than its fair value. The Credit Bid will result in the payment of **all** of Lightstream's creditors in full (even pre-CCAA trade creditors with unsecured claims) **except** for the Unsecured Noteholders.

3. This is even more troubling because the Court is being told that the Credit Bid APA has not yet been finalized (despite the Company and the Secured Noteholders agreeing to this path in mid-July). The unreasonably short timelines that the Company seeks to impose on third party bidders have not been matched with urgency by the Secured Noteholders.

4. There is another fundamental issue that calls out for the cessation of the Sale Process: the fact that the Oppression Claimants' long-standing action, in which they seek to be able to take part in the Secured Note exchange transaction, has not yet been decided. Until that matter is resolved, proceeding with a Sale Process that revolves around the Credit Bid is unworkable, for the following reasons, among others:

(a) the ultimate composition of the Secured Noteholder group cannot be known;

(b) whether a Credit Bid will proceed at all (given the Secured Noteholder internal governance issues that could arise upon determination of the group's ultimate composition) cannot be known;

(c) the quantum of the Credit Bid, if it does proceed, cannot be known, such that third party bidders cannot know what amount they must bid to clear the Credit Bid and become a Qualifying Bidder;

(d) the Oppression Claimants cannot know whether they have to submit a separate bid (which could be the case if it were determined that they could not participate in the Secured Note transaction); and

(e) the Company, the Monitor and all creditor groups cannot know what their return might be from any particular bid for the Company's assets.

5. As set out below, the Oppression Claimants are ready, willing and able to proceed to a determination of their oppression claims on an expedited basis. But that determination must precede any meaningful sale process. If the Sale Process continues to advance without the oppression claims being determined, it will not produce results that will be meaningful or reliable.

6. As will be demonstrated in detail below, this truncated Sale Process and various other aspects of the Initial Order are demonstrably not in the best interests of Lightstream and all its stakeholders. The Oppression Claimants propose a limited number of reasonable revisions to the Initial Order, which would allow these proceedings to move forward in a manner that protects the rights of all of Lightstream's stakeholders and allows the best possible opportunity for recovery by all those stakeholders. Importantly, the Oppression Claimants' proposed revisions to the Initial Order would not unduly prejudice the Syndicate, the Secured Noteholders, nor any other stakeholder.

7. Further, contrary to the position advanced by the Company (in paragraph 45 of its October 5 Brief), the positions being advanced by the Oppression Claimants with respect to the Initial Order will not just benefit them: they will benefit all Unsecured Noteholders.

8. The Oppression Claimants filed a Bench Brief on September 26, 2016 (the "**Original Brief**"). In this Brief of Argument, the Oppression Claimants will not repeat the arguments already put forward in their Original Brief. All capitalized terms that are used but not defined in this Brief of Argument are intended to bear their meanings as defined in the Original Brief.

II. FACTS

A. Relevant Evidence Before the Court on the Comeback Hearing

9. The evidence before the Court at the October 11, 2016 comeback hearing is comprised of the following:

(a) Affidavit of Peter D. Scott sworn September 21, 2016 (the "**Scott Affidavit**");

(b) Pre-filing Report of FTI Consulting Canada Inc., the Monitor of Lightstream (the "**Pre-filing Report**" and the "**Monitor**");

(c) Affidavit of David Kirsch sworn September 23, 2016 (the "**Kirsch Affidavit**");

(d) Supplemental Affidavit of Peter D. Scott sworn September 23, 2016 (the "**Scott Supplemental Affidavit**");

(e) Transcript of the cross-examination of Mr. Scott held on October 3, 2016, including the Exhibits and Undertaking Responses related thereto (the "**Scott Transcript**"); and

(f) Confidential Exhibits 6 and 8 from the October 3, 2016 questioning of Mr. Scott (which have been delivered to the Court, but to no other parties besides Lightstream, the Monitor and the Oppression Claimants' counsel).

B. Background Facts

10. The background facts that are relevant to the comeback hearing are described below in the Law and Argument section of this Brief.

III. LAW AND ARGUMENT

A. The Comeback Hearing

11. The Oppression Claimants opposed the form of Initial Order sought on September 26, 2016, in light of, among other things, the non-urgent nature of the application and the fact that the Oppression Claimants received the application materials with inadequate notice, particularly given the very material deviations from the Alberta Template CCAA Initial Order. In light of the inadequate notice to the Oppression Claimants, which resulted in an inherent disadvantage at

the hearing of the Initial Order, the hearing scheduled for October 11, 2016 is a "true" comeback hearing, in which Lightstream must justify why all of the relief granted in the Initial Order is appropriate, and at which the Court will consider each of Lightstream's requests for relief *de novo*.

- *Re Target Canada Co.*, 2015 ONSC 303 at para. 82 **[TAB 1]**

B. Lightstream's Duties to all its Stakeholders and the Purpose of the CCAA

12. The purpose of the CCAA is inherent in its long title: "to facilitate compromises and arrangements between companies and their creditors." Its purpose is to provide a structured environment in which an insolvent Company can continue to carry on business while its creditors consider a plan or compromise for the future benefit of both the Company and its creditors. The objective is to enable the debtor company to continue in business so that **all** stakeholders can benefit.

- *Re Blue Range Resource Corp.*, 2000 ABCA 239 at para. 6 **[TAB 2]**
- *Re 843504 Alberta Ltd.*, 2003 ABQB 1015 at para. 13 **[TAB 3]**
- *Re Winalta Inc.*, 2011 ABQB 399 at para. 98 **[TAB 4]**

13. When a company is insolvent, the directors of the debtor corporation have a continued duty and obligation to act honestly and in good faith, and in the best interests of the corporation, considering the interests of all stakeholders, including all creditors. "Best interests of the corporation" includes "the maximization of the value of the corporation".

- *Re People's Department Stores Ltd. (1992) Inc.*, 2004 SCC 681 at para. 42 **[TAB 5]**
- *Re BCE Inc.*, 2008 SCC 69 at paras. 36-37 **[TAB 6]**
- *Re Stelco Inc.*, [2005] O.J. No. 1171 (CA) at paras. 59-60 **[TAB 7]**

14. The CCAA is inherently flexible, providing numerous avenues or options for a debtor company to restructure for the benefit of its stakeholders; there is no one solution that will apply for every company, as the best course of action may vary from organizational and management restructuring, downsizing, refinancing, or debt to equity conversion, among other things.

- *Re 843504 Alberta Ltd.*, *supra*, at para. 14 **[TAB 3]**

15. In fulfilling their duties and obligations, directors and the debtor company must consider all such avenues and options in order to determine what is in the best interests of the corporation; no such determination can be made until all such avenues are considered and directors must be careful not to favour the interests of any one group of stakeholders.

- *Re Stelco Inc., supra*, at para. 60 **[TAB 7]**
- *Re People's Department Stores Ltd. (1992) Inc., supra*, at para. 47 **[TAB 5]**

C. Lightstream and its CFO Agree That a Sale at this Time Does Not Maximize Value

16. In its Management Presentation from early September, 2016, Lightstream stated (under the heading "Preserve Long Term Value") that the company's recapitalization plan "avoids selling assets in [a] low commodity price environment." Mr. Scott, Lightstream's CFO, agreed in cross-examination that it was his view that the long-term value of Lightstream's assets could be maximized by recapitalizing as opposed to selling its assets in the market conditions prevailing at that time. He also confirmed that he believed that statement was still true as of the date of his cross-examination (October 3), in today's market conditions.

- Scott Transcript at page 33, lines 16 – 27
- Scott Transcript at Exhibit 5, page 15

17. However, despite that belief, Lightstream is not even attempting to negotiate a restructuring or recapitalization plan in these CCAA proceedings. Rather, Lightstream is pursuing the Sale Process, which it is contractually obligated to do under the Support Agreement. Thus, it is admitted that the Company is not pursuing the path that it believes will maximize value, but instead is pursuing a path that it is contractually obligated to pursue. This is demonstrably contrary to the purposes of the CCAA, as described in the cases set out above.

- Scott Transcript at page 34, lines 11 – 22

18. The Company is required by its duty to all stakeholders in these CCAA proceedings to explore all alternative transactions that it believes could maximize value, other than a truncated Sales Process. The Company cannot abdicate its duty in this regard, by pointing to the fact that it failed to conclude a restructuring and recapitalization agreement during the previous CBCA arrangement proceedings. The parameters governing a potential restructuring transaction have

changed entirely, because Lightstream has now declared its insolvency (a precondition of obtaining the Initial Order, which was admitted in para. 102 of the Scott Affidavit). In the proposed CBCA arrangement, Lightstream intended to provide consideration to existing shareholders (2,250,000 common shares in the post-arrangement entity, along with 7,750,000 Series No. 2 Warrants, exchangeable for additional common shares). Pursuant to s. 6(8) of the CCAA, no CCAA compromise or arrangement can provide any return to the holders of equity claims, unless all creditor claims are paid in full. 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 restructuring with its creditors.

- CCAA, s. 6(8) **[TAB 11]**

19. However, Lightstream is not even trying to seek a restructuring or recapitalization transaction. Lightstream is simply following the path that the Syndicate and the Secured Noteholders are dictating, via the Second Forbearance Agreement and the Support Agreement, both of which are just like any other pre-CCAA contract (that Lightstream is entitled to breach in these proceedings in pursuit of a restructuring).

D. The Current Course of Action is Demonstrably not in the Best Interests of the Corporation

20. For the reasons set out below, it is submitted that the Sales Process, with the inclusion of the Credit Bid, will not maximize the value of the corporation and therefore is not in the best interests of the corporation or consistent with the purposes of the CCAA.

1. The Company's Assets have Value That, if Unlocked, Could Support Asset Value in Excess of the Credit Bid

21. The asset value of an oil and gas exploration and production company like Lightstream is determined, among other ways, by the creation of independent reserve reports. A reserve report is an assessment of the company's asset value, carried out by an independent valuator. Lightstream's independent valuator is Sproule. The component parts that go into a reserve report are:

(a) an estimate of the company's recoverable oil and gas reserves;

(b) an assessment of the production expected from those oil and gas reserves;

(c) an expected future revenue stream from that production, using a forward commodity price curve or "price deck";

(d) an estimate of the costs that will have to be spent by the company to obtain that revenue stream; and

(e) an assessment of undeveloped oil and gas well locations.

- Scott Transcript at page 9, line 13 – page 13, line 5

22. A change in any of those components will change the company's overall asset value.

- Scott Transcript at page 13, lines 14 – 20

23. With respect to the "recoverable oil and gas reserves" component of a company's asset value, one of the ways that an oil and gas company increases its asset value is to carry out accretive capital expenditures (drilling new wells, completing wells, working over wells, etc.) where the increased revenue resulting from the operation exceeds the capital expenditure, or the increase in reserves resulting from the operation exceeds the reserves previously reported for the relevant properties.

- Scott Transcript, page 16, line 12 – page 18, line 8

24. On an ongoing basis, Lightstream actively assesses what it considers to be "economic locations" among its approximately 1,500 undrilled prospective locations ("economic" meaning operations that are expected to have positive value to the company as a result of making capital expenditures on such locations). Lightstream also prioritizes those economic locations so that it is aware of what are expected to be the most accretive prospective locations. This assessment process is an active, ongoing exercise in Lightstream that involves a number of personnel in different departments: engineering, geological, land and finance.

- Scott Transcript, page 18, line 9 – page 20, line 21

25. In fact, Lightstream already has active plans to make certain capital expenditures and thereby increase its asset value. In its early September 2016 Management Presentation, Lightstream stated that "[c]urrent economic conditions warrant [a] drilling program upon completion of the Recapitalization Plan." Mr. Scott confirmed that not only was that statement

true when it was made (in early September), but he also agreed that it remained true as of the date of his cross-examination on October 3. He also separately confirmed in his cross-examination that Lightstream has a number of current locations with respect to which it considers capital expenditure opportunities to be accretive to the company's value, at today's commodity prices.

- Scott Transcript at page 34, line 23 – page 35, line 16
- Scott Transcript at page 31, line 16 –line 23

26. Further, Lightstream has plans to implement this capital expenditure strategy, but only after the Credit Bid transaction is concluded. If the Credit Bid is accepted and the proposed exit financing is put in place, Lightstream (or more properly CreditBidCo, which is the Secured Noteholder vehicle that will end up owning Lightstream's assets) will have available to it $80 million in working capital. The current management of Lightstream, who will become the management of CreditBidCo, will execute a capital expenditure program using that available working capital (although Mr. Scott is not presently certain of the exact level of the capital expenditures that would be made, which would be dependent on the then-prevailing cost and commodity price environment).

- Scott Transcript at page 35, line 18 – page 37, line 13

27. The effect of the staging of these events (the closing of the Credit Bid, the closing of the exit financing and then the making of capital expenditures) will have the effect of maximizing the value of Lightstream's assets, but not for the benefit of all of the company's current creditor groups. Rather, this benefit will be deferred, and will benefit the go-forward creditors of CreditBidCo, which will include all the current creditors of Lightstream except for the Unsecured Noteholders, who would be vested out as part of the Sale Process if the Credit Bid is approved.

28. In light of the company's duties to all its stakeholders, the logical question must be asked: if Lightstream has current plans to carry out accretive capital expenditures (*i.e.* operations which will add more value than they will cost), why is Lightstream not considering a way to implement such a strategy **now**, to benefit its current creditors? One alternative would be to borrow the funds necessary to carry out the capital expenditure program now on a super-priority debtor-in-

possession ("**DIP**") basis. Mr. Scott admitted that the company is not even exploring this possibility.

- Scott Transcript at page 55, line 11–line 22

29. Again, the only explanation for why the company is not seeking ways to maximize value now, but is instead deferring the implementation of such strategies until after the Unsecured Noteholders are vested out, seems to be that the Company is contractually bound to proceed in this manner, pursuant to the Second Forbearance Agreement and the Support Agreement.

2. The Company has a Strong Cashflow Position

30. This is not a case in which the debtor company has no cashflow and is therefore being forced by circumstances to urgently pursue a single-track process under the CCAA. To the contrary, the Monitor's Pre-Filing Report demonstrates that for the 16-week period from the commencement of these proceedings to the week of December 30, 2016, the Company will move from an opening cash position of $38 million to a closing cash position of over $28 million.

31. Thus, the Company has significant liquidity to continue operating its business while it prudently and carefully determines the best course of action, for the benefit of all its stakeholders. There is no "cashflow crisis" that would justify the urgency with which his Honourable Court is being urged to proceed. In its May 31, 2016 Management Presentation (in the "Executive Summary" section on page 3 and the "Business Plan" section on page 4), Lightstream described its 3-year "Base Case Business Plan" based on current strip pricing and keeping the Company's production levels flat (at approximately 25,000 boepd) (the "**Base Case**"). The Base Case assumed that the Secured Notes and the Unsecured Notes would be equitized, in other words no interest payments would be made to those stakeholder groups from a cashflow prospective. The Base Case also assumed an ongoing first lien credit facility in the principal amount of $450 million (which is a significantly higher than the actual current amount outstanding to the Syndicate of approximately $371 million). The Base Case was described by Lightstream as "self-funding" and not requiring the injection of any new cashflow. Mr. Scott confirmed in his cross-examination that strip pricing as between the date of the development of the Base Case and today has not changed materially.

- Pre-filing Report of the Monitor at paras. 19-20

- Scott Transcript, Exhibit 4 at page 3 and page 4
- Scott Transcript at page 72, line 19 – page 74, line 12

32. Therefore, the Company's own Base Case confirms that its operations are cashflow-positive in the current circumstances (since interest payments to the Unsecured Noteholders and Secured Noteholders are stayed by the Initial Order) for more than just the short-term. The Company will be cashflow-positive for the next three years (even without building in any increase in commodity prices).

33. Lightstream's cash position while in these proceedings could be enhanced even further from what has been projected in the Monitor's Pre-Filing Report, if paragraph 11(a) of the Initial Order was revised to remove the payment of interest to the Syndicate during these proceedings (thereby treating the Syndicate the same as all other pre-CCAA creditors). There would be no material prejudice to the Syndicate in staying its interest payments for the duration of these proceedings, because it is obvious (from, among other things, the asset valuations in the company's financial statements as well as the Secured Noteholders' support of the Credit Bid which would pay out the Syndicate in full) that there is ample value in Lightstream's assets, above the approximately $371 million owed to the Syndicate.

34. As noted above, the Company's cash position is projected to reduce from an opening cash position of $38,396,000 in the week of September 16, to a closing cash position of $28,745,000 in the week of December 30: a decrease of $9.6 million. The vast majority of that cash decrease is the $8.745 million in interest and bank charges that will be paid to the Syndicate over the same time period. Given the ample security coverage enjoyed by the Syndicate, there is no reason why the Syndicate should not be treated the same as all other creditors, by having its interest payments stayed during the CCAA proceedings.

35. Thus, far from being in a cashflow crisis, Lightstream is in a very strong cashflow position. Lightstream has the luxury of more time than is typical in CCAA proceedings, to consider all its options to best maximize value to all of its stakeholders. There is no timing urgency that can justify the severely truncated Sale Process.

3. Credit Bid/CCAA Sale Process

36. The Sale Process and the associated Secured Noteholder Credit Bid are inherently flawed and contrary to the purpose of the CCAA.

37. The Sale Process is extremely truncated, calling for non-binding indications of interest to be submitted on or before October 21, 2016 (25 days after the granting of the Initial Order) and binding bids on or before November 21, 2016 (31 days later). This extremely short time line will not allow for a proper determination of the fair market value of the Company's assets. Interestingly, while the Company and Secured Noteholders are seeking to make all other bidders respond to unrealistically short timelines, they have not been able to proceed at a similar pace. Despite entering into the Support Agreement in mid-July, they have not even finalized the Credit Bid APA. The fact that that document has not yet been completed over the course of two and a half months, should give the Court some indication about the complexity of Lightstream's assets and business, and the challenges faced by a true third party bidder in putting together a competitive bid.

38. Lightstream holds significant assets in three diverse and disparate geographical areas: approximately 2,500 drilled wells and over 1,500 undrilled prospective locations in three discrete business units spread across Western Canada. Assessing such a large number of assets will be a significant and time-consuming task for any serious bidder. By way of example, for the Company itself and Sproule, its independent engineering firm (both of whom obviously have familiarity with the assets), the process of analyzing the Company's data annually and generating a reserve report, takes approximately **four months**. This is an indication of just how extensive are the Company's assets, and how much work would have to be invested by a prospective bidder to be able to make a meaningful and competitive bid.

- Scott Transcript at page 8, line 6 – page 9, line 12; page 23, line 25 – page 26, line 8

39. In addition, there is no need for such a rushed Sale Process. As set out above, the Company's cash flow projections are strong and are sufficient for the Company to continue to operate for a long time, especially if interest payments are stayed in accordance with the CCAA.

40. It is anticipated that the company and the Secured Noteholders will argue that a truncated Sale Process is sufficient in this case, because the company commenced a sale process in July 2016 during the CBCA arrangement proceedings (the "**CBCA SISP**"). However, there is no evidence that the CBCA SISP has been in any way meaningful or robust. Only with the most compelling evidence demonstrating that bidders in the CBCA SISP have already devoted significant time and resources to assessing Lightstream's assets, could the Company justify the extremely truncated Sale Process. There is no such evidence. The Court has been told only that 37 parties executed confidentiality agreements in the CBCA SISP (a preliminary step that obviously requires very little commitment of time or resources). All questions relating to activity levels in the CBCA SISP were objected to in the cross-examination of Mr. Scott, so this Court is left completely in the dark about the CBCA SISP. Even in the complete absence of evidence, logic dictates that activity levels in the CBCA SISP would likely have been low, given that Lightstream was messaging to the market until late September that it was proceeding with a financial restructuring and recapitalization under the CBCA, not a sale.

- Scott Transcript at page 47, line 16 – page 49, line 7

41. Similarly, all questions relating to activity levels in the 2014 sale process conducted by the Company (with respect to its Bakken Business Unit only, not all the assets of the Company) were objected to in the cross-examination of Mr. Scott.

- Scott Transcript at page 42, line 3 – page 44, line 13

42. The complete lack of evidence about the 2014 marketing process for the Bakken Business Unit and about the CBCA SISP leaves this Court to speculate about what consideration the market has given to Lightstream's assets. It is reasonable to conclude that, when a company like Lightstream has announced multiple processes (the second of which was announced when it was pursuing a non-sale path) and never transacted, bidders have not devoted serious time and energy to considering the opportunity. Additionally, for the reasons noted above and in the Original Brief, the Sale Process cannot and should not proceed until such time as the oppression claim is determined. Bidders simply cannot know what they are bidding against or how to structure their bids, until the outcome of that claim is known. The CBCA SISP was hampered by the same fundamental flaw: bidders who might otherwise have been interested in Lightstream's assets would not have been able to understand how to bid or what they were bidding against,

since the CBCA SISP was launched after the oppression actions had commenced and been proceeding, but without any resolution.

43. This Honourable Court should acknowledge the reality that, on the record before the Court, the Sale Process is starting at square one. If it continues to move forward, it must do so on a reasonable timeframe to allow the market to properly (for the first time) assess Lightstream's assets, and it can only do so after the oppression claim has been decided.

44. The Sale Process is also completely focused on the Secured Noteholder Credit Bid, which is intended to act as a "floor bid". However, instead of maximizing the value of the Company and determining the best course of action in consideration of the appropriate value of the Company, the proposed price for the Secured Noteholder Credit Bid was not negotiated or determined with reference to fair market value, but rather is an arbitrary and static price based simply on the amount of the Secured Noteholder's debt. The request in cross-examination to have Mr. Scott produce the asset valuation generated by Lightstream's financial advisor TD Securities Inc. ("**TD Securities**") was objected to by Lightstream, so again the Court is left in the dark. Courts have rejected a proposed sale where there is not a proper valuation and it is effectively a sale for the benefit of one stakeholder, recognizing that proper valuations and options must be explored to determine what is in the best interests of all stakeholders. The truncated Sale Process will not provide for a proper valuation of the assets of Lightstream.

- Scott Transcript at page 52, line 3 - 14, Response to Undertaking No. 1
- *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, aff'd *Re Fracmaster Ltd.*,1999 ABQB 379 **[TAB 8]**

45. While there is some information in evidence about what is expected in the Credit Bid, no Credit Bid Asset Purchase Agreement has been finalized or put before the Court. Notwithstanding that, paragraph 25 of the Sale Process declares that the Credit Bid shall be deemed to be a Qualified Bid, and that any other Qualified Bid needs to contemplate the payment in full of the Secured Noteholders. Further, the requests to have Mr. Scott undertake to produce two documents and agreements referred to in the Support Agreement (the "Backstop Agreement" and the "Representation Letter") have been met with proposed confidentiality restrictions that would not even allow the contents of those documents to be put before this

Honourable Court. Thus, this Honourable Court is being put in the unique (and perhaps even unprecedented) position of being asked to approve a Sale Process that revolves around a Credit Bid and Support Agreement that the company has not disclosed to the Court.

- Scott Transcript, page 49, line 12 - line 14, Response to Undertakings No. 2 and 3

46. The Credit Bid also assumes that the Secured Noteholders' claim includes, among other things, a "make-whole" premium, the legal validity of which has not yet been determined. In addition, the Monitor has not yet completed its security review to confirm that the Secured Noteholders' security is valid and enforceable. Therefore, the Sale Process is being structured on a particular basis without even knowing if the Secured Noteholders will have the ability to submit the Credit Bid and whether the amount of that Credit Bid is appropriate.

47. The inappropriateness and prematurity of the Credit Bid is also highlighted by the fact that the Oppression Claimants are in ongoing litigation against Lightstream with respect to the very transactions that created the purportedly secured debt that is proposed to be used to credit bid for all of Lightstream's assets. Until it is determined whether the Oppression Claimants are to be issued Secured Notes, the constitution of the Secured Noteholder group, and the size of the Credit Bid (if it can even proceed) cannot be known.

48. In summary, there are numerous reasons why the Sale Process should be suspended or have the deadlines therein significantly lengthened. There are no compelling reasons, and no evidence before this Court, justifying the truncated Sale Process as currently proposed.

4. The Secured Noteholders Have Not Contributed Meaningfully to a Solution

49. The point was made at the Initial Order hearing on September 26, 2016 that the Secured Noteholders have invested USD$200 million into Lightstream. However, the full nature of the Secured Noteholder exchange transaction was not explained at that hearing. The Secured Note transaction in 2015 had two components:

(a) a non-cash exchange of existing Unsecured Notes in the amount of USD$546 million for new Secured Notes in the amount of USD$450 million; and

(b) a cash investment by the new Secured Noteholders in the amount of USD$200 million, which was used to partially pay down the amount owed to the Syndicate under Lightstream's credit facility.

50. The overall effect of the Secured Note transaction was not accretive to the value of Lightstream, for a number of reasons. First, Lightstream's annual interest burden grew by approximately USD$10 million. The exchange of USD$546 million in lower interest-rate (8.625%) Unsecured Notes with USD$450 million of much higher interest rate (9.875%) Secured Notes only modestly reduced the annual debt service burden, by USD$3 million (from USD$47.09 million to USD$44.43 million). However, the new injection of USD$200 million at a 9.875% interest rate under the Secured Notes replaced very low interest (3.25%) first lien debt owed to the Syndicate, thereby massively increasing Lightstream's annual debt service burden on that portion of its debt (by over USD$13 million, from USD$6.5 million to USD$19.75 million).

- Scott Transcript at page 41, line 1 – line 15 and page 46, line 1 – line 26

51. Second, the USD$200 million cash raised by the Secured Note transaction did not provide Lightstream with any significant working capital, to allow capital expenditures to create accretive value in the Company's assets. Rather, the Company's total gross reserves declined materially from 160,742 Mboe as at December 31, 2014, to 142,159 Mboe as at December 31, 2015. At the same time, Lightstream's daily production dropped significantly between the second quarter of 2015 and the second quarter of 2016 (a 24% decrease in the Bakken Business Unit; a 16% decrease in the Cardium Business Unit and a 45% decrease in the Alberta/BC Business Unit). The reduction of the Syndicate debt by USD$200 million in July 2015, was very quickly followed by a reduction in the Company's borrowing base in November 2015, from $750 million to $550 million (meaning that the company was not provided with any significant or lasting increase in working capital, from the partial paydown of the Syndicate debt).

- Scott Transcript, Exhibit 1 at page 9 and 16 (Annual Information Form for the Year Ended December 31, 2015)
- Scott Transcript, Exhibit 2 at page 16 (Annual Information Form for the Year Ended December 31, 2014)
- Scott Affidavit at paras. 23, 27 and 29

52. Accordingly, the true effect of the Secured Note exchange transaction was to increase Lightstream's annual interest burden, embroil the Company in oppression litigation, not increase its working capital and set up the Secured Noteholders to make the coercive and unfair Credit Bid.

5. The Support Agreement is Onerous, Unnecessary and Should be Disclaimed

53. Prior to filing under the CCAA, the Company entered into a Support Agreement with the Secured Noteholders, pursuant to which the Secured Noteholders have the power to dictate the way in which Lightstream moves forward in the CCAA proceedings. The Credit Bid and the Sale Process are preordained under the Support Agreement. However, as a matter of law, the Support Agreement, a pre-filing contract that has not been approved by (or even fully disclosed to) this Court cannot dictate the CCAA process, which is meant to facilitate a compromise with **all** of the Company's creditors. One group of creditors, no matter the support or increased assistance they are providing to the debtor, cannot obtain a privileged position in a CCAA proceeding. The CCAA Court cannot permit the enhancement of one stakeholder's position at the expense of others. This principle applies to third party interim financing lenders who are helping debtor companies solve imminent cashflow shortages. It is even more applicable to parties like the Syndicate and the Secured Noteholders, who are providing no such assistance and are already part of the existing debt structure of the Company (and therefore have "nowhere else to go").

- *Re Essar Steel Algoma Inc.*, Unofficial Transcript of Endorsement of Justice Newbould dated November 16, 2015 at 2 **[TAB 9]**
- *Re 843504 Alberta Ltd., supra*, at para. 13 **[TAB 3]**

54. Contrary to the principles governing these CCAA proceedings, the Support Agreement contains many coercive elements that are at odds with Lightstream's duties under the CCAA and penalize the Oppression Claimants and other stakeholders. For example, in order to develop a plan or compromise that is in the best interests of the corporation and that maximizes value, it is obvious that a debtor company must have flexibility to utilize all potential options under the CCAA and hold free discussions with all of its stakeholders. However, the Support Agreement does the complete opposite and reduces the Company's flexibility by, among other things, requiring the Company to notify the Secured Noteholders of **any** discussions about **any**

transactions other than the Credit Bid. The Company simply cannot have discussions about other alternatives, without the knowledge of the Secured Noteholders. This creates a chill on the Company's ability to restructure and creates a practical limit on any restructuring. Within the CCAA, no creditor should enjoy an advantage over another, and the Monitor and directors of the debtor company cannot prefer one group of stakeholders over another; the Support Agreement seeks to provide an inherent advantage and preferential treatment which is contrary to the CCAA.

- Support Agreement, Exhibit 10 to the Scott Affidavit, at s. 4(m)
- ***Re 843504 Alberta Ltd.***, *supra,* at para. 13 **[TAB 3]**
- ***Re Winalta***, *supra*, at para. 77 **[TAB 4]**
- ***Re Stelco Inc.***, *supra*, at para. 60 **[TAB 7]**
- ***Re People's Department Stores Ltd. (1992) Inc.***, *supra*, at para. 47 **[TAB 5]**

55. This chill on the company considering a restructuring is further apparent from the very structure of the Support Agreement, which does not even contemplate a possible CCAA plan or restructuring. Its sole focus is the Sale Process and the Secured Noteholder Credit Bid. In the event that the proposed CBCA arrangement fails (as it did in this case), Lightstream became compelled under the Support Agreement to proceed with a "single-track" CCAA proceeding – the conclusion of the Credit Bid in a Sale Process (assuming no superior bid emerges in the unreasonably short Sale Process). In other words, the Support Agreement seeks to take away the company's discretion as to how to carry out its duties to all its stakeholders, which the CCAA requires.

- Support Agreement at Schedule "B" (Term Sheet) at page 10 – 11, Exhibit 10 to Scott Affidavit

56. The Support Agreement is also coercive of the Oppression Claimants, as demonstrated by the following provisions:

(a) the Secured Noteholders agreed to replicate in their Credit Bid the consideration offered to the Unsecured Noteholders, but **only** if the Unsecured Noteholders had voted in favour of the CBCA arrangement; and

(b) if the Credit Bid is successful, the Ad Hoc Committee of Secured Noteholders agreed to pay $20 million to Lightstream's existing shareholders, but **only** if the existing shareholders had voted in favour of the CBCA arrangement and **only** if the Oppression Claimants were **not** successful in obtaining any remedy in the oppression action which would have a material adverse effect on the Company or would impact the priority or composition of the Secured Noteholders.

- Support Agreement at Schedule "B" (Term Sheet) at page 10 – 11, Exhibit 10 to Scott Affidavit

57. These provisions were clearly designed to put pressure on the Unsecured Noteholders to support the CBCA arrangement (which, among other things, delivered consideration to a group of stakeholders subordinate to the Unsecured Noteholders, namely the existing shareholders) and also to put pressure on the Company and its existing shareholders, to resist the remedies sought by the Oppression Claimants (which, among other things, would chill potential settlement discussions between the Company and the Oppression Claimants).

58. As confirmed by Mr. Scott in his cross-examination, the effect of the Credit Bid, if accepted, will be to:

(a) fully repay the creditors who have priority to the Unsecured Noteholders (the Syndicate in cash and the Secured Noteholders by delivering the company's asset to them);

(b) pay nothing to the Unsecured Noteholders; but

(c) to pay in full (by assumption of their agreements and payables by CreditBidCo) the pre-CCAA unsecured trade creditors, whose debts rank *pari passu* with the debts of the Unsecured Noteholders.

- Scott Transcript at page 50, line 25 – page 51, line 22

59. The Secured Noteholders are stayed by the Initial Order. The Support Agreement and the unfair and onerous terms it purports to impose on the Company are at odds with the duties of the Company in these CCAA proceedings. It should be disclaimed, which would allow the

Company to consider all its restructuring options, unfettered by the onerous conditions set out in the Support Agreement.

6. The Exit Financing

60. The exit financing proposed as part of the closing of the Credit Bid (the "**Exit Financing**") also does not provide any justification to conduct a truncated Sale Process. The lenders who are offering to participate in the Exit Financing are disclosed in Confidential Exhibit "6" to the Scott Transcript, the Exit Financing Commitment Letter.

61. Because of the confidentiality undertaking imposed by the company with respect to the disclosure of the Exit Financing Commitment Letter, more detailed submissions will be made at the Comeback Hearing.

62. For present purposes, the Oppression Claimants simply point out that because of the overlap between the lenders in the Syndicate and the lenders in the Exit Financing, the *in terrorem* arguments of the Syndicate regarding the "drop-dead" date under the Exit Financing, cannot be given any credence. That deadline, like various provisions in the Support Agreement, is simply another coercive provision that the Secured Noteholders and the Syndicate are trying to leverage to support the unreasonably truncated Sale Process.

63. As discussed further below, the Exit Financing also highlights the conflict of interest of TD Securities as the sole "Sale Advisor".

E. Relief Requested with respect to the Initial Order

1. Consider and Report on Alternative Transactions

64. The Company is currently limited in what it can attempt to accomplish under the CCAA, due to the Support Agreement. However, no agreement can override the purposes of the CCAA or the duties to act in the best interests of the Company. Therefore, the Company and the Monitor must consider alternative restructuring possibilities. For example, a recapitalization transaction should be pursued to determine if it would provide better recovery for all stakeholders.

65. While the Company attempted a potential debt-for-equity exchange of the Secured Notes and Unsecured Notes under the CBCA, the landscape is now completely different under the

CCAA, including that the distribution to existing equity that was contemplated in the CBCA restructuring is now not permissible under the CCAA. This restructuring option should therefore be considered within the framework of the CCAA.

66. This is not a situation like many other cases (such as *Argent Energy* and many others) where the Applicants are out of liquidity, and the only source of capital - an interim debtor-in-possession lender - imposes conditions that a sale process be approved and run as a condition precedent to the capital being provided. Rather, the Secured Noteholders, who are stayed and from whom the Company does not need any DIP financing, are attempting to impose unreasonable restrictions on these proceedings. The Applicants' liquidity, combined with the stay provided in the CCAA, afford the Applicants the opportunity to pursue all value maximizing paths, and not just a sale in a depressed market.

- ***Re Argent Energy Trust, et al***, Amended and Restated CCAA Initial Order dated March 9, 2016 **[TAB 10]**

67. Another option that has not been pursued is an interim debtor in possession loan so that the Company can make the capital expenditures that it believes will be accretive to its asset value. One of the purposes of the CCAA is to allow the Company to continue in business for the benefit of all stakeholders. The Company has stated that it believes certain capital expenditures would be accretive to asset value and to cash flow, which presents a potential for all stakeholders to benefit, particularly in light of the improving commodity price sentiment. This course of action ought to be considered.

68. The obligations of a Monitor under the CCAA are clear and include a fiduciary duty to all stakeholders and the obligation to treat all creditors reasonably and fairly, ensuring that no creditor has an advantage over another. Consistent with the duty to act in the best interests of all creditors, the Monitor should report on all possible restructuring and transaction possibilities. The Monitor cannot be hindered by the wishes of one group of creditors.

- ***Re 843504 Alberta Ltd.***, *supra*, at para 19 **[TAB 3]**
- ***Re Winalta Inc.***, *supra*, at paras. 67-68, 77, 81 **[TAB 4]**

2. Suspension of the Sale Process

69. Given the extremely short timelines contemplated in the Sale Process, it is appropriate to suspend the Sale Process entirely until the Monitor can present its report on the restructuring and transaction possibilities outside of the proposed Sale Process and Credit Bid and the oppression claims are decided.

3. Disclaim the Support Agreement

70. As set out above, the terms of the Support Agreement are hindering the ability of the Company and the Monitor to act in accordance with their duties and obligations to all stakeholders, and in accordance with the objectives of the CCAA. The Company, in conjunction with the Monitor, should therefore consider disclaiming the Support Agreement in the context of considering all potential restructuring transactions.

71. Pursuant to section 32 of the CCAA, the Company may, after providing notice to the affected party and the Monitor, "disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under" the CCAA. The Support Agreement is such an agreement and does not fall within any of the exceptions within section 32.

72. In determining whether such a disclaimer should be approved, one of the considerations is whether the disclaimer "would enhance the prospects of a viable compromise or arrangement being made in respect of the company". This requires a consideration of the interests of all creditors, not only the creditors who are party to the disclaimed agreement, to determine if the disclaimer is beneficial to creditors generally.

- *CCAA*, s. 32(4)(b) **[TAB 11]**
- *Re Target Canada Co.*, 2015 ONSC 1028 at paras. 22-25 **[TAB 12]**

73. While the disclaimer of the Support Agreement is not yet formally before this Court, there is no doubt that the Support Agreement is hindering the ability of the Company and the Monitor to pursue the best compromise or arrangement for the Company. Therefore, the Initial Order should be amended to reflect the possibility of the Company, in conjunction with the Monitor, disclaiming the Support Agreement in accordance with section 32 of the CCAA. The Support Agreement is not one of the (very rare) types of agreements that cannot be disclaimed

under the CCAA (such as collective bargaining agreements). The Support Agreement cannot be elevated to the status of a non-disclaimable contract and should not be allowed to fetter the Company's discretion or usurp its decision-making in these debtor-in-possession CCAA proceedings. Support agreements can play constructive roles in achieving restructurings, but they cannot be allowed to become shackles that prevent companies from considering all other viable restructuring options.

74. In response to the *in terrorem* arguments made at the September 26, 2016 hearing and in the Briefs of the Company and the Syndicate, this Court should not give credence to the statements that the Syndicate and the Secured Noteholders will somehow withdraw their support or take prejudicial steps, if the deadlines they have imposed in the Second Forbearance Agreement and the Support Agreement are not adhered to. The reality is that those creditors are part of the existing debt structure of the Company, and they will continue to take all necessary steps to recover their investments. Even if the truncated Sale Process is not approved, it can be fully expected that the Secured Noteholders will make a credit bid to protect their investment, in a proper and reasonable sale process.

4. Stay of Interest Payments to the Syndicate

75. The CCAA proceeding is intended to maintain the *status quo* while the debtor company determines the best course of action for all of its stakeholders. On this basis, there is no reason to require the Company to continue paying interest to the Syndicate. There would be no risk or prejudice to stopping such payments as there is more than sufficient asset value to repay the Syndicate in full once the CCAA proceedings are complete.

76. The Company should be provided every opportunity to emerge from the CCAA as a more viable entity; relief from these interest payments would increase the Company's cash flow and increase its flexibility.

5. Administration Charge for Oppression Claimants' Advisors

77. As set out in the Original Brief, it is more than appropriate in these circumstances to have the Oppression Claimants' advisors included in the Administration Charge. Courts have held that, unless professional advisor fees are protected by way of a charge the objectives of the

CCAA would be frustrated as professionals would be unlikely to risk offering services without any assurance of ultimately being paid.

- *Re Timminco Ltd.*, 2012 ONSC 506 at para 66 **[TAB 13]**

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

- *Re Argent Energy Trust, et al, supra* **[TAB 10]**

79. The Oppression Claimants are more entitled to have their fees paid than the subordinated unsecured debentureholders were in *Argent Energy*, given that in this case the Secured Noteholders' advisors' fees are being paid and the Oppression Claimants have ongoing litigation against the Applicants where they are seeking a remedy in which they would become Secured Noteholders as well.

80. A charge for the benefit of third party advisors (*i.e.* advisors to parties other than the company or the Monitor) can only be ordered if the test set out in s. 11.52(c) of the CCAA is satisfied. Section 11.52 states:

> **11.52** (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) **any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.**

> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company. [emphasis added]

81. The Company has pointed out that there is no evidence on this point from the Oppression Claimants, but likewise the Company has tendered no evidence capable of satisfying the specific factual requirement of s. 11.52(c) with respect to the Syndicate's advisors and the Secured Noteholders' advisors, who are proposed to become beneficiaries of the Administration Charge. Not only is there no evidence that the requested charge "is necessary for the Syndicate's or the Secured Noteholders' effective participation in these proceedings", Mr. Scott admitted in cross-examination that he has no information suggesting that those parties are insolvent or have an inability to pay their own advisors.

- Scott Transcript at page 63, line 8 - page 64, line 6

82. The Company has refused to let this Court see the amount of the fees paid by Lightstream to the Syndicate's and the Secured Noteholders' advisors.

- Scott Transcript, Response to Undertaking No. 4

6. TD Securities Should be Replaced as Advisor if the Sale Process Continues

83. To the extent that the Sale Process is not suspended as requested above, it is appropriate that TD Securities be replaced as the sole "Sale Advisor".

84. TD Securities and TD Bank have various roles with respect to Lightstream. TD Bank is the agent and a lender under the first lien Credit Facility, and is one of the parties intending to provide exit financing to Lightstream. Accordingly, TD Bank has significant other interests and motivations in the outcome of this proceeding, including the outcome of the proposed Sale Process. By way of example only, if the Credit Bid is implemented, the Oppression Claimants understand that TD Bank will be providing exit financing to the Applicants and thereby earning fees and profits via interest; however, if there is a superior third party bid, that third party may not require TD Bank's financing.

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

- *Re Winalta Inc.*, *supra*, at paras. 81-82 **[TAB 4]**

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

- *Re Winalta Inc.*, *supra*, at paras. 78-82 **[TAB 4]**
- *Re Nelson Education Ltd.*, 2015 ONSC 3580 **[TAB 14]**
- *Re GuestLogix Inc.*, 2016 ONSC 1047 at para. 33 **[TAB 15]**
- *Re Ivaco Inc.*, [2004] OJ No 2483 at paras. 15 & 17 **[TAB 16]**

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

- *Walter Energy*, 2016 BCSC 107, at para. 20 **[TAB 17]**
- *Re PCAS Patient Care Automation Services Inc.*, 2012 ONSC 2840 at para. 19 **[TAB 18]**
- *Re Danier Leather Inc.*, 2016 ONSC 1044 at para. 32 **[TAB 19]**

88. In particular, in the present circumstances where the Oppression Claimants allege prior oppressive conduct by Lightstream and its directors, the existence of a truly independent and unconflicted party to run the sale process is of utmost importance. In these unique circumstances, it is imperative to ensure that no one stakeholder is preferred and that all creditors

are treated equally with a view to what is in the best interests of the corporation. TD Bank's prior roles with Lightstream make an independent and unbiased Sale Process conducted by TD Securities next to impossible.

89. In response to the October 5, 2016 Brief filed by the Company, the Oppression Claimants are not arguing that a bank-affiliated advisor cannot be appointed, nor are they arguing that TD Securities is not a qualified advisor. The fact remains, however, that because of the various roles played by TD Securities and TD Bank in these proceedings, the appearance of bias and conflict is very real. As well, there are numerous parties (including non-bank affiliated parties) with the necessary expertise to market oil and gas assets in Calgary and Western Canada.

7. The Directors' Charge, the KERP Charge and the KEIP Charge

90. The Company and the Monitor have, since the date of the application for the Initial Order, satisfied the Oppression Claimants' request for backup documentation and analysis with respect to these proposed charges. Having reviewed that information, the Oppression Claimants have no objection to these proposed charges.

F. THE THRESHOLD ISSUE

91. In its Bench Brief filed prior to the hearing, and at the hearing on September 26, 2016, Lightstream proposed that this Court hear and decide a "threshold issue" prior to proceeding with any steps in the CCAA application. Lightstream's proposed threshold issue was provided to the Oppression Claimants on October 2, 2016 and contained three questions:

(a) have the claims of the Plaintiffs asserted in the Actions become potential claims within the CCAA proceeding?

(b) is there jurisdiction in the Court to recognize the Plaintiffs' claims 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 Notes to remedy alleged oppressive conduct? and

(c) if there is jurisdiction to make an Order recognizing the Plaintiffs' claims as secured claims and varying the Secured Notes Transaction, would the Court

exercise its discretion to do so based upon the facts as pleaded and evidence agreed upon?

92. Lightstream's proposal seems to imply a hearing schedule of approximately six weeks. The Oppression Claimants are fully prepared to meet such a schedule and move forward as promptly as possible, although as noted above, the Sale Process should not proceed until the oppression issues have been decided.

93. The Oppression Claimants have advised Lightstream that they object to Lightstream's proposed first and third questions. The Oppression Claimants further advised that the only appropriate question before this Court is the second question, revised as follows:

> "Does the Court have jurisdiction in the context of the present proceeding under the *CCAA* to require Lightstream Resources Ltd. to issue additional secured notes to the Oppression Claimants as Plaintiffs in Action Nos. 1501-08782 and 1501-07813 (the "**Action**")."

The Oppression Claimants have prepared a draft order respecting this question, which is attached hereto at **[TAB 20]**.

94. As of the date the preparation of this Brief, the parties have not agreed on the form of the question for the threshold issue. Accordingly, the Oppression Claimants' submission on the proper form of the question is set out below.

1. The First Question Is Not Relevant and Is Meaningless

95. It is not clear what Lightstream means when it refers to "potential claims within the *CCAA* proceeding". In the Actions, in Lightstream's previous application under the CBCA and now in this CCAA proceeding, the primary remedy sought by the Oppression Claimants is a declaration that they are entitled to participate in the Secured Notes Transaction, and an order requiring Lightstream to issue securities (*i.e.* Secured Notes) under s. 242(3)(e) of the *Alberta Business Corporations Act* to remedy the oppressive conduct. Mudrick and FrontFour have reiterated this requested relief.

96. Whether the Actions are "claims within the *CCAA* proceeding" (whatever this may mean) or whether they have been stayed by this CCAA proceeding does not matter – the relief sought

by FrontFour and Mudrick still requires the Court to determine whether FrontFour and Mudrick are entitled to participate in the Secured Notes Transaction and thereby become Secured Noteholders in this CCAA proceeding.

2. The Third Question Inappropriately Requires The Court to Determine the Ultimate Issue on a Partial and Incomplete Factual Record

97. The third question proposed by Lightstream asks the Court to decide the merits of the Actions on the basis of only the facts pleaded and evidence agreed upon, rather than on the basis of the full factual record that would be available to the Court through a proper hearing. A determination of whether a court would grant a discretionary remedy available under the oppression statute can hardly be said to constitute a "threshold" issue.

98. The oppression remedy requires the court to focus on the reasonable expectations of the shareholders involved and the presence of oppression unfair prejudice, or unfair disregard. In *Re BCE Inc.*, the Supreme Court of Canada stated that oppression is a fact-specific remedy that requires the court to determine what is just and equitable based on a determination of the reasonable expectations of the stakeholders and the conduct of the Company:

> As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to *the facts of the specific case*, the relationships at issue, *and the entire context*, including the fact that there may be conflicting claims and expectations.
>
> Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, *provided they are reasonable in the context*...These expectations are what the remedy of oppression seeks to uphold. [Emphasis added]

- ***Re BCE Inc.***, *supra*, at paras. 62 and 63. See also *Icahn Partners LP v Lions Gate Entertainment Corp*, 2011 BCCA 228, para 1, where the court noted that the analysis of reasonable expectations is "highly contextual and fact-specific" **[TAB 6]**

99. The more recent case of *Shevsky v California Gold Mining Inc.*, echoed these comments. The Alberta Court of Appeal recognized that:

> Not all unfair conduct rises to the level of oppression for which a court may grant a remedy; what may be oppressive in one factual context may not be oppressive in a slightly different factual context. Fact findings are the crucial foundation for the legal analysis that must follow, because within such fact findings the hearing court identifies the interests that merit relief, and within such fact findings the court assesses the nature of the impugned conduct and its effect. The evidence is also critical to the court's determination of the appropriate remedy in the event that oppression is found.

- ***Shevsky v California Gold Mining Inc.***, *2016 ABCA 103*, para. 2 **[TAB 21]**

100. As the Oppression Claimants emphasized at the last attendance before this Court, the Actions are ready to be tried without further delay. The reasonable expectations of the stakeholders involved, and the characterization of the Company's conduct, cannot be determined without a full appreciation of the facts, as contained in a full record before the Court. Lightstream's proposal would require the Court to determine the ultimate issue – that is, whether the Oppression Claimants are entitled to the relief sought – on the basis of a partial hand-picked set of facts thereby depriving the Oppression Claimants of their right to a full hearing.

3. The Threshold Issue Will Require Brief Argument

101. Question two as proposed by Lightstream and revised by the Oppression Claimants, is a true threshold issue relating to the jurisdiction of the Court under the CCAA to grant the oppression remedy sought. It can be argued on the basis of the pleadings in the Actions, and should take no more than an hour or two of this Court's time for a hearing. Briefs should be submitted the week before the hearing.

IV. CONCLUSION AND RELIEF SOUGHT

102. The Oppression Claimants seek revisions to the Initial Order to address the issues raised herein, as set out above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of October, 2016.

Estimated Time for Argument: 60 minutes

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

LIST OF AUTHORITIES

1. *Re Target Canada Co.*, 2015 ONSC 303
2. *Re Blue Range Resource Corp.*, 2000 ABCA 239
3. *Re 843504 Alberta Ltd.*, 2003 ABQB 1015
4. *Re Winalta Inc.*, 2011 ABQB 399
5. *Re People's Department Stores Ltd. (1992) Inc.*, 2004 SCC 681
6. *Re BCE Inc.*, 2008 SCC 69
7. *Re Stelco Inc.*, [2005] O.J. No. 1171 (CA)
8. *Re Essar Steel Algoma Inc.*, Unofficial Transcript of Endorsement of Justice Newbould dated November 16, 2015
9. *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, aff'd *Re Fracmaster Ltd.*,1999 ABQB 379
10. *Re Argent Energy Trust, et al*, Amended and Restated CCAA Initial Order dated March 9, 2016
11. *CCAA*, Sections 6(8) and 32(4)(b)
12. *Re Target Canada Co.*, 2015 ONSC 1028
13. *Re Timminco Ltd.*, 2012 ONSC 506
14. *Re Nelson Education Ltd.*, 2015 ONSC 3580
15. *Re GuestLogix Inc.*, 2016 ONSC 1047
16. *Re Ivaco Inc.*, [2004] OJ No 2483
17. *Walter Energy*, 2016 BCSC 107
18. *Re PCAS Patient Care Automation Services Inc.*, 2012 ONSC 2840
19. *Re Danier Leather Inc.*, 2016 ONSC 1044
20. Draft Order of the Oppression Claimants on the Threshold Issue
21. *Shevsky v California Gold Mining Inc.*, *2016 ABCA 103*